

FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW

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New York, New York
FOUNDATION PRESS
1998

vate exchange. In that case the victim of a nuisance would be willing to pay its perpetrator to have it removed. If the amount the victim were willing to pay to have the nuisance removed exceeded the perpetrator's price to remove it, the two sides would enter into a bargain to do just that. If, conversely, the victim's reservation price were less than the perpetrator's, the nuisance would remain, but in either case the outcome would be efficient. In effect, the opportunity for bargaining would work to internalize the externality. Accordingly, Coase argues that in the absence of transaction costs it would not matter whether or not the government imposed a Pigouvian tax, or whether or not courts imposed liability. Whatever the rule of law, the parties would have the same incentive to bargain their way to an efficient outcome and the allocation of resources would be the same.

The lessons of the Coase theorem have been widely misunderstood. Coase argues against state intervention as the preferred response to market failure, it is true, and he does suggest that the cost of the former is often greater than the costs of the latter, but he does not claim that market transaction costs are zero or that laissez-faire is always justified. Rather, his criticism is that it was misleading for the Pigouvians to argue for state intervention by stressing the transaction costs of the market while ignoring the transaction costs of government institutions. His fundamental thesis is that comparative transaction costs are more important than the presence of an externality and that the efficient allocation of resources ultimately will depend more on such transaction costs than on the nominal rules of the legal regime. The excerpt from Harold Demsetz's article "When Does the Rule of Liability Matter?" explains and develops this thesis in greater detail, concluding that legal rules matter most when the transaction costs of private exchange are high.

2.1 THE MODEL OF MARKET FAILURE

Some Thoughts on Risk Distribution and the Law of Torts*

GUIDO CALABRESI

In their excellent new casebook on torts, Professors Gregory and Kalven state that "the central policy issue in tort law is whether the principal criterion of liability is to be based on individual fault or on a wide distribution of risk and loss." And so, I suppose, it is. But to say "risk distribution" is really to say very little. Indeed, under the heading "risk distribution" have come the most diverse schemes for allocating losses, schemes that have almost nothing to do with each other.

* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale Law Journal*, pp. 499-553. Copyright © 1961 Yale Law Journal Company and Fred B. Rothman & Company. Reprinted with permission.

The reason for the difficulty is, presumably, that while many people have talked about "risk distribution" and some have even used it as a basis for proposed modifications in the law of torts, few have in recent years attempted to examine in any depth just what it is they are striving for when they say "distribute losses." They could mean one of three things. Do they wish as broad a spreading of all losses, both interpersonally and intertemporally, as is possible? Or do they want the burden of losses to be borne by those classes of people "most able" to pay? Or do they seek something entirely different—that those "enterprises" which give rise to a loss "should" bear the burden, whether or not this accomplishes the prior two aims? The answer, I suppose, is that some times they mean each of these things, and at other times all of them. Unfortunately, these goals are not always consistent with each other. They are, moreover, supported by quite different ethical and economic postulates—postulates of quite varied acceptability. To decide when and how we wish to distribute losses we must, therefore, examine the theoretical justifications of each of these three positions. This article takes some first steps in that direction. . . .

Enterprise Liability—or the Allocation of Resources Justification

"Activities should bear the costs they engender"; "it is only fair that an industry should pay for the injuries it causes." "Enterprise liability"—the notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault—is usually explained in such terms. A statement of this kind is generally followed by an additional one which implies that the enterprise can pass the loss on to the consumers in price rises, and that therefore enterprise liability is really a form of "risk spreading." It is, of course, true that enterprise liability sometimes does spread losses; it is equally true, however, that sometimes it does not. . . . And since risk spreading is not always a valid justification for enterprise liability we are at the moment less concerned with the risk spreading potential of enterprise liability than with whether another, more general, justification exists for the "should" in the phrase "an enterprise should bear its costs."

The problem of this "should" and what it means is analogous to the problem of why workmen's compensation should be limited to injuries arising out of or in the course of employment, and why master-servant liability should be limited to those acts which are in some sense within the scope of employment. If the "should" were merely a way of saying, "because this is a handy way of spreading losses through the price mechanism to a broad group of people—the consumers," one would wonder why workmen's compensation or master-servant liability should be so limited. And, indeed, writers have long wondered why. Some have answered directly that there is no logical reason for limiting liability to injuries related to employment. Others have said about the same thing,

but have masked their answer by stating that some "innate sense of fairness" justifies the limitations. What that "fairness" is, unfortunately, is never clearly explained.

But the "should" is used so often that one suspects it must have a more clearly defined justification than some vague sense of fairness. And indeed it does; though it is a justification that only some of us would accept, and which, strangely enough, has been all but ignored in tort law in recent years. That justification can be called the "allocation of resources" justification. At its base are certain fundamental ethical postulates. One of these, perhaps the most important, is that by and large people know what is best for themselves. If people want television sets, society should produce television sets; if they want licorice drops, then licorice drops should be made. And, the theory continues, in order for people to know what they really want they must know the relative costs of producing different goods. The function of prices is to reflect the actual costs of competing goods, and thus to enable the buyer to cast an informed vote in making his purchases.

An example may help clear the mind a bit. Assume two different societies, Athens and Sparta: in Sparta all accident costs are borne by the state and come out of general taxes; in Athens accident costs are in some way or another charged to the doer. C. J. Taney, a business man in Athens, has one car, but he wants to buy another. The cost of owning a second, used, car would come to about \$200 a year, plus an addition to his insurance bill of another \$200. The cost of train fares, the occasional taxis he would need to use to be as comfortable without the car, and other forms of entertainment which make up for the car, come to about \$250. Contrasting the \$400 additional car cost with the \$250 expense of riding in trains and taxis, he decides to forgo the car. If C. J. lived in Sparta, on the other hand, he would have to pay a certain sum in taxes to cover the general accident program. He could not avoid this cost whatever he bought. As a result, the comparative cost of buying a car and going by taxi in Sparta would be \$200 per year for the car as contrasted with \$250 for train and taxi fares. Chances are Taney would buy the car. In purchasing a second car the Sparta C. J. is not made to pay the full \$400 that it costs. And in fact, he must pay part of that cost whether or not he buys one. He will, therefore, buy a car. If he alone had to carry the full burden of a second car, he would use trains and taxis, spending the money saved on something else—a TV set or a rowboat.

One need not imagine that any of us sit around at home thinking about relative costs of different goods and the relative pleasures derived from them for the theory to make sense. The fact is that if the cost of all auto accidents were suddenly to be paid out of a general government fund the expense of owning a car would be a lot lower than it is now since people would no longer need to worry about buying insurance; the result would be that some people would buy more cars. Perhaps they would be teenagers who can afford \$100 for an old jalopy, but who

cannot afford—or whose fathers cannot afford—the insurance. Or they might be people who could buy a second car so long as no added insurance was involved. In any event, the demand for cars would increase, and, therefore, so would the number of cars produced. Indeed, the effect would be the same as if the government suddenly chose to pay the cost of steel used by car makers, and to raise the money out of taxes. In each case the objection would be the same. In each, an economist would say, resources are misallocated in that goods are produced which the purchaser would not want if he really had to pay the full extent of their cost to society—their cost, whether in terms of the physical components of the item or of the expense of accidents associated with its production and use.

The resource-allocation theory is not, however, without its limitations. A primary difficulty with it involves the existence of monopoly power. . . . And since monopoly distorts allocation of resources, any system of loss allocation based on this theory must take this possible bias into account.

But forgetting for a moment the problems monopoly brings, the most desirable system of loss distribution under a strict resource-allocation theory is one in which the prices of goods accurately reflect their full cost to society. The theory therefore requires, first, that the cost of injuries should be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of those activities. (It is because of this nonfault basis, of course, that “enterprise liability” is often lumped together with other nonfault systems of loss allocation under the general heading, “risk distribution.”) Second, the theory requires that among the several parties engaged in an enterprise the loss should be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.

But which is that party? Is it the worker who has been injured, or his employer; is it the depositor whose check is forged, or the bank; is it the pedestrian, or the driver of the car that hit him? . . . [A] pedestrian—even if tempted to buy accident insurance because of the risk of being hit by a car—would not be able to make this part of the price of cars. As a result, car buyers would have no reason not to buy cars, even though their purchases raised the cost of pedestrian auto insurance. In fact, they would be in the same situation as C. J. Taney in Sparta for whom the real cost of a car is not reflected in its purchase price. Were the risk of accident put instead on the car owner as driver, this added cost would be reflected in the real expense of owning a car and would affect purchases. Secondly, in the real world not all parties evaluate losses equally, or are equally likely to insure. Before workmen’s compensation the individual worker simply did not evaluate the risk of injury to be as great as it actually was. He took his chances; and even if he did not wish to take his chances, the fact that other workmen took a chance forced him to do the

same, or to starve. The result—apart from some individual tragedies—was that wages and prices in certain industries simply did not reflect the losses those industries caused. Finally, insurance may cost one party less than it costs another. If that is so, the proper party to bear the risk is the party whose insurance costs are lower. For only then are the true costs of injuries, and not some false costs of more expensive insurance, reflected in price.

Effect of Monopoly Power on the Allocation of Resources Justification

The foregoing analysis of the resource-allocation and loss-distribution theories is clearly valid only in the absence of monopoly power altogether, or where a similar degree of monopoly power exists in all industries. But since in the American economy monopoly power in fact varies enormously from industry to industry, the difficult question of whether these theories are equally justified in the presence of monopolies is crucial. As noted, this is because the relatively monopolistic seller charges a price which is higher in relation to his costs than that charged by the relatively competitive seller; he thereby causes a shift in choices away from monopoly goods, less of which are demanded than would be justified by their true costs. It might be argued, therefore, that charging a monopolistic producer with all his accident costs would frequently do nothing to correct the distortion, and where the accident costs of the monopolist were relatively high, might actually increase that distortion. Thus, at first glance at least, it might appear that accident costs should be charged to competitive industries in order to induce them to charge more and produce less, while to counteract the monopolist's relative under-production these costs should not be placed on monopolistic industries. Some of the reasons for the undesirability of such a system will appear later in the discussion of the "deep pocket" or "let the rich man pay" side of what is called risk distribution. For the moment, however, it is enough to note that while the allocation-of-resources theory may be strong enough to justify some modifications in the way losses are allocated, it is not strong enough to justify modifications which run counter to basic political beliefs in our society—like the belief that monopolists should be treated worse than small competitors, or at least not better.

Fortunately for the allocation-of-resources theory, more careful analysis destroys much of the theoretical validity of this "subsidize monopoly" argument. In the first place, the allocation-of-resources theory is of primary importance in situations involving two or more products which can to some significant extent substitute for each other. C. J. Taney is faced with the alternative of using aluminum and steel in making widgets. Suppose that one of these can only be produced with a high accident cost, while the other involves few accidents indeed. Taney's choice between the two metals will be influenced by their relative prices,

and these will be influenced by whether or not the accident cost is charged to the metal-producing industries. From the standpoint of resource allocation, the fact that both steel and aluminum have a high degree of monopoly power when compared to corner hash-houses is quite irrelevant. The choice is between steel and aluminum, not between these and fried clams. Putting accident costs on corner hash-houses and not on steel and aluminum plants might help counter a minor misallocation of purchases between metals and clams. But this adjustment would create a major resource misallocation between steel and aluminum, the prices of which would not reflect their relative costs because of the difference in accident rates in the two industries. In America, industries producing goods which can to some real extent substitute for each other have, by and large, similar degrees of monopoly power. Hence, a system of loss allocations which charged all industries with their accident costs would be a pretty good one from the standpoint of resource allocation, even though monopoly power differs greatly in the economy as a whole. . . .

The traditional or "marginal" theory [of pricing] assumes that the seller is less concerned with the average cost of production than with what the last units he produces cost him relative to what they bring in. So long as it costs him less to produce the last 1, or the last 1,000, widgets than he will make when he sells these additional widgets, he will produce them. If, on the other hand, he believes that the effect of producing more widgets will be to increase his costs more than his revenue, he will not produce them. At this equilibrium point profits would be maximized and losses minimized. Assuming that increases in widget production are accompanied by higher accident costs, a seller who is saddled with accident costs will produce fewer widgets and charge a higher price for each one. He will do this because the point at which producing more widgets will increase his total costs at a higher rate than his total revenues will have been shifted back by the fact that while the additional revenue derived from producing an extra 1,000 widgets is unchanged, it now costs more to produce the last thousand widgets than it did before.

But instead of varying according to output, the tort liability costs may be constant regardless of production volume. They may in effect be a tax for entering the industry. An example of such fixed costs would be the lump sum damages awarded to neighboring property owners if a factory creates a nuisance. Once the payment—say \$10,000—is made, it makes no difference whether one makes 1 or 1,000,000 widgets. In this situation, though profits will decrease by the amount of the damages, the placing of accident costs on the industry will not affect price or output at all, unless someone who used to produce widgets decides to produce them no longer. The increase in total cost caused by the production of the last 1,000 widgets will, like the increase in revenue due to their sale, be unchanged by the fact that it cost \$10,000 to get into the business in the first place. Since the equilibrium point at which profits are maxim-

ized remains the same, no amount of output changing will tend to mitigate this loss or return profits to their previous levels. In short, Taney may decide that because of the added \$10,000 cost of being in the widget business—a cost he incurs whether he produces one or one million widgets—it is no longer worth his while to manufacture widgets. But if he decides it is still profitable, he will sell as much, and at the same price, as before. . . .

If one accepts the traditional “marginal” theory the result will be the same if accident costs vary fairly continuously with output, but will be quite different where they are either fixed or are subject to change in large lumps only. In the latter cases the immediate effect on prices and output will be nil and there will, therefore, be no immediate effect on allocation of resources one way or another. There is, however, a markedly different secondary effect in monopolistic and competitive firms under this kind of cost burden. And this secondary effect, without favoring monopolies, promotes a favorable resource allocation in the difficult case where a relatively monopolistic industry competes with an industry that is relatively competitive.

Taney makes widgets. Widget-making is a highly competitive business, and Taney is barely able to make a go of it. Suddenly he is slapped with the requirement that he pay for accidents caused by widget-making. Assume that insurance costs are such that he will be charged the same whatever he produces, so long as he produces at all. Insuring will drive him out of business; failure to insure will ultimately drive him, or an unlucky competitor who had accidents, out too. Fewer widget-makers will remain, output will be lower, and that output will now sell at a higher price, one sufficient to cover accident as well as other costs. Were Taney in a monopolistic industry he would also have suffered a decrease in profits from the fact that he now had to bear accident costs, and since these accident costs did not vary with output he could not pass any part of them on to the consumers through output and price shifts. But, in all probability, he would still be making enough after his decrease in profits to make staying in the business worthwhile. His extra, or monopoly, profits would have been cut, but he would still be surviving. So would the few others in his industry. Output would therefore remain the same and so would price. In short, if the theory is accurate, competitive industries would ultimately react to increases in fixed costs by losing some firms; monopolistic industries, on the other hand, would be unaffected in their size and output, although their extra profits would decrease. The net result would be a relatively higher price and lower output in the competitive industry, a desirable result from the standpoint of allocation of resources. . . .

Some Tentative Conclusions

We are now in a better position to understand what may be meant when it is said that masters “should” be liable for the torts of their servants,

but should "only" be liable for them if they occur in the scope of the servants' employment. Similarly, we can now understand the "arising out of or in the course of employment" limitation on workmen's compensation. More detailed analysis of the specific legal doctrines of workmen's compensation, respondeat superior, and independent contractor will have to wait until we have discussed the other elements in what is called risk distribution—the other pieces of our puzzle. But it is not difficult to see that whatever the other elements in risk distribution will show, allocation of resources gives quite substantial support to doctrines which rely essentially on an enterprise concept of scope of liability.

Proper resource allocation militates strongly against allocating to an enterprise costs not closely associated with it—"liability should be limited to injuries arising out of or in the course of employment." But it also militates for allocating to an enterprise all costs that are within the scope of that enterprise. "The enterprise is held liable for the injuries even though no fault on its part can be shown." Not charging an enterprise with a cost which arises from it leads to an understatement of the true cost of producing its goods; the result is that people purchase more of those goods than they would want if their true cost were reflected in price. On the other hand, placing a cost not related to the scope of an enterprise on that enterprise results in an overstatement of the costs of those goods, and leads to their underproduction. Either way the postulate that people are by and large best off if they can choose what they want, on the basis of what it costs our economy to produce it, would be violated. . . .

We can also begin to see why strict fault liability had such a strong vogue from the middle to the end of the 19th century. Many factors were involved, of course. Not the least among them is the fact that the justifications for the risk spreading and "let the rich man pay" elements in risk distribution were not such as would commend themselves to a 19th century Weltanschauung. But, on the other hand, the allocation-of-resources theory would seem to fit in with the 19th century approach to output and production as much, if not more, than with the 20th century one. Why then did it play so small a role in the choice of a system of loss allocation?

Perhaps the answer can be found in the rather peculiar state of industry at the time. In the early days of the industrial revolution many industries were operating on a decreasing cost basis. That is, if an industry could expand sufficiently its costs would fall as a result of that expansion. It is an interesting fact that in cases where an industry is operating on a decreasing cost basis a subsidy to that industry will probably help, rather than hinder, proper allocation of resources.

An example may help. Widget-maker Taney has such high costs in making widgets that he must sell them at a price which only the rich can afford. As a result he makes few widgets. If he could sell at a lower price,

however, many more people would want to buy widgets. If he could reach this greater level of production his costs would be sufficiently low to enable him, after a time, to meet them all and to sell all the widgets he produced. Taney, however, cannot just start producing at this much higher output, if for no other reason than that he would go broke, selling widgets so cheaply, before his costs would drop. If he had a subsidy, however—if he did not for some years have to meet all his costs—he would be able to establish himself at the higher output, and in the long run all people would be better off. There would be a widget in every pot, as well as in every garage.

If this was the situation of most American industry in the nineteenth century—and the fact that high tariffs were being justified even by “free trade” economists at the time, on just this ground, indicates that it was—then an argument could be made that proper “long run” allocation of resources required that industry be spared from paying hidden accident costs—at least unless other factors like fault were involved. I do not suggest, of course, that 19th century judges made the transfer to fault liability on the basis of this rather complicated economic theory. But their statements that nonfault liability would deprive our land of the benefits and promises of industrial expansion may represent a rough-and-ready, noneconomist’s, way of recognizing the fact that industry was simply not ready to bear all of its costs, and that the country would in the long run be better off if it did not. To this extent these phrasings are no different from those of modern writers who, conditions having changed, say without further analysis that enterprises “should” bear all the accident costs they cause, regardless of fault.

Of course, the fact that a subsidy may have made sense does not suggest that the injured worker should have been the one to pay the subsidy. Today we would be inclined to have the subsidy come out of taxes—either a general tax, or one on those who benefit most from the innovation. This is, however, giving a 20th century answer to a 19th century question. For, the reason we quite properly find the idea of workers subsidizing industrial expansion intolerable is because we are wedded to “risk spreading” and “deep pocket” notions, and these are notions which did not appeal especially to the 19th century mind. (In addition, industry itself would have borne a heavy part of the burden of taxes; subsidization through taxation might, therefore, have discouraged industrial expansion in the same way as nonfault liability.)

Some General Observations

At the end of this rather long analysis we might well consider some of the consequences of the different justifications for nonfault distribution of losses, and some inconsistent results these theories would seem to require. Perhaps the most dramatic inconsistencies exist between some of the requirements of the allocation-of-resources justification and the

loss-spreading justification. The treatment of losses which are definitely caused by enterprises, but which could not be foreseen by those enterprises—and which are therefore probably not insured against—is a strong example. Unless they were covered by a general state social-insurance program, such losses would be unlikely to be thoroughly spread. They would be left either on the injured parties or on the enterprises which engendered them. . . .

Insofar as resource allocation is concerned, such losses are just as truly costs of producing particular goods as are more foreseeable risks. Lack of foreseeability makes it somewhat more difficult to include these costs in the price of the item produced, but does not make it impossible. Industries with more than their share of unforeseeable losses—and, as a result, more than their share of bad years or failures—get reputations for being risky. Fewer firms enter such industries and, over time, higher prices prevail. Thus, the desired allocation effect is accomplished. Higher prices do not mean, however, that any substantial loss spreading occurs. They only mean that entrepreneurs in such industries make greater profits, subject to the danger that, when the risk strikes, one of them may be so severely damaged that he will never recover his losses, or that he may be wiped out altogether. In such cases undesirable secondary social and economic losses would, of course, follow.

None of this would occur if instead of being handled by a system of enterprise liability risks of all injuries were covered by a general state accident program. But neither would these losses be reflected in prices under such a scheme. Advocates of allocation-of-resources enterprise liability would argue further that though such secondary losses seem harsh, they are a necessary part of any free enterprise system. Entrepreneurs always take “uninsurable risks”—indeed, the danger of going into business, which, many economists say, is the very source of “profits” in business, as distinguished from mere payments for labor or for use of capital, is just such a risk. And advocates of enterprise liability would say that this is merely another indication of how enterprise liability is really the “free enterprise” way of allocating losses, as against more collectivist social insurance plans.

Of course, it is true that enterprise liability must ultimately be supported primarily on a free enterprise argument. Though as a system of loss-spreading enterprise liability has some merits, it is still relatively inefficient. In the first place, we are not prepared to charge enterprises with losses which are not readily assignable to some specific activity. And, of course, many such losses do exist. If risk spreading is really important, these general losses of living would in themselves require some kind of social insurance. Enterprise liability may be similarly inefficient where the cost of collecting the loss from the enterprise is very large either in terms of court costs, or lawyers' fees. (In such situations, neither would there be an allocation-of-resources justification for placing these losses on any activity. Indeed, the justification would

run the other way. A greater misallocation is caused by incurring the avoidable costs of trying to allocate the loss than by leaving it where it falls and letting the price of the product involved understate its true costs.) At best, then, if risk spreading is deemed crucial, enterprise liability could do only part of the job; the other part would have to be filled in by some social insurance scheme.

In the second place, even in the area where enterprise liability does play its part, it would in all probability be a far less thorough risk spreader than a social insurance plan. We have seen that the danger of creating sick industries and the possibility of driving out small competitors—at least during a transition period to enterprise liability—indicate that harmful secondary economic and social effects may well occur with enterprise liability, while they could be avoided under general social insurance. This is not to say that enterprise liability would do a bad job of spreading losses; it is only to say that social insurance probably would do a better one.

Similarly, from the point of view of the “deep pocket” justification, social insurance would probably be preferable to enterprise liability. It is true that in the long run enterprise liability promises either wide loss spreading or—by and large—a tax on monopoly. But it does not tax all monopolies equally; nor does it tax wealthy men who are not monopolists. The taxing system—with all its weaknesses—is far more refined in taking from the rich and giving to the poor than enterprise liability could ever be. For all these reasons, many writers who have been concerned primarily with risk spreading or “deep pocket” have tended to view enterprise liability as, at best, a half way house on the road to social insurance.

One can argue with this position by raising questions about the actual costs of running a program of social insurance, and by suggesting that, in view of those costs, enterprise liability does what it does in the way of risk spreading pretty cheaply. Or one can go back to questions of deterrence, and to some of the other justifications for fault liability, and see whether they do not form some justification for enterprise liability as against social insurance. But the first of these approaches is not really subject to proof, and the second, though potentially fruitful, is really outside the scope of this article, since it would involve a thorough discussion of the role fault plays in our system of loss allocation.

On the basis of the discussion in this article, however, enterprise liability is superior to social insurance in that it promotes proper allocation of resources. And the importance of allocation of resources increases to the extent that we value free enterprise. Therefore, so long as our society remains committed to free enterprise, enterprise liability is unlikely to be relegated to the role of a stop-gap measure on the road to social insurance. . . .

Of course, if the costs of administering enterprise liability prove exorbitant, or if damages rise out of all proportion to the injuries sustained—if, in other words, the amount charged to the industry becomes much greater than the loss caused—it will be difficult to make out a case for enterprise liability on resource-allocation grounds. And we may look for an increased trend toward social insurance. Similarly, if we become more concerned with the elimination of any possible economic dislocation, and if at the same time—for the two are quite consistent—we become increasingly disenchanted with production in accordance with the apparent desires of consumers, then social insurance is bound to increase in importance. But if these things don't happen, there is every reason to think that we shall try to combine broader enterprise liability—in which risk spreading, loss allocation, and deep pocket values are synthesized—with limited social insurance programs, paid out of progressive taxes, to cover those losses which are too general to be assigned to any single activity or group of activities

Unity in Tort, Contract, and Property: The Model of Precaution*

ROBERT COOTER

Forms of Precaution

Even when necessary or unavoidable, an accident, breach of contract, taking, or nuisance causes harm. The affected parties, however, can usually take steps to reduce the probability or magnitude of the harm. The parties to a tortious accident can take precautions to reduce the frequency or destructiveness of accidents. In contract, the promisor can take steps to avoid breach, and the promisee, by placing less reliance on the promise, can reduce the harm caused by the promisor's breach. Similarly, for governmental takings of private property, the condemnor can conserve on its need for private property, while property owners can reduce the harm they suffer by avoiding improvements whose value would be destroyed by the taking. Finally, the party responsible for a nuisance can abate; furthermore, the victim can reduce his exposure to harm by avoiding the nuisance.

Generalizing these behaviors, I extend the ordinary meaning of the word "precaution" and use it as a term of art in this article to refer to any action that reduces harm. Thus the term "precaution" includes, for example, prevention of breach and reduced reliance on promises, conservation of the public need for private property and limited improvement of private property exposed to the risk of a taking, and abatement and

* Robert Cooter, *Unity in Tort, Contract and Property: The Model of Precaution*, 73 *California Law Review*, pp. 1-51 (1985). Copyright © The California Law Review, Inc. Reprinted with permission.