



Theoretical Perspectives on Torts

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Konomark
Most rights sharable

Why have
tort law?

If we're going to have
it, how should we
choose its rules?
What's the design
principle?

Some possible ideas ...

- We have tort law because it's only fair that people should be compensated for losses (justice/fairness).
- We have tort law because forcing people to pay for the damage they cause will leave everyone better off (economic efficiency).

Feminist Perspective

- Leslie Bender
 - A Lawyer's Primer on Feminist Theory and Tort, 38 J. of L. Educ. 3 (1988)
 - (We read part of this earlier in the semester.)

Law and Economics Perspective

- Richard Posner
 - Federal circuit judge (7th) and law professor (Chicago). He wrote *Speakers of Sport v. ProServ*.
- Guido Calabresi
 - Federal circuit judge (2d) and law professor (Yale)
- Ronald Coase
 - The most famous. He argued that if there are no transaction costs and people can contract, then different legal rules lead to the same outcome for society.
- Many others ...

Guido Calabresi's Efficiency Goal

The minimization of the costs of accidents, the costs of avoidance, and the costs of administration (including error costs).

Guido Calabresi's Athens and Sparta

Athens: People pay for their own accidents.
\$400 for car (\$200 price + \$200 insurance)
\$250 to not buy car (bus fare, etc.)

Sparta: Accidents paid for from general fund.
\$200 for car
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Guido Calabresi's Athens and Sparta

Efficient

Athens: People pay for their own accidents.
\$400 for car (\$200 price + \$200 insurance)
\$250 to not buy car (bus fare, etc.)

→ You won't buy the car.

Sparta: Accidents paid for from general fund.
\$200 for car
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Inefficient

→ You will buy the car.

Guido Calabresi's Athens and Sparta

Therefore (according to this analysis), the courts ought to choose the rule that makes people responsible for their own accidents, as this rule leads to an efficient result.

Guido Calabresi's Athens and Sparta

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The main idea here is that there is wisdom in getting the proper alignment of incentives. In particular, putting the burden of liability on the party who is in the position to avoid the accidents at the least cost.

The Coase Theorem:

- Key concepts:
 - Externalities (effects on third parties to the K)
 - Transaction costs (e.g., searching, negotiating, coordinating)
- Theorem: If transaction costs are zero—that is, if all mutually beneficial bargains get made—then any setting of legal rights leads to an efficient outcome.
- Implication: Which rule you pick might make one party or the other better off, but the result will be efficient either way.
- Observation: This doesn't mean rules don't matter. Rather, it suggests that transaction costs are what make rules matter.

Coase Theorem (various statements):

- "If transaction costs are zero—if, in other words, any agreement that is in the mutual benefit of the parties concerned gets made—then any initial definition of property rights leads to an efficient outcome."
— David D Friedman
- "If there are zero transaction costs, the efficient outcome will occur regardless of the choice of legal rule."
— A. Mitchell Polinsky
- "When bargaining costs are zero, the initial assignment of legal entitlements does not affect the efficiency of the resulting allocation of resources." — Herbert Hovenkamp
- "the delimitation of rights is an essential prelude to market transactions; but the ultimate result (which maximizes the value of production) is independent of the legal decision." — Ronald H. Coase

Let's try out the Coase
Theorem with strict
liability for
ultrahazardous
activities ...



An example using a nuclear plant, meltdown risk, and strict liability.



Nuclear plant is worth \$100M/yr to utility to operate.

**A meltdown would cause \$500B worth of damage and has a 1-in-10,000 chance of happening in a year.
So, the cost of risk to the city is the probability times the loss: \$50M/yr.**

Assuming this captures all costs and benefits, what is the efficient result?



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Assuming this captures all costs and benefits, what is the efficient result?

The nuclear plant operates.



Nuclear plant worth \$100M/yr to utility. City risk is \$50M/yr.

**What if tort law requires the nuclear plant to pay
for all accidents (strict liability)?**



Economically efficient!

Nuclear plant worth \$100M/yr to utility. City risk is \$50M/yr.

What if tort law requires the nuclear plant to pay for all accidents (strict liability)?

The nuclear plant operates.
It's worth it for the utility to buy insurance for \$50M/yr (or self insure at same rate).



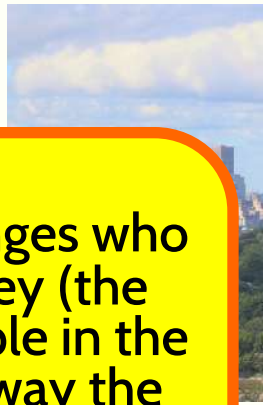
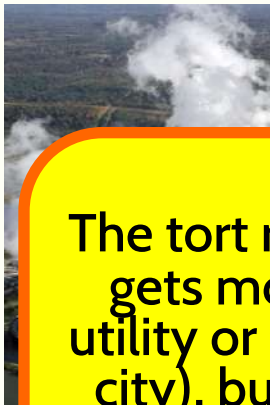
Nuclear plant worth \$100M/yr to utility. City risk is \$50M/yr.

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Economically efficient!

Nuclear plant worth \$100M/yr to utility. City risk is \$50M/yr.
What if tort law does not require the nuclear plant to pay for accidents (no liability)?
The nuclear plant operates.
The people in the city will buy insurance at \$50M/yr (or self insure at same rate).



The tort rule changes who gets more money (the utility or the people in the city), but either way the efficient result is reached: The plant operates.



CHANGE

Nuke worth \$25M/yr to utility. City risk is \$50M/yr.

What is the efficient result?
The nuclear plant does not operate.

CHANGE



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Economically efficient!

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What if tort law requires the nuclear plant to pay for all accidents (strict liability)?
The nuclear plant does not operate.
It's not worth it for the utility to buy insurance for \$50M (or self insure at same rate) to get \$25M.



Nuclear plant worth \$25M/yr to utility. City risk is \$50M/yr.
What if tort law does not require the nuclear plant to pay for accidents (no liability)?



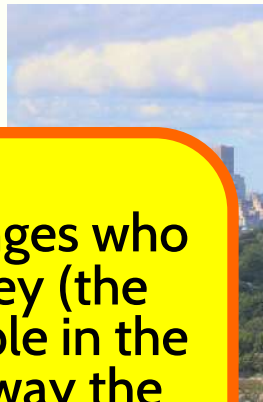
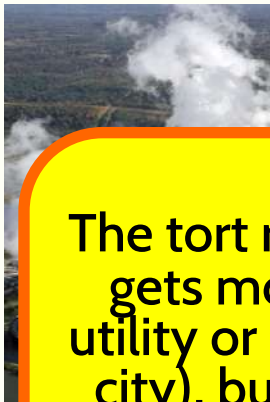
Economically efficient!

Nuclear plant worth \$25M/yr to utility. City risk is \$50M/yr.

What if tort law does not require the nuclear plant to pay for accidents (no liability)?


The nuclear plant does not operate.

The people in the city will pay the utility between \$25M and \$50M to stop operating the plant.




The tort rule changes who gets more money (the utility or the people in the city), but either way the efficient result is reached: The plant doesn't operate.

The people in the city will pay the utility between \$25M and \$50M to stop operating the plant.



If this seems terrible, that people would have to pay someone to stop doing a thing that threatens them, then it means you care about something other than economic efficiency.

The pe... M to stop
operating the plants.



Insight: Thinking of one party as the "victim" gets in the way of understanding what is most economically efficient.

The pe... M to stop
operating the plants.

Summary of analysis from nuclear plant hypo:

Nuclear plant worth \$100M/yr to utility. City risk is \$50M/yr:

- Strict liability rule → Nuclear plant **operates** b/c it's worth it for the utility to buy insurance (or self insure) for \$50M/yr to get \$100M/yr → **Efficient result**
- No liability rule → Nuclear plant **operates** b/c the people in the city will buy insurance (or self insure) for \$50M/yr and because it's not worth it for them to pay \$100M/yr to the utility for shutting down the plant → **Efficient result**

Nuclear plant worth \$25M/yr to utility. City risk is \$50M/yr.

- Strict liability rule → Nuclear plant **shuts down** b/c it's not worth it for the utility to buy insurance (or self insure) for \$50M/yr to get \$25M → **Efficient result**
- No liability rule → Nuclear plant **shuts down** b/c the people in the city will pay the utility between \$25M and \$50M to stop operating the plant → **Efficient result**

Let's go back to
Calabresi's Athens and
Sparta ...

What does the Coase Theorem say about this?

Labreski's Athens and Sparta

Efficient

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Inefficient

Coasean analysis: You won't buy the car, because the people of Sparta will pay you to not drive it.

What does the Coase Theorem say about this?

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labresi's
Sparta

But the Coase Theorem assumes away transaction costs. In the real world, there are always transaction costs, and they are almost always significant!

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Sparta: Accidents paid for from general fund
\$200 for car
\$250 to not buy car (bus fare).

Economically efficient!

Coasean analysis: You won't buy the car, because the people of Sparta will pay you to not drive it.

Let's try out the Coase Theorem for intentional face punching ...

Economically
efficient!

It's worth \$40,000 for me to punch you in the face.
It's worth \$200 for you to not be punched in the face.

What if tort law allows a battery cause of action?

What if it does not?

It doesn't matter – you'll get punched in the face either way.

Law and society perspective with economic awareness:

- Robert C. Ellickson
 - Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County,
38 Stan. L. Rev. 623 (1986)