

Mitigation and Last Clear Chance Notes

When the inputs occur sequentially, none of the damage-based liability rules creates the optimal incentives both for long-run efficiency and for second-best outcomes when the long-run efficient choice is not made. Furthermore, the incentives that the law entails must prevent parties that act first from being negligent while motivating those that act second to choose the optimal amount of care. Think of this in terms of the motorcycle and the truck driver example. A *marginal cost liability rule* is optimal in this situation because the motorcyclist pays for the additional cost (of swerving, per se) that she imposes on other drivers by not parking optimally (usually with a fine or parking ticket). On the other hand, the truck driver is then liable for any costs that he imposes on the motorcyclist beyond those that would occur if the truck driver had best responded to the motorcyclist's inefficient behavior. The result of the marginal cost liability ruling is incentivizing the motorcyclist to park optimally while making the truck driver internalize costs of avoiding potential damages and costs of being extra careful.

Some other applications include the mitigation of damages in contract law. If a product purchased is defective, the buyer should undertake cost effective strategies to mitigate the damage. This follows from the logic that the buyer should only collect for the additional cost of prevention and any subsequent damages that would occur if the buyer were to optimally mitigate. The buyer would then have an incentive to increase the amount of care/precaution when the seller has acted inefficiently. Examples of this include the farmer purchasing defective seeds as well as a buyer buying pork packed in barrels of brine that is found to have leaks. Since the barrels are covered by a warranty that the barrels will not leak, the seller of the pork will pay only for the replacement and not for any other damages incurred from suboptimal actions after the discovery of the leak.

Another application is the Last Clear Chance in Accident Law. This implies that even if the party that acted first behaved inefficiently, the second party must choose the optimal actions or else they will have to pay for the marginal costs that they have also imposed. Some examples of these include the collision between a moving truck and one left standing on the highway as well as the scenario that involves drunk drivers and other drivers on the road.

Lastly, avoidable consequences pertain to situations wherein individuals must consider the additional damages that may accrue from their actions (marginal cost liability rule). *United Verde Extension Mining Co. v. Ralston* (1931) is a good example. Given that the sulfur fumes prevent the crop that the farmer intends to plant from being profitable at all, the farmer should not bother plant the seeds. Again, the logic is that the farmer should collect for lost profits but not for further costs arising from the inefficient behavior of planting a hopeless crop.

Good Samaritan Rule Notes

The Good Samaritan is a bystander who happens to encounter another individual who needs rescue. If the cost of rescue is trivial, the Good Samaritan would tend to the needs of the individual. In the Anglo-American countries, the courts require no affirmative duties by bystanders, and rarely is there a legal obligation to compensate the rescuer for the minor costs incurred in rescuing. In other words, the Anglo-American countries do not provide any incentives (aside from moral-based incentives) to rescue someone in need. For the most part, they also do not force most potential victims to be thoughtful of costs posed on other people of their rescue (The required posting of bonds for rescue is, of course, an exception). This rule, however, does not attempt to price altruism and thus, it does not diminish the magnitude of the good deed. The counterargument is that many times the law promotes ethical behavior without diminishing it. Moreover, this ruling avoids the costs associated with searching for bystanders that could have rescued someone in need, but did not. Hence, the costs of monitoring, enforcing, and arbitrating the division of blame and punishment are all avoided.

On the other hand, the ruling in Continental Europe requires rescue when the cost of doing so is trivial. Compensation is then given for a successful rescue while a penalty is forced into any bystanders caught neglecting those who needed rescue (at a trivial cost). Because of the potential penalty, the bystanders are incentivized to rescue. In addition, the individual who faces a potential rescue is incentivized to take on an optimal amount of risk as the compensation for the rescue falls under his care.

The Role of Being First in Allocating Rights: Coming to the Nuisance Notes

If the law always gives the right to whoever is first, then people are incentivized to take actions/investments earlier than optimal to get the right to be first (think of Black Friday lines as analogous to this scenario). Partially because of this, the law does not necessarily give the entitlement to the first party in line. Strategic behavior by the participants trying to be first and thereby gaining extra consideration is avoided by granting extra consideration to the side which *should* have been first instead of the side who was actually first. Economic logic clarifies the contingencies when being first counts and the doctrine of coming to the nuisance should also be invoked.

We do not consider all possible scenarios. All we want is to encourage the optimal scenario. Hence, we determine the optimal outcome and decide rules that lead to that outcome. In other words, we determine the liability rule or property right that promotes the efficient sequence. We also need an extra consideration by including the moving costs by the side who should have been first into the cost-benefit calculations.

The Determining Factors:

1. Character of the area is predetermined
 - This incentivizes the parties to anticipate what is going to happen in the future. If a place is fit for industry, a housing and other residential structures should not build there. On the contrary, if the location is fit for residential zones, a factory should not build its structures in that area.
 - Example is *Bove v. Donner Hanna* which ruled that even though Bove, the rooming house, was there first, it should have anticipated industry to develop close to the train tracks.

2. Character of the place determined by its first use
 - If the first use establishes the dominating character of the location, like the case of a featureless land and a dump being created on it, then it should be allowed to stay (*Mahlstadt v. City of Indianola* (1959: 194)).
 - Note: How about if we have a hypothetical scenario where the developers who decided to build by the dump could collect for damages or can force the dumps to move. Would developers or homeowners be better off in the long-run? No, as shown in the following scenario. Given the idea of Hedonic pricing, we compare two almost identical houses except that one is built by the dump. The one built by the dump is valued at \$100,000 while the house that is not built by the dump is valued \$110,000. We then know that the proximity to the dump lowers the value of the house by \$10,000. Now, assume that a law is passed that either pays the homeowner or the developer. This law is common knowledge, meaning that everyone knows about it.
 - If the law makes the dump pay the developer, the developer will charge the homeowner \$100,000 and the developer will get \$110,000 in total (the developer anticipates the compensation).
 - If the law makes the dump pay the homeowner, the developer will charge the homeowner \$110,000. However, the homeowner will be compensated with \$10,000 by the dump so the developer will again get \$110,000 in total for the house.
 - In both cases, the land owner charges the developer the same price because the landowner also knows about the law and anticipates the payouts. The landowner may then be the only one better off in this situation if he does not also own the dump.

3. Character of the place is determined by the second use
 - If the second party creates the dominating character of the place, then it should be given the right. This is the context used for feedlots and cities. When cities expand, they ultimately cover areas that may have been suitable for animal husbandry. However, cities do not need to compensate feedlots. Why? Because feedlots can sell their lot at a higher price than they would otherwise. Furthermore, their cost of moving is lower than the cost for the city to develop around it. Lastly, the feedlots should have anticipated the expansion of the city. These same reasons are in addition to those pointed out below.

- In these situations, the law is unlikely to compensate for the costs of relocation even though the party was there first and should have been there first. The reasons are the following:
 - Alternative land uses are likely to be more profitable so that the lot owner would benefit from relocating.
 - Overtime, the owner of the property could have let the property depreciate.
 - A system of compensation would be costly since in the absence of compensation, the outcome is the same and a court case is rarely needed.
 - A system of compensating lot owners for moving would encourage owners to hold on to their businesses in order to collect for damages.
- Property rights are contingent in space and time.
- Non-conforming land uses that were there first are subject to a cost-benefit analysis. Moreover, when there is severe damage to the nonconforming structure due to fire, earthquakes, etc., then the prior use is no longer prior and cannot be reinstated.
- 4. The character of the place is determined by the second use, but the second use should not have been there.
 - The first party is asked to move but the second party must compensate it (since it is the one that committed the mistake). This discourages inefficient future behavior.
 - Connect this to the case of *Spur Industries v. Del E. Webb Development Co.* (1972: 700). *Spur Industries* is a feed lot while *Del E. Webb Development* is a prominent retirement community developer.

Boxed Examples: Pages 186 - 187