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A Reexamination of the Distinction Between "Loss-Allocating" and "Conduct-Regulating" Rules

Wendy Collins Perdue
University of Richmond, wperdue@richmond.edu

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The Louisiana choice of law code, drafted under the leadership of Dean Symeonides, is an important effort to codify the best of modern conflicts understanding. I routinely teach it to my conflicts students even though few will practice in Louisiana. I think it quite possible that someday states that have followed more ad hoc judicial codifications[1] may consider adopting the more systematic codification found in Louisiana.

The basic philosophy underlying the Louisiana choice of law code is set forth in Louisiana Civil Code article 3515, which calls for the application of the laws of "the state whose policies would be most seriously impaired if its law were not applied to that issue."[2] The remainder of the codification is an effort to delineate how this general principle applies in different substantive areas. The starting point for building these specific rules is an understanding of the policies underlying the particular substantive area of law. The Louisiana choice of law code for torts[3] provides an excellent illustration of this approach. The tort rules also illustrate that a set of choice of law rules built around particular assumptions about the substantive law may not work as expected if those substantive assumptions prove incorrect.

The Louisiana choice of law articles on torts[4] incorporate a distinction, first developed in New York,[5] between tort rules that are conduct-regulating and those that are loss-allocating. The distinction has been described as "one of the few breakthroughs in modern American conflicts law."[6] The basic rule is, as to laws that are conduct-regulating, to apply the law of the place of conduct, and, as to laws that are loss-allocating and the parties are from the same state, to apply the law of the common domicile. Dean Symeonides has succinctly explained the basic rationale behind the distinction: "most reasonable people can agree that conduct-regulating rules are territorially oriented, whereas compensation and loss-distributing rules usually are *not* territorially oriented."[7] This conflicts rule is built around the premise that there are two fundamental purposes of tort law—deterrence

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* Associate Dean and Professor of Law, Georgetown University Law Center. Professor Perdue co-authored a casebook on conflict of laws with Dean Symeonides and Arthur von Mehren, *see* Conflict of Laws: American, Comparative, International (1998), and gratefully acknowledges all that Dean Symeonides has taught her about choice of law. She also thanks Lynn Stout and Carlos Vázquez for their comments on this paper.

1. *See*, e.g., Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (1972).
2. La. Civ. Code. art. 3515.
3. La. Civ. Code arts. 3542-3548.
4. *Id.*
5. *See* Schultz v. Boy Scouts of America, 480 N.E.2d 679 (N.Y. 1985).
6. Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677, 705 (1992).
7. *Id.* at 703.

and compensation—and that all tort rules can meaningfully be classified as serving one of those two purposes.[8] For example, the drafters of the code expected that rules such as caps on damages or immunity from suit would be treated as loss-allocating and rules such as "rules of the road" would be treated as conduct regulating.[9]

In this paper, I disagree with the premise that all tort rules can be meaningfully classified as either compensatory or deterrent. I argue that most tort rules are both and that "the compensation and deterrence goals ascribed to the tort system cannot be separated."[10] I then explore the impact on the Louisiana tort choice of law code of this alternative understanding of tort law.

My analysis begins with the proposition that *all* tort rules are loss-allocating. A liability rule shifts the loss from the injured victim to the tortfeasor; conversely a rule of no liability means that the loss, no matter how real, will be borne by the victim. All tort rules determine who will bear a loss and thus all are loss-allocating. In addition to all tort rules being loss-allocating, I believe that most affect conduct. The reason is directly tied to loss-allocation. Loss-allocation creates incentives for those who must bear the loss to behave differently than they would if they did not bear the loss. To the extent people respond to incentives, tort rules will affect conduct.[11] As I note later in the paper, these effects on conduct may not always be intended by the lawmaker, and in particular situations, the conduct effect of two different rules may be quite small. Nonetheless, I believe there are few situations in which one can conclude that a tort rule is inherently loss-allocating but not conduct-regulating.

The difficulties of classification have not gone unnoticed. Indeed, Dean Symeonides, with typical intellectual candor has acknowledged the problem[12] but has admonished that "difficulty . . . is no excuse for abandoning the judicial function."[13] However, if one accepts the view offered here that all tort rules allocate loss and thereby affect conduct, then the classification problem is not merely the result of insufficient diligence. The problem is more fundamental.

The difficulties of classification can be illustrated with a brief examination of several different categories of tort rules with which the courts have struggled. These illustrations are not exhaustive but do highlight problems that are typical in this area.

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8. *Id.*

9. Symeonides, *supra* note 6, at 699.

10. *See* Michael Trebilock, *Incentive Issues inthe Design of "No-Fault" Compensation Systems* 39 U. Tor. L. J. 19, 20 (1989).

11. There are two situations in which rules are certain to have no impact on conduct. The first is where the marginal demand for the conduct in question is inelastic. In this situation, people will engage in the conduct no matter what the cost or consequences. Punishing an addict for taking drugs is an example of this, though, of course, the punishment may have the effect of deterring others from becoming addicted. The second situation is where application of the rule is completely unpredictable.

12. Symeonides, *supra* note 6, at 704.

13. *Id.* at 705 (quoting Jagers v. Royal Indem. Co., 276 So. 2d 309, 313 (La. 1973)).

Strict liability. One question on which the New York courts have split[14] is whether a strict liability rule is conduct-regulating or loss-allocating. The court split is not surprising. Strict liability is a classic example of a tort rule that both allocates loss and affects conduct. Strict liability undeniably contains an element of insurance or loss-allocation.[15] Under a negligence standard, victims are insured against accidents that the defendant could have avoided with due care. Strict liability expands the insurance component and insures the victim against all accidents (including unavoidable ones).[16] Thus, strict liability is loss-allocating. But strict liability is also conduct-regulating. A negligence rule creates an incentive for an actor to use due care.[17] A strict liability rule does not alter the incentives concerning the level of care,[18] but instead creates an incentive to reduce the level of an activity.[19] Consider, for example, a negligence versus a strict liability rule concerning the liability of employers for accidents on scaffolds.[20] Under both rules, the employer will have an incentive to take due care with respect to the scaffold, and we would not predict any greater level of care under one rule than the other. What would be different is that under a strict liability regime, we would predict that employers will use fewer scaffolds.[21] Thus, in addition to allocating loss, a strict liability rule is likely to affect conduct, though not the level of care.

Limits on damages. A second category of rules that are both loss-allocating and conduct-regulating are rules limiting damages. There are a variety of laws that limit the amount or type of damage that can be recovered. Examples include: caps on pain and suffering, limits on wrongful death recoveries, and limits on what types of losses will be covered, e.g., loss of consortium. One might easily characterize these as loss-allocating since they obviously directly and explicitly determine how much a party must pay. But these rules have significant impact on conduct. From an economic perspective, it is the possibility of a damage award that causes an actor to internalize the costs its conduct imposes on others. The level of damages that an actor expects to pay directly affects the level of care the actor will take.[22] A potential tortfeasor will take precautions so long as it is cheaper to take precautions than to pay the expected damage award.[23] If the damages are low, then the amount

14. *Compare* Huston v. Hayden Bldg. Maintenance Corp., 617 N.Y.S.2d 335 (1994); Salsman v. Barden & Robeson Corp., 564 N.Y.S.2d 546 (1990), *with* Calla v. Shulsky, 543 N.Y.S.2d 666 (1989) and Aviles v. Port Auth., 615 N.Y.S.2d 668 (1994).

15. *See* Richard Posner, Economic Analysis of Law 179 (4th ed. 1992) [hereinafter Posner].

16. *See* William Landes & Richard Posner, The Economic Structure of Tort Law 66 (1987) [hereinafter Landes & Posner].

17. *See* Landes & Posner, *supra* note 16, at 64.

18. *See id.* at 64-66; *see also* Posner, *supra* note 15, at 175.

19. *See* Posner, *supra* note 15, at 176.

20. This is what was at issue in the cases about which the New York courts have split. *See supra* note 14.

21. *See* Posner's discussion of a similar situation involving the liability of railroads for fires caused by locomotive sparks, Posner, *supra* note 15, at 176-77.

22. *See* Steven Shavell, Economic Analysis of Accident Law 127-28 (1987).

23. *See* Posner, *supra* note 15, at 163-64.

spent to avoid those damages will also be low. Thus, although damages limits have an allocative effect, they also affect conduct.

Immunity. A third category of rules that are both loss-allocating and conduct-regulating are rules granting immunity to certain actors or for certain conduct. The New York Court of Appeals has held that immunity is loss-allocating.[24] While it clearly is that, it is also conduct regulating. Immunity is simply the flip side of strict liability.[25] Under strict liability, if a tortfeasor engages in particular conduct and harm results, that person is liable. The rule creates an incentive for the tortfeasor to reduce the amount of that risk-creating conduct. Immunity puts the risk of loss entirely on the victim and thereby eliminates incentives for the tortfeasor to take care and creates incentives for the victim both to take due care and to take precautions to avoid the risk-creating activity.[26]

The immunity at issue in *Schultz v. Boy Scouts of America* was charitable immunity. Both economic theory and recent political debates suggest that immunity is conduct-regulating. The economic justification for charitable immunity is that it allows charities to externalize some of their costs as a way of increasing charitable sources.[27] It is conduct-regulating because it provides incentives for charities to increase the quantity of service provided. The conduct-regulating characteristic of charitable immunity is also apparent in the growing trend to provide immunity for volunteers within charitable organizations.[28] A primary justification for these statutes is that concerns about liability were discouraging volunteer participation.[29] Immunity is viewed as an incentive to encourage more people to volunteer with charitable organizations.[30]

States that have eliminated charitable immunity have concluded that the harm from negligent charities outweighs the benefit of more charities. It is not the case, however, as the dissenters imply in *Schultz*,[31] that non-immunity is conduct-regulating but immunity is not. Both immunity and non-immunity rules will affect conduct. States that grant and deny immunity may be focusing on different conduct. Immunity states may seek to increase charitable works while non-immunity states may seek to decrease negligence.[32] Nonetheless, both rules affect conduct.

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24. Schultz v. Boy Scouts of America, 480 N.E.2d 679, 686 (N.Y. 1985).

25. *See* Landes & Posner, *supra* note 16, at 63 ("strict liability is symmetrical with no liability").

26. *See* Posner, *supra* note 15, at 178.

27. *See* Landes & Posner, *supra* note 16, at 181 n.51; Note, *The Quality of Mercy: "Charitable Torts" and Their Continuing Immunity*, 100 Harv. L. Rev. 1382, 1395 (1987).

28. *See* Charles Tremper, *Compensation for Harm from Charitable Activity*, 76 Cornell L. Rev. 401, 412 (1991); Note, *supra* note 27, at 1386.

29. *See id.* at 77.

30. *See* David Hartman, *Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy*, 10 U. Bridg. L. Rev. 63 (1989). There is some anecdotal evidence that concerns about liability do in fact alter charitable activities. *See* Tremper, *supra* note 28, at 417.

31. 480 N.E.2d at 691 (Jasen, J., dissenting).

32. It is also possible that an immunity state is *motivated* entirely by a concern for loss-allocation and is either unaware of or indifferent to affects on conduct. This issue of motivation is addressed below.

Up to this point, I have argued that there are few, if any, tort rules that are inherently loss-allocating but not conduct-regulating. Nonetheless, there are three situations in which some tort rules can be said not to regulate conduct. The first is where, despite an actual or theoretical effect on conduct, the intent or purpose is entirely loss-allocating. If the goal of a choice of law rule is to implement the policies of the underlying law, focus on intent is entirely appropriate. But this technique will be helpful only where the purpose is uni-dimensional. Where the purpose is both loss-allocation and conduct-regulation, I do not believe there is any coherent methodology to determine which of multiple purposes is the more important or significant.

An example of a rule with likely conduct effects but whose purpose may be solely loss-allocation is no-fault automobile insurance. No-fault automobile liability is generally justified as a form of insurance or loss-allocation.[33] There is a plausible theoretical argument that most no-fault plans affect conduct and reduce safety precautions[34] and, indeed, there is also some empirical evidence to support this theory.[35] Nonetheless, even if it is true that a particular no-fault scheme does in fact result in less safe driving, it is unlikely that this was the purpose of the law. Thus, suppose an accident occurred in a no-fault state that limited non-pecuniary recovery and the accident involved people from a state that did not limit recovery. One could conclude that the no-fault state was not trying to affect conduct (even if it did), and so its policies would not be impacted by the application of the law of the common domicile.

In trying to ascertain underlying purposes, one might conclude that all laws which decrease the precautions taken by some people must always be loss-allocating since no state would want to increase the risk of accidents. This conclusion would be incorrect. A decrease in one side's obligations to prevent accidents puts the burden on the other party.[36] For example, a rule that makes railroads liable for all fires caused by its trains puts the burden of prevention on the railroad. An alternative rule of no liability would put the burden entirely on surrounding land owners. A state might adopt the no-liability rule because it believed land owners were the most efficient accident avoiders.[37] Thus, by decreasing the obligations for railroads to take care, the rule increases the incentives for land owners to take care. There is no theoretical difference between the railroad law and the no-fault insurance plans. No-fault automobile liability plans could have the purpose of creating incentives for pedestrians to take care; the difference is

33. *See* Robert Keeton & Jeffrey O'Connell, Basic Protection for the Traffic Victim 5 (1965).

34. *See* Posner, *supra* note 15, at 205-06; Trebilock, *supra* note 10, at 31-33.

35. *See* Elisabeth Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-fault Accidents*, 25 J. Law & Econ. 49 (1982); Trebilock, *supra* note 10, at 28-30.

36. Similarly, as explained earlier, *see* text accompanying *supra* notes 18-20, strict liability provides an incentive to avoid the risk creating activity. Thus, a state might impose strict liability for scaffold accidents to encourage the use of alternatives to scaffolds. Conversely, a state might reject strict liability for scaffolds because it does not want to encourage the use of scaffold alternatives which it might consider as unsafe or objectionable as scaffolds.

37. *See* Posner, *supra* note 15, at 176-78.

simply that, as an empirical matter, it does not seem plausible that this is the purpose behind no-fault plans.

There is another important qualification on the use of intent or purpose—one cannot assume that because one state's purpose in adopting a rule is loss allocation, another state's purpose for adopting a different rule is also loss allocation. For example, even if we are confident that State A's no-fault system is intended to be loss-allocating, it does not follow that State B's retention of a negligence system is not conduct-regulating. On the contrary, it is quite likely that a state would decline to adopt a no-fault system precisely because of concern about undesirable effects on conduct.

Intent or purpose is likely to be inconclusive in many, if not most, cases, leaving many tort rules that can logically be classified as both loss-allocating and conduct-regulating. There is a second technique that may be used to eliminate some additional rule from the category of those that are conduct-regulating. This technique is a process of pragmatic evaluation and is built on the principle that, although in theory virtually all legal rules affect incentives and conduct, in practice the conduct effect of two different rules may be quite small. Under this approach, the court would make a pragmatic assessment of the likely real-world effects under the different rules that are arguably applicable. To be effective, it will be necessary to make a relatively particularized comparison. For example, while in some contexts the difference between a negligence rule and a gross negligence rule may significantly alter behavior, it may be unlikely to have that effect in the context of a guest statute. First, a driver has an incentive to protect her own safety. Second, a driver will be liable to non-passengers for her ordinary negligence. The incremental additional incentive provided by the possibility of liability to passengers may be negligible. Thus, one could conclude that, as a practical matter, guest statutes are not conduct regulating. Of course in theory, guest statutes create incentive for prospective passengers to take greater care in their selection of drivers. One might conclude, nonetheless, that passenger behavior is unlikely to be much affected by the rule.

As another illustration, one can do a pragmatic evaluation of contributory versus comparative negligence. Both contributory and comparative negligence are likely to have conduct effects when contrasted with a rule that puts no responsibility on the victim.[38] However, when the choice is between these two versions of victim responsibility, a plausible argument can be made that the conduct-affecting difference between the two are negligible. As Richard Posner has explained, "comparative negligence has the same effects on safety as contributory negligence."[39] Any differences in conduct under the two systems will be subtle and turn on the effects on conduct of litigation uncertainty.[40] In light of this, a court

38. *See* Posner, *supra* note 15, at 169.

39. *See id.* at 171.

40. *See id.* at 172. Although one empirical study suggests that drivers take less care in comparative negligence states than in contributory negligence states, a court might conclude differently, at least as to other types of conduct; *see* Michelle White, *An Empirical Test of the Comparative and Contributory Negligence Rules in Accident Law*, 20 Rand J. Econ. 308 (1989).

might reasonably conclude that, from the point of view of conduct regulation, the differences between comparative and contributory negligence is slight and that the primary difference is in loss-allocation.[41]

There are several limitations to this pragmatic approach. First, courts are unlikely to have empirical data and, therefore, the analysis is likely to be based on hunches and unquantifiable assumptions. Still, in some areas involving human motivation courts may be able to make a reasonable assessment. A second and greater risk is that courts will attempt an individualized assessment—would this defendant have behaved differently if the rule had been different? Such an individualized assessment is almost impossible to do in a meaningful way. Imagine a case of medical malpractice in which the doctor amputates the wrong leg. One could ask, "If this state permitted higher damage awards, would this doctor have amputated the correct leg?" Framed this way, the question is unanswerable. The doctor was surely not doing a cost-benefit calculation at the time she operated. The appropriate question is not an individualized inquiry but a marginal one.[42] For example, if higher damages were allowed, insurance companies might insist on greater precautions or additional training. Higher damage awards might result in higher malpractice insurance for riskier procedures with the result that doctors would use lower risk procedures. We cannot know what would have happened in the particular case and should not try to determine that. Instead, the focus should be on determining whether a different rule would likely have resulted in different conduct or precautions being taken by some people impacted by the rule.

A third situation in which tort rules may not be conduct-regulating is the classic Coase case[43] in which the parties have an opportunity to bargain around the rule.[44] In this situation, the legal rule may not affect conduct but simply reallocate wealth.[45] Such bargaining is unlikely in cases involving strangers, but may be possible where there is a prior or on-going relationship. Thus, application of a common domicile rule may be appropriate in some tort cases involving non-strangers. This principle could explain the result in *Schultz*,[46] where the tortfeasor and victim had a preexisting relationship. It would not justify applying the charitable immunity rule of a common domicile where the victims happened to be from the same state but had no relationship.

As the foregoing analysis demonstrates, there may be some limited situations in which we can reasonably identify some tort rules as loss-allocating and not

41. *See* Posner, *supra* note 15, at 172. In a case involving the choice between contributory and comparative negligence, the New York courts have held that these rules are loss-allocating. *See* Moon v. Plymouth Rock Corp., 693 N.Y.S.2d 809, 811 (1999); Armstead v. National R.R. Passenger Corp., 954 F. Supp. 111, 113 (S.D.N.Y. 1997); Murphy v. Acme Markets, Inc., 650 F. Supp. 51, 53 (E.D.N.Y. 1986). In contrast, Dean Symeonides has argued that they are conduct-regulating. Symeon Symeonides, *Choice of Law in the American Courts in 1999: One More Year*, 48 Am. J. Comp. L. 143 [text accompanying nn.33-43] (2000).

42. *See* Trebilock, *supra* note 10, at 31.

43. *See* Ronald Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960).

44. *See* Posner, *supra* note 15, at 49-50.

45. *See* Michael Polinsky, An Introduction to Law and Economics 12 (2d ed. 1989).

46. Schultz v. Boy Scouts of America, 480 N.E.2d 679 (N.Y. 1985).

conduct-regulating. Nonetheless, it is likely that in many, if not most, situations this will not be possible. Obviously, this creates a problem for a choice of law rule that requires classification of all tort rules into one category or the other. Arbitrary labeling is one solution, but an unsatisfactory one. We could also abandon completely the distinction, but it would then be necessary to substitute an alternative rule to guide choice of law in torts. A third option is to retain the distinction, use the methodology described above to identify some tort rules as loss-allocating, and treat all other rules as conduct-regulating. The practical effect of this may be to move to a largely territorial choice of law rule for torts since most tort rules would probably be treated as conduct regulating, but I don't view that as an inherently objectionable result. Indeed, this result is consistent with the standard economic view that the primary function of tort law is to provide incentives and deterrence for future behavior.[47] Dean Symeonides has argued that "most reasonable people can agree that conduct-regulating rules are territorially oriented."[48] If one accepts this position and the standard economic view of torts as primarily conduct-regulating, then a largely territorial approach to choice of law is appropriate.[49]

In this paper, I have examined the distinction between loss-allocating and conduct-regulating tort rules that is embodied in the Louisiana codification as well as in the judicial practice of other states. I have argued that this distinction is based on a particular view about tort law and have offered an alternative view, grounded in standard economic theory. I have attempted to show how this alternative view impacts on a conflicts rule that is built on the loss-allocating/conduct-regulating distinction.

47. *See* Posner, *supra* note 15, at 202; Guido Calabresi, The Cost of Accidents 135 (1970).

48. Symeonides, *supra* note 6, at 705.

49. Interestingly, Judge Posner, one of the leaders of the law and economics movement, has asserted in a tort choice of law case that "[l]aw is largely territorial." Spinozzi v. ITT Sheraton Corp., 174 F.3d 842, 846 (7th Cir. 1999).