

Summer 6-1-1999

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Recommended Citation

Alex Kozinski, *The Toyota Principle*, 56 Wash. & Lee L. Rev. 923 (1999),
<https://scholarlycommons.law.wlu.edu/wlulr/vol56/iss3/11>

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The Toyota Principle

Alex Kozinski*

It is a widespread but mistaken belief that the relationship between law and economics was first recognized by Ronald Coase in a 1960 article called "The Problem of Social Cost."¹ Although Professor Coase and a handful of other economists, such as Aaron Director and Richard Posner at Chicago, have done much to enhance our understanding of the relationship between the two disciplines, courts operating at common law have for years understood that law is a mechanism of social control. Tort law, in particular, is meant not merely to compensate the victims of misconduct, but – perhaps equally important – it is designed to curb such misconduct in the future.

Thus, assume – hypothetically, of course – you make a car that carries with it a hidden danger: a bolt sticks out in a particular way so the gas tank explodes when the car is rear-ended. You save ten dollars a car by doing this. You wind up saving twenty million dollars (ten dollars multiplied by two million cars), but someone else pays the price for those savings – the people who get burned by exploding gas tanks. But they are not the only ones who pay the price: Everyone else who drives around in that particular car suffers the same hazard. They are subject to an actuarial harm – the risk that they might be severely injured in the case of a rear-end collision.

Courts facing cases like the one I just described do not need a long lesson in economics to figure out what is going on. We do not want car manufacturers getting rich by skimping on car safety. So, when the risk comes to fruition, we make the company pay through the nose. First, in order to compensate the victim, and second, to teach them not to do it again.

There is no guarantee, of course, that the company will not ignore us and keep skimping on safety, but we rely on greed to do our dirty work. Generally, it works pretty well. Much too well, some have argued, but that is not what I want to address in this essay.

* Judge, Ninth Circuit Court of Appeals. Judge Kozinski delivered this address on January 21, 1999 as part of Washington and Lee University's Law and Responsibility Lecture Series. This Lecture Series celebrated the 250th Anniversary of the University and the 150th Anniversary of the School of Law.

1. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

Instead, I want to address recycling. I have noticed that there is a renewed sense of commitment to the environment these days. In my chambers, we recycle everything from cans and bottles to paper and plastics – even the gags in my speeches.

Anyway, I want to pay a tribute to an unsung hero of the environmental movement – Mr. Ronald Roy Henderson. Mr. Henderson was so committed to the cause of recycling that he would recycle things even before the owner was finished using them. He specialized in going onto other people's land and recycling valuable electrical cable that he thought could be better used elsewhere.

One day, he and a business associate decided to visit an abandoned missile base in search of cable to recycle. They found a convenient hole in the fence, just under a KEEP OUT sign. Of course, the cables were not just lying around. Cables that had been *that* abandoned already had been removed by a previous generation of trespassers. Mr. Henderson aimed for the sky: He went after cables that were hanging some forty feet up, connected to utility poles, like many other electrical cables nowadays. Did it occur to Henderson that maybe the cables were energized? No, he thought, it would be wasteful for the government to send power through lines here in the middle of nowhere. And we all know the government is never wasteful.

Henderson was so sure that the lines were dead that he sent his friend up first. When the friend cut into one of the cables, Henderson observed that he started twitching and smoking. Henderson quickly scampered up the pole to help his friend. Reaching the top, he grabbed the freshly cut cable for support, but quickly let go, only to learn the hard way that the law of gravity has no exclusionary rule.

Of course, Henderson was badly injured. And, of course, he sued. His theory was that the government should have turned off the juice because it should have known that Henderson and his friend were going to climb the pole and steal the wires. No kidding – this is a real case.²

Now in a sane world, Henderson would have been sent packing and received a bill for the defendant's attorney's fees. But this was the Southern District of California, so what Henderson received instead was a trial. The trial was conducted on what you might call an attractive nuisance theory: Was the defendant negligent in failing to turn off the power surging through the cables that hung a mere forty feet above ground, begging to be snatched? After all the evidence was in, the district court held for the defendant on the ground that the defendant could not have foreseen the injury to the plaintiff and, therefore, had no duty to turn off the electricity.

2. See *Henderson v. United States*, 827 F.2d 1233 (9th Cir. 1986), *opinion withdrawn and superceded in part by* 846 F.2d 1233 (9th Cir. 1988).

Proving once again that chutzpah knows no bounds when a deep pocket is within picking range, Henderson appealed, and the Ninth Circuit reversed – at least initially. My distinguished colleagues brushed aside the suggestion that law-abiding people have no duty to adjust their behavior to accommodate thieves. Hey, thieves are people too; they are entitled to a safe workplace just like anyone else. So, if the property owner knows that thieves are likely to ply their trade on his property, the owner must do what is necessary to keep them from getting injured.

Here, the court said, it was pretty clear that Henderson and his buddy would go scavenging for cable because they had done so once before. So, the injury was foreseeable, and the defendant might have breached his duty by failing to turn off the electricity. The court reversed with a pretty strong hint that the district court ought to enter judgment for the plaintiff.

Now, in fairness to my colleagues, they eventually reversed field and concluded that the district judge was not clearly erroneous in finding that the injury was unforeseeable. But the portion of the opinion that deals with duty still stands. Thus, California law, as interpreted by the Ninth Circuit, is that landowners have a duty to protect thieves whom they know are likely to come onto the property from hazards so obvious that the most stupid of our species would recognize them.

Well, the mind reels at the thousands of ways the citizens of California are violating their responsibilities as announced in the *Henderson* case. For example, think about all those people who live in high-rise condominiums and lure naive cat burglars into scaling the walls by maliciously keeping their money and jewelry under their mattresses. And what about those irresponsible banks that keep large moneybags in their safes, inflicting back injuries on unsuspecting safecrackers who have to haul the loot to the getaway car?

These examples may seem silly, but are they really any more silly than *Henderson*? Yet Mr. Henderson and his lawyer managed to force the defendant to go through the expense of a trial and an appeal and almost pulled out a victory.

Henderson's case is an example of the way our legal system has come to subsidize behavior that is irresponsible or self-destructive, precisely the type that any rational legal system should try to suppress. I started out by discussing the fact that courts long have recognized that large jury verdicts can have a positive influence by discouraging negligent and willful misbehavior. What courts have been less apt to recognize is that verdicts also influence the behavior of the compensated plaintiff and all those in a similar situation. For just as imposition of liability tends to discourage undesirable behavior, the payment of a subsidy tends to encourage it. When we pay damages to a plaintiff who bears substantial responsibility for the harm he suffered, we send a

message to him and to others like him that taking care of your safety is not your responsibility but someone else's.

What, one might ask, is the utility of telling the Mr. Hendersons of the world that they might be able to impose the cost of their reckless and anti-social conduct on the people they set out to victimize? It would make much more sense – and comport far more with common notions of fairness and justice – to apply a rule of law that I call the Toyota Principle: You asked for it, you got it. Under the Toyota Principle, a person who suffers harm as a result of an activity that any nine-year-old knows will surely result in serious injury is stuck with the consequences and cannot pin the blame on anyone else.

Many personal injury cases pit man against machine. Often, the machine does exactly what it was supposed to do, what anyone with an ounce of common sense would have expected it to do. Take trains for instance. Now, you may not always be able to predict when a particular train will arrive, but you usually can predict, with a fair degree of accuracy, the path of the train. If you look closely, you will notice that under every train is a track made of solid steel securely anchored to the ground. A pretty good rule of thumb is that a train will follow the path of the track. This rule is especially true where the train is a subway and does not have any place in particular to go, even if it were inclined to leave the track. Thus, the way to avoid being run over by trains is to stay off the tracks. It works every time.

If you already are on the tracks, remember that it is much easier for you to get off the tracks than for the train to get off the tracks. Remember also that you are better equipped to detect a train than a train is to detect you. If we were to create a neutral rule governing the man versus train case, we probably would put the burden on the cheapest cost-avoider – the pedestrian.

Nevertheless, it turns out that the legal system has treated people who jump in front of trains pretty well, all things considered. Not too long ago, the New York Transit Authority found itself on the business end of a man v. train lawsuit.³ In that case, the plaintiff sought damages for injuries suffered when he threw himself in front of a train in a not entirely successful suicide attempt. Although the injuries were severe – he lost both legs – you would think the Transit Authority would have refused to pay. After all, throwing oneself in front of a train is not just assumption of risk, it is assumption of certainty. It is more than contributory negligence, it is contributory lunacy.

But things are never that simple. The courts in many states apply the doctrine of pure comparative negligence. These courts probably realize that the plaintiff really should not have jumped in front of the train. However, these courts find it necessary to address any number of additional questions,

3. See *Lucas v. New York City Transit Auth.*, 557 N.Y.S.2d 919 (N.Y. App. Div. 1990).

such as: Suppose the engineer saw the guy and did not stop? Or did not stop fast enough? Or should have seen the guy but did not? Or suppose someone in the station should have seen the guy on the track and telephoned the engineer? In every case, many such fascinating questions arise, each of which can make for a wonderful lawsuit – taking up the time of the court and the parties and enriching the lawyers.

But let us ask the deeper philosophical question: Who cares? This case, it seems to me, is another case that should be governed by the Toyota Principle. When you choose to occupy the physical space that soon will be occupied by a speeding train, your own responsibility for what then happens so overshadows every other consideration that you should not be allowed to quibble whether others, too, might have been at fault.

Although what happened to this plaintiff is a tragedy, it is a tragedy he brought upon himself with very little help from anyone else; the responsibility of others – if any there was – arose solely and completely because he did something that he had no business at all doing. Nevertheless, the lawyer managed to negotiate a settlement for \$650,000 on the plaintiff's behalf.

There is, however, a happy ending to this story, proving that everyone can learn from his or her mistakes. This same individual later threw himself in front of another train, but, having perfected the technique, this time he came out entirely unscathed.

In the same genre is the case of the woman who climbed into the trunk of a car in a particularly imaginative suicide attempt, but changed her mind after she had slammed the lid shut.⁴ Well, she had a problem then: Car trunks are not made with her particular situation in mind, so there was no way for her to act on her changed perspective. She was stuck in the trunk for nine days, eventually was rescued, and, you guessed it, sued.

Whom did she sue? Was it the people in her life who had driven her to suicide? Was it her mother or father for subjecting her to an unhappy childhood? Did she sue her grandparents for the tort of negligent procreation in passing on to her a gene that carried a propensity toward depression? Of course not. She sued the car manufacturer for not having put a release inside the trunk.

The ultimate in this genre of lawsuit involves cases brought against rock groups for death and injury allegedly caused by subliminal lyrics. I am sure most readers are familiar with the Nevada lawsuit brought by distraught parents against Judas Priest⁵ – the rock group, not Frankie Lee's best friend.

The victims were two teenagers who were heavy drinkers, drug users and high school dropouts. Their parents were so cool, you might say, they let the

4. See *Daniell v. Ford Motor Co.*, 581 F. Supp. 728 (D.N.M. 1984).

5. See *Judas Priest v. Second Judicial Dist. Court*, 760 P.2d 137 (Nev. 1988).

kids keep drugs in their room. You can just imagine the rationale: They are going to use drugs anyway, better they should do it in their room where it is safe than out in the street somewhere. As it turned out, the room was not all that safe; it was chock-full of lethal phonograph records. Immediately after listening to one of these records the two youngsters grabbed a shotgun and sequentially shot themselves in the head.

There is no doubt, few things are as gut-wrenching as teenage suicide. It is a senseless tragedy that occurs all too often in this country, and efforts at understanding or preventing it have borne little fruit. However, the parents of the two teenagers here had an insight about how teenage suicide might be prevented – a belated insight, to be sure, but an insight nonetheless. Teenage suicide, the parents argued, was caused by subliminal messages sent by the rock group Judas Priest through its phonograph records. They sued and got to trial with a case based largely on the evidence of an expert who had been working in the field of subliminals ever since he dropped out of high school and started selling subliminal tapes on topics ranging from breast enlargement to wart removal. Although the Judas Priest lawsuit eventually failed, another rock deity, Ozzy Osbourne – the guy who bites the heads off live bats on stage – was sued for the separate suicides of two young men who allegedly killed themselves in response to subliminal messages in Mr. Osbourne's records.⁶ And the beat goes on, as Sonny and Cher used to say.

I suggested earlier that rewarding plaintiffs who were injured as a result of their own self-destructive behavior tends to reward such behavior and – economic theory tells us – to encourage it. No doubt many of you chuckled at that, though you were most polite about it. After all, you might have thought, no one really attempts suicide or jumps in front of a train or climbs utility poles relying on the fact that they will be able to sue and recover. Surely, no one will lock themselves into a trunk for nine days waiting to cash in on the litigation wheel of fortune.

Probably not, though I keep thinking about the fellow who got a verdict for nine million dollars for losing an arm to a subway train after he stumbled off the platform drunk.⁷ Responding to a storm of adverse publicity that erupted when the citizens of New York learned how their tax dollars would be spent, the plaintiff's lawyer sent the *New York Times* an impassioned letter which closed with the rhetorical question: "Would you rather have your left arm or 9 million dollars?"⁸

6. See *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992).

7. See *Merino v. City of New York*, 583 N.Y.S.2d 397 (N.Y. App. Div. 1992), *aff'd sub nom. Merino v. New York City Transit Auth.*, 675 N.E.2d 1222 (N.Y. 1996).

8. Alan M. Shapey, *Choose One: Your Left Arm or \$9 Million*, N.Y. TIMES, Oct. 16, 1990, at A28.

Do not let me influence your answer to this question, but I put pencil to paper and figured out that if it cost ten dollars an hour to hire someone to do for you all the things you do with your left arm, you could hire an entire platoon of such people, twenty-four hours a day, 365 days a year, using only the interest on the nine million dollars. The *New York Times* did not print the responses to the lawyer's letter, but I suspect there are people in New York who would sell their left arm for considerably less than nine million dollars.

Jest aside, there is a serious point here. The law is not merely a mechanism for resolving disputes; it is a weathervane of social mores. The rules of law we announce do have an effect on the way we relate to each other. When courts tell us that someone else is always to blame for whatever misfortune happens to befall us, pretty soon we start to believe it. Lawsuits such as the ones I have described have a distorting effect on our aggregate perception of the world and ultimately on the degree of responsibility each of us is willing to take for the conduct of our lives.

Take, for example, the parents of the two teenagers who shot themselves after listening to Judas Priest's records. The parents might have adopted various attitudes in response to the misfortune. They might have recognized that teenage suicide is one of those tragedies that can befall a family without regard to anyone's fault in particular – kind of like birth defects or earthquakes. Or, if they were in the blame-laying frame of mind, they might have blamed the deceased boys. After all, the boys were the ones who pulled the trigger. Or, the parents might have blamed themselves. They knew full well that their boys were consuming large quantities of alcohol and drugs. At the same time, one of the boys had managed to procure for himself a veritable arsenal, including a sawed-off shotgun, a .22 caliber pellet gun and a dart gun. Surely, somewhere along the way the parents might have put two and two together and said, "Okay boys – if you want to drink and use drugs, you can't go around carrying a loaded shotgun;" or "If you want to carry a shotgun, you can't drink and use drugs." God forbid that the parents should have put their foot down and insisted that the boys cut out drinking *and* drugs *AND* guns; that would not have been cool. Teenagers, after all, are not that experienced with life, and they rely on their elders to give them the type of guidance that comes from experience.

Instead of internalizing their grief and channeling their anger toward becoming better parents to their remaining children, these parents managed to absolve themselves of a large measure of guilt by finding someone else on whom to lay blame – a sinister external force that robs us of our free will and delivers us from responsibility for our deeds. Who is this diabolical, faceless menace? Someone with a deep pocket who is not all that popular in the adult world.

Lawsuits such as the one brought against Judas Priest reinforce the natural frustrations parents have in raising their children. The lawsuits add weight to the notions that what parents do does not much matter anyway and that personal responsibility in parenting, as in other human endeavors, really is of little consequence because there are powerful forces out there that tend to undo everything we try to do. So why bother? When we give credence to such lawsuits – and particularly when we allow recovery – we undermine the important notion that a cause-and-effect relationship exists between our willful acts and our destiny.

The sad fact is, the universe is a hard and gritty place. Very bad things happen to people who do not take responsibility for their own lives. As a society, we suffer grievously when individuals fail to live up to their potential because they have a sense that there is not much they can do to affect their destiny. When we allow our courtrooms to be crowded with individuals who seek to escape the consequences of their own folly, we foster the notion that somebody out there is to blame for whatever goes wrong in our lives and that it is someone else's duty to look out for us.

Far too many people, to one degree or another, are susceptible to the siren call of that message. Take the case of Brian Willson the antiwar activist (not Brian Wilson, the Beach Boy). Most of you might remember that Brian Willson was the protester who thought he would make a statement by playing chicken with a Navy munitions train some years ago. He did not budge, and the train did not stop. It must have been pretty obvious that the train was not going to stop; Mr. Willson's six fellow protesters all jumped off the track, leaving Mr. Willson to lose both his legs.

After the accident Mr. Willson stated that he was sure the train was going to stop. In other words, he did not really believe he could stop a moving train with his shins. Rather, he was victim to a more subtle but equally dangerous notion: that the people operating the railroad had a responsibility to stop the lawful progress of their train long enough for him to create a sensation. But what if Mr. Willson had lived in a world where the train had no such responsibility? I rather suspect that he would have found another way of expressing his political views and that he would still have his legs today.

When people start thinking they are going to win a game of chicken with a train, it is time to reevaluate our system of compensation. We need a renewed sense of responsibility to solve the monumental problems we face as we approach the third millennium. The time has come for the courts to say: If you got hurt because of your own irresponsible or destructive actions, you are stuck with the consequences, and we will not go looking for some deep pocket to pay the price for your folly. In other words, you asked for it, you got it.