

Introductory Examples

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CRIME

Example 1: A commission has been appointed to consider some reforms of the criminal law. The commission has identified certain white-collar crimes (such as embezzling money from one's employer) that are committed after rational computation of the potential gain and the risk of getting caught and punished. Currently, those convicted of committing these crimes are sentenced to a term in prison. After taking extensive testimony, much of it from economists, the commission decides that a monetary fine, rather than incarceration, is the appropriate punishment for these offenses. The commission ranks each offense by seriousness and determines that the fine should increase with the seriousness of the offense, but by how much?

CONTRACT

Example 2: An oil company signs a contract to deliver oil by a certain date from the Middle East to a European manufacturer. Before the oil is delivered, war breaks out in the exporting country, so that the oil company cannot perform the contract as promised. The lack of oil causes the European manufacturer to reduce production and lose profits. The manufacturer brings an action (*i.e.*, files a lawsuit) against the oil company for breach of contract and asks the court to award it a sum of money, called "damages," that is equal to the amount of profits the manufacturer would have realized if the oil had been delivered as promised. Unfortunately, the contract is silent about the risk of nonperformance in the event of war, so that the court cannot simply read the contract and resolve the dispute on the contract's own terms. In resolving the suit, the court must decide whether to excuse the oil company from performance on the ground that the war made the performance "impossible" or to find the oil company in breach of contract and to require the oil company to compensate the manufacturer for lost profits.⁵

PROPERTY

Example 3: *Eddie's Electric Company* emits smoke, which dirties the wash hanging at nearby *Lucille's Laundry*. *Eddie's* can abate the pollution by installing scrubbers on its stacks, and *Lucille's* can reduce the damage by installing filters on its ventilation system. The installation of scrubbers by *Eddie's* or filters by *Lucille's* completely eliminates pollution or the damage from it. Installing filters is cheaper than installing scrubbers. No one else is affected by pollution because *Eddie's* and *Lucille's* are near to each other and far from anyone else. *Lucille's* initiates court proceedings to have *Eddie's* declared to be a "nuisance." If the action succeeds, the court will order *Eddie's* to abate its pollution. Otherwise, the court will not intervene in the dispute.

TORT

BUTTERFIELD V. FORRESTER, 11 East 60 (K.B., 1809)⁶

This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff [Butterfield], who was riding along the road, was thrown down with his horse, and injured, etc. At the trial before BAYLEY, J.⁷ at Derby, it appeared that the defendant [Forrester], for the purpose of making some repairs to his house, which was close by the roadside at one end of the town, had put up a pole across part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house [a tavern] not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at one hundred yards distance; and the witness who proved this, said that if the plaintiff had not been riding very hard, he might have observed and avoided it; the plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence, BAYLEY, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant, which they accordingly did.