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Sprecher v. Adamson Companies: Nonfeasance Immunity Slides by the California Supreme Court

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I. INTRODUCTION

Tort law has traditionally refused to assign liability to an owner or occupier of land on whose property a natural condition exists which causes damage to an adjoining landowner. The common law has instead reserved liability for the situation in which an artificial condition causes the damage. The distinction between artificial and natural conditions developed as an embodiment of the broader distinction between misfeasance and nonfeasance. Misfeasance exists when a defendant's conduct creates a risk of harm to the plaintiff, or aggravates the danger posed by an already existing risk of harm. Nonfeasance, on the other hand, exists when the risk of harm has been created independently of the defendant's conduct.

1. See W. PROSSER, LAW OF TORTS 354-56 (1971) and RESTATEMENT (SECOND) OF TORTS § 363 (1965) for a statement of the natural condition immunity rule and citations to cases applying it.

2. A "natural condition" is one that has not been changed by any act of a human being, whether by the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the possessor. It is also used to include the natural growth of trees, weeds and other vegetation upon land not artificially made receptive to them. RESTATEMENT (SECOND) OF TORTS § 363 comment (b) (1965). An "artificial condition" is any structure erected upon the land as well as "trees or plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces." Id.

3. See Noel, Nuisances from Land in its Natural Condition, 56 HARV. L. REV. 772 (1943):

   [T]raditionally the common law has not imposed on one man any obligation to take affirmative steps for the protection of others, and that the duty of a person in possession of land to exercise reasonable care to prevent it from causing harm to others never has arisen out of possession or ownership alone, but only out of some particular use of the property, as where he erects a structure and fails to keep it in a safe condition.

   Id. at 773 (citing F. BOHLEN, STUDIES IN TORTS 47 (1926)).

4. See Weinrib, The Case for a Duty to Rescue, 90 YALE L.J. 247, 256 (1980). It does not matter that the defendant's conduct is completely innocent—if it creates the risk of harm, it is nonetheless misfeasance. Id.

5. Id. "Participation by the defendant in the creation of the risk, even if such participation is innocent, is thus the crucial factor in distinguishing misfeasance from nonfeasance." Id.
Until recently, California courts observed this distinction. In *Sprecher v. Adamson Companies*, however, the California Supreme Court departed radically from the common law rule of natural condition immunity. The *Sprecher* court imposed an affirmative duty on landowners to manage their property reasonably, invalidating the distinction between artificial and natural conditions as a basis for determining liability.

The *Sprecher* holding raised significant questions with respect to the recognition of nonfeasance liability. This note will examine the issues of nonfeasance and misfeasance raised by the *Sprecher* facts and will analyze the reasoning used by the court to reach its conclusion. This note will also explore the rationale for the recognition and denial of nonfeasance tort immunity. It will conclude that the *Sprecher* court failed to establish a principled basis for abrogating the misfeasance-nonfeasance distinction.

II. FACTS OF THE CASE

The defendants, Adamson Companies and Century-Malibu Ventures, Inc., owned a 90-acre parcel of land in Malibu, California. A portion of this land contained an active landslide which was discovered in the early part of this century. The plaintiff, Peter Sprecher, owned one of several beach front homes immediately downhill and across a road from the defendants' land. In March 1978, heavy rains precipitated a major movement along the landslide area on defendants' property, causing plaintiff's house to move and press against the house of his neighbor, Gwendolyn Sexton. Sexton filed suit against plaintiff seeking injunctive relief from this encroachment. Plaintiff cross-complained against Sexton, the County of Los Angeles, and the defendants. In his cross-complaint, plaintiff sought damages from defendants for harm done to his house. He claimed that defendants had negligently

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6. See Wischer v. Fowler, 7 Cal. App. 3d 225, 86 Cal. Rptr. 582 (1970) (triable issue of fact existed whether hedge that allegedly obstructed plaintiff decedent's view of highway and resulted in his death was artificial or natural); Coates v. Chinn, 51 Cal. 2d 304, 332 P.2d 289 (1958) (tree from which branch had fallen resulting in plaintiff's injury was artificial condition, and thus ordinary negligence principles would govern case); Boarts v. Imperial Irrigation Dist., 80 Cal. App. 2d 574, 182 P.2d 246 (1947) (growth of weeds on defendant's property was natural condition and defendant therefore owed no duty to cut the weeds to prevent crop damage to plaintiff's adjoining property).
8. Id. at 371, 636 P.2d at 1128, 178 Cal. Rptr. at 790.
9. Id. at 360-61, 636 P.2d at 1121-22, 178 Cal. Rptr. at 783-84.
10. Id.
11. Id.
failed to correct or control the natural landslide condition which existed on their property. All parties to the action agreed that human activity had played no part in the land movement that caused the damage.

The trial court granted defendants' motion for summary judgment and the court of appeal affirmed. The California Supreme Court unanimously reversed, imposed a duty of care on the defendants to manage their property reasonably, and remanded the case for determination of whether the defendants had breached this new duty.

III. REASONING OF THE COURT

The Sprecher court recognized that the distinction between artificial and natural conditions was rooted in the principle that "mere nonfeasance" is not actionable. The court rejected this principle, reasoning that possession of land "with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." The court dismissed the nonfeasance underpinning of natural condition immunity by declaring that "[w]hatever the rule may once have been, it is now clear that a duty to exercise due

12. Id.
13. Id.
15. 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981). Justice Richardson wrote a separate concurring opinion. He agreed with the majority that the artificial-natural condition distinction should be abandoned and a duty imposed on landowners in every case when a condition on their land caused injury, but questioned whether, under the circumstances of the Sprecher case, any restraining engineering procedures could reasonably be required of the landowners. 30 Cal. 3d at 374, 636 P.2d at 1130, 178 Cal. Rptr. at 792 (Richardson, J., concurring).
16. 30 Cal. 3d at 373, 636 P.2d at 1130, 178 Cal. Rptr. at 792.
17. Id. at 367, 636 P.2d at 1126, 178 Cal. Rptr. at 788. The rule is stated in RESTATEMENT (SECOND) OF TORTS § 314 (1965): "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." The origin of the rule is historic; early courts were concerned primarily with flagrant forms of misbehavior and generally overlooked "doing nothing" as a basis for imposing liability. Id. at comment (c). An exception to the rule has been recognized when a special relationship exists between the defendant and plaintiff, and further inroads are likely in instances involving "extreme cases of morally outrageous and indefensible conduct." Id.
18. 30 Cal. 3d at 369, 636 P.2d at 1127, 178 Cal. Rptr. at 789. "[I]t becomes clear that the traditional characterization of a defendant's failure to take affirmative steps to prevent a natural condition from causing harm as nonactionable nonfeasance conflicts sharply with modern perceptions of the obligations which flow from the possession of land." Id.
19. 30 Cal. 3d at 370, 636 P.2d at 1127, 178 Cal. Rptr. at 789.
care can arise out of possession alone."

The court buttressed this position by analogizing to its holding in *Rowland v. Christian*, in which the supreme court abrogated the common law distinctions among a licensee, invitee, and trespasser as a basis for assigning a duty to a possessor of land when a person on the land suffers injury. The *Sprecher* court reasoned: "Modern cases recognize that after *Rowland*, the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises."

In following *Rowland*, the *Sprecher* court also emphasized the applicability of California Civil Code section 1714, which states that "[e]veryone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . ." The court held that a departure from this "fundamental concept . . . is unwarranted as regards natural conditions of land."

To complete its analogy to the *Rowland* rationale, the *Sprecher* court listed the factors delineated by the *Rowland* court to determine when a possessor of land should be afforded immunity. The court concluded that the applicability of those factors is neither diminished

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20. *Id.* at 367, 636 P.2d at 1126, 178 Cal. Rptr. at 788.
22. *Id.* at 118-19, 443 P.2d at 568, 70 Cal. Rptr. at 104. In *Rowland*, the plaintiff, a social guest of the defendant, was injured by a faulty water faucet in the defendant's apartment. The condition of the fixture was known to the defendant. The lower court granted summary judgment for the defendant, relying on the common law rule that the only duty a possessor owed a licensee was that of refraining from wanton or willful conduct. The supreme court reversed, holding that an individual's status as a trespasser, a licensee, or an invitee was no longer dispositive of the duty of care owed and was to be considered only as to the issue of whether the possessor had exercised reasonable care under the circumstances. *Id.* at 118-19, 443 P.2d at 568, 70 Cal. Rptr. at 104.
23. 30 Cal. 3d at 368, 636 P.2d at 1126, 178 Cal. Rptr. at 788.
25. 30 Cal. 3d at 371, 636 P.2d at 1128, 178 Cal. Rptr. at 790.
26. *Id.* at 370-71, 636 P.2d at 1128, 178 Cal. Rptr. at 790. The *Rowland* factors include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequence to the community of imposing a duty to exercise due care, and the availability, cost, and prevalence of insurance. 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100. The *Sprecher* court acknowledged that this last factor concerning insurance coverage may bear a relationship to the artificial-natural condition distinction, as coverage may be difficult to obtain for some risks
nor increased by the nature of the condition causing harm, whether artificial or natural.  

The court cited Rogers v. Jones as an example of the "[m]odern cases" decided subsequent to Rowland that have recognized that "the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises." The court also noted that maintenance of the natural condition immunity rule after Rowland would produce the anomalous situation in which a possessor of land would have a duty of reasonable care to protect trespassers, licensees, and invitees from risks of harm posed by a natural condition, but would have no duty to his or her neighbor.

The Sprecher court also suggested that failure to abate a natural condition might actually constitute a form of misfeasance. The court drew upon a hypothetical case proposed by Professor Weinrib to illustrate that, in certain situations, what appears to be nonfeasance may actually be misfeasance. The example demonstrates that an individual may be burdened with a duty to exercise reasonable care if his or her conduct aggravates an existing risk of harm to the victim: "Although it may be nonfeasance to refuse to rescue a drowning person whose predicament arose independently, it is misfeasance to hide the rope that others might toss out to him." Using this reasoning, the Sprecher court suggested that "by virtue of taking possession of a tract of land, and thus preventing another from doing so, a possessor 'hides the rope' that others might toss out to those outside the premises. That is, his possession of [the] land . . . forestalls its possession by another
who might abate the condition." Upon this basis, the court concluded, "any unreasonable failure to abate would constitute misfeasance."

The Sprecher court perceived a judicial trend away from the natural condition immunity rule, stating that "[t]he erosion of the doctrinal underpinning of the rule of nonliability is evident from even a cursory review of the case law." The court cited cases from fifteen jurisdictions which have recognized an exception to the rule for fallen trees that cause injury, and reasoned that the rationale for the tree exception applied to all natural conditions. The court also cited section 840 of the Restatement (Second) of Torts as evidence of the trend away from the natural condition immunity rule and as support for the proposition that liability should not be limited to tree situations only, but should include all dangerous natural conditions.

The court also noted the widespread recognition of the landholder's duty to protect an adjoining landowner from a risk of harm posed by a dangerous artificial condition, even if the original risk was created by the possessor's predecessor in interest. The court stated that this rule embraced the notion that a duty to exercise reasonable care could arise even if the possessor's conduct could be characterized as nonfeasance. Assignment of a duty in this nonfeasance situation, the court reasoned, indicated that the line between misfeasance and

33. 30 Cal. 3d at 370 n.8, 636 P.2d at 1127 n.8, 178 Cal. Rptr. at 789 n.8.
34. Id.
35. 30 Cal. 3d at 371, 636 P.2d at 1128, 178 Cal. Rptr. at 790.
36. Id. at 364-65, 636 P.2d at 1124, 178 Cal. Rptr. at 786.
37. Id. at 365, 636 P.2d at 1124, 178 Cal. Rptr. at 786.

The courts are not simply creating an exception to the common law rule of nonliability for damage caused by trees and retaining the rule for other natural conditions of the land. Instead, the courts are moving toward jettisoning the common law rule in its entirety and replacing it with a single duty of reasonable care in the maintenance of property.

Id. The Sprecher court cited no case in which the common law rule had been jettisoned in its entirety.

38. Id. at 365, 636 P.2d at 1124, 178 Cal. Rptr. at 786. RESTATEMENT (SECOND) OF TORTS § 840 (1977) states:

(1) Except as stated in Subsection (2), a possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land.
(2) A possessor of land who knows or has reason to know that a public nuisance caused by natural conditions exists on his land near a public highway, is subject to liability for failure to exercise reasonable care to prevent an unreasonable risk of harm to persons using the highway.

39. 30 Cal. 3d at 369, 636 P.2d at 1127, 178 Cal. Rptr. at 789.
40. Id.
nonfeasance had already been crossed. Therefore, "the historical justification for the rule of nonliability for natural conditions has lost whatever validity it may once have had."42

IV. ANALYSIS

A. Possession Giving Rise to Duty

In holding that mere possession of land may give rise to a duty to abate a dangerous condition thereon, whether the condition is natural or artificial, the Sprecher court emphasized the principle that the duty springs from the possessor's "right to control and manage the premises."43 However, the court's abrogation of nonfeasance immunity in Sprecher cannot be harmonized with this principle as it has been developed by the California courts and the legislature.44

1. Rowland v. Christian

The court's broad assertion that "after Rowland, the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises"45 suggests that the Rowland

41. Id. (citing Weinrib, supra note 4, at 257).
42. 30 Cal. 3d at 370, 636 P.2d at 1128, 178 Cal. Rptr. at 790.
43. Id. at 368, 636 P.2d at 1126, 178 Cal. Rptr. at 788. The court did not expressly state whether it considered possession of land containing a dangerous natural condition as a form of misfeasance, other than to suggest the possible application of the "risk aggravation" principle to the Sprecher facts. See supra notes 32-35 and accompanying text. However, a reasonable inference can be drawn from the court's language that it actually considered possession of land to be misfeasance. The court stated:

Proponents of the rule of nonliability for natural conditions argued that a defendant's failure to prevent a natural condition from causing harm was mere nonfeasance. A natural condition of the land was by definition, they argued, one which no human being had played a part in creating [citations omitted]... Whatever the rule may once have been, it is now clear that a duty to exercise due care can arise out of possession alone.

30 Cal. 3d at 367, 636 P.2d at 1126, 178 Cal. Rptr. at 788. If the Sprecher court did, in fact, consider the defendants' failure to abate the landslide condition as a form of misfeasance, it created a fiction that defies the traditional criteria for distinguishing nonfeasance from misfeasance. Misfeasance exists when a defendant's conduct creates a risk of harm that threatens the plaintiff. See Weinrib, supra note 4, at 256. The risk of harm in the Sprecher situation arose independently of the defendants' conduct. Because the parties agreed that no human activity had caused the landslide to occur, see supra text accompanying note 13, the only "conduct" attributable to the defendants was ownership and possession of the land. Defendants' possession, however, did not create the risk of harm. The landslide condition in Sprecher posed a threat to downhill property whether the land containing the landslide was owned by defendants, third parties, or no one.

44. See supra note 23 and accompanying text.
45. 30 Cal. 3d at 368, 636 P.2d at 1126, 178 Cal. Rptr. at 788.
court struck down all immunities afforded the landowner at common law. This is inaccurate. The Sprecher court overlooked the distinction between the common law immunity abrogated in Rowland and natural condition immunity.

The issue resolved by the Rowland court was whether the possessor’s duty to an individual on his property should be a function of that individual’s status. The Rowland court abrogated the common law distinction among licensee, invitee and trespasser because these distinctions were “deeply rooted to the land” and could not be justified in an “industrialized urban society.” This lack of justification led to “complexity and confusion” for courts attempting to apply the distinctions.

Natural condition immunity, however, is rooted in the distinction between nonfeasance and misfeasance. It can be rationalized, even in modern times, by the need to distinguish between conduct that creates a risk of harm and conduct that does not. The Rowland court did not have occasion to address natural condition immunity or the policies underlying it. Nonfeasance was not an issue in Rowland because the condition causing injury was purely artificial. Furthermore, there was a form of misfeasance involved in Rowland: the defendant had participated in the risk creation, either by succeeding in possession or by allowing the condition to become dangerous.

Rowland’s abrogation of one common law immunity offers little justification for the assertion that all common law immunities are now invalid. It offers even less justification for the abrogation of natural condition immunity.

Moreover, the court’s assertion that cases decided subsequent to Rowland have recognized an affirmative duty grounded in possession and control does not support the imposition of nonfeasance liability. In Rogers v. Jones, cited by the Sprecher court to support the proposition that a duty can arise from possession and control of premises, the court of appeal pointedly did not extend the possessor’s duty to encom-

46. See supra note 22 and accompanying text.
47. 69 Cal. 2d at 116, 443 P.2d at 566, 70 Cal. Rptr. at 102.
48. Id. at 120, 443 P.2d at 569, 70 Cal. Rptr. at 105.
49. See infra notes 91-102 and accompanying text.
50. 69 Cal. 2d at 110, 443 P.2d at 562, 70 Cal. Rptr. at 98. See supra note 22.
51. See 69 Cal. 2d at 111, 443 P.2d at 563, 70 Cal. Rptr. at 99 and infra text accompanying notes 87-90.
52. 30 Cal. Rptr. at 368, 636 P.2d at 1126, 178 Cal. Rptr. at 788.
54. 30 Cal. 3d at 368, 636 P.2d at 1126, 178 Cal. Rptr. at 788.
pass nonfeasance situations.\textsuperscript{55} To the contrary, the Rogers court acknowledged that a landowner owed no duty to a person on his land who was injured under circumstances described by the court as nonfeasance.\textsuperscript{56} In Rogers, the plaintiff, who had attended a professional football game, was injured when assaulted in a parking lot owned and managed by the defendant. The court reasoned:

While . . . the occupier of land has a general duty to exercise ordinary care for the safety of persons who come upon the property, he is not an insurer of their safety, and the duty does not extend to controlling the misconduct of third persons which he has no reason to anticipate and reasonable opportunity or means to prevent.\textsuperscript{57}

The refusal of the Rogers court to hold the defendant landowner liable has additional significance because the injury in Rogers, unlike that in Sprecher, did not arise from pure nonfeasance; the defendant's conduct in operating the parking lot arguably helped to create the inherent risk involved when "thousands of spectators abruptly descend[ed] upon" the lot.\textsuperscript{58} Despite this relationship between conduct and injury, the Rogers court refused to impose on the defendant an affirmative duty based on his possession and control of the land. Rogers, therefore, does not support the imposition of such a duty on the Sprecher defendants, who had not participated in the creation of the dangerous natural condition that caused the damage.\textsuperscript{59}

\textsuperscript{55} 56 Cal. App. 3d at 351, 128 Cal. Rptr. at 407.
\textsuperscript{56} Id.
\textsuperscript{57} Id. (citations omitted). The plaintiff in Rogers had attempted to assist a private security officer who had been assaulted and knocked down by plaintiff's assailant. The trial court awarded the plaintiff personal injury damages based on a finding that the defendant had negligently failed to control the conduct of those on his premises. The court of appeal reversed this judgment, holding that the defendant owed no duty to the plaintiff to control the unforeseeable misconduct of third persons. Id.
\textsuperscript{58} Id.
\textsuperscript{59} Although the Rogers court characterized the defendant's failure to control the acts of a third person on his land as "nonfeasance," id. it has been suggested that this type of conduct is best classified as "pseudo-nonfeasance." Professor Weinrib states:

The difference between real nonfeasance and pseudo-nonfeasance can be formulated by transforming the but-for [causation] test so that it attends not to the actual injury but to the risk of injury . . . .

[B]ecause this formulation of the distinction focuses on the defendant's having had some role in the creation of risk, and not the quality of that role, the defendant's fault in creating the risk is irrelevant whether a case is one of nonfeasance or not.

Weinrib, supra note 4, at 254-55 (emphasis added). In Rogers, the important point is not that the court may have misclassified the conduct as nonfeasance, but that the court recognized limitations on a possessor's duty when the relationship between the defendant's conduct and the risk of harm becomes substantially attenuated.
2. Civil Code Section 1714

The Sprecher court's mechanical application of Civil Code section 1714, accompanied by the declaration that the Rowland factors did not warrant departure from the section, confused further an unsettled area of California tort law. It is well settled that "every case is governed by [section 1714's] rule of general application that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct." When a case involves nonfeasance, however, it is not clear on what basis a court will decide whether departure from section 1714 is justified. Two recent California Supreme Court cases demonstrate this confusion.

In Weirum v. RKO General, Inc., the court suggested that in cases of pure nonfeasance, immunity may be afforded without consideration of the Rowland factors. In Tarasoff v. Regents of University of

60. See supra text accompanying notes 24-28.
61. See supra note 26.
63. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).
64. In Weirum, a wrongful death action was brought against the owner of a radio station which had been sponsoring a contest rewarding the first listener to reach the location of one of the station's disc jockeys. Plaintiff's decedent was killed when his automobile was negligently forced off a highway by an automobile driven by a contest participant. Id. at 43, 539 P.2d at 37, 123 Cal. Rptr. at 469. The defendant radio station argued that it owed no duty to the plaintiff because section 315 of the RESTATEMENT (SECOND) OF TORTS applied to the case. Id. at 48. 539 P.2d at 41, 123 Cal. Rptr. at 473. This section, based on nonfeasance immunity, states:

There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless
(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
(b) a special relation exists between the actor and the other which gives to the other a right of protection.

The Weirum court rejected the argument that section 315 afforded the defendant immunity: As section 315 illustrates, liability for nonfeasance is largely limited to those circumstances in which some special relationship can be established. If, on the other hand, the act complained of is one of misfeasance, the question of duty is governed by the standards of ordinary care discussed above. [The court had earlier emphasized foreseeability as the primary factor in determining the existence of a duty.] Here, there can be little doubt that we review an act of misfeasance to which section 315 is inapplicable.

15 Cal. 3d at 49, 539 P.2d at 41, 123 Cal. Rptr. at 473. Thus, the Weirum court suggested that cases involving nonfeasance may be decided apart from section 1714 and the Rowland factors.

See also Coffman v. Kennedy, 74 Cal. App. 3d 28, 141 Cal. Rptr. 267 (1977). In Coffman, the plaintiff was injured when the car he was driving collided with another vehicle operated by an intoxicated driver and in which the defendant was a passenger. The court of appeal affirmed the portion of the trial court's ruling that held that the defendant owed no duty to the plaintiff to control the conduct of the intoxicated driver, citing section 315 of the
California, however, after finding the existence of a special relationship which rendered moot the question of nonfeasance immunity, the court expressly declined to decide "whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another's conduct." It is not clear whether the Sprecher court considered section 1714 and the Rowland factors because it deemed the Sprecher defendants' conduct to constitute misfeasance, or whether the court implicitly extended the question left open in Tarasoff to encompass other nonfeasance situations as well (i.e. failure to abate dangerous natural conditions on land) and then declared section 1714 and the Rowland factors applicable in all nonfeasance contexts. This latter possibility seems highly unlikely as the Sprecher court did not cite the Tarasoff decision, nor did it discuss the foreseeability issue, other than to list it as one of the Rowland factors.

B. Misfeasance: Aggravating the Risk by "Hiding the Rope"

The Sprecher court's suggestion that a landowner aggravates the risk of harm posed by a dangerous natural condition because he foretells possession of the land by another who may abate the condition is strained in several respects. First, possession of land by one who fails to make safe a dangerous natural condition does not preclude the possibility that the condition will be corrected and the risk reduced. The parties are free to negotiate an agreement concerning abatement of the condition. The Sprecher court's analogy to Professor Weinrib's "hiding of the rope" hypothetical is ill-conceived because the hypothetical involves an emergency situation in which contract values are suspended. Negotiations with a drowning person regarding his rescue cannot result in an enforceable contract because of the existence of duress. No such suspension of contract values occurs when a natural landslide condition poses a risk of harm. If the condition poses an immediate and

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65. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. at 269. The Coffman court did not consider the Rowland factors in affording the defendant nonfeasance immunity.
66. Id. at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.
67. 30 Cal. 3d at 370 n.8, 636 P.2d at 1127 n.8, 178 Cal. Rptr. at 789 n.8; see supra text accompanying notes 31-34.
68. Weinrib, supra note 4, at 271-72.
69. See infra text accompanying notes 103-05.
substantial threat to an individual's person or property and the landowner refuses to negotiate, the threatened individual may enjoy a privilege to enter the land and take self-help measures to abate the risk, obligating himself to pay for damages caused to the landowner's property.\textsuperscript{70}

The weakness of the court's reliance on the "hiding of the rope" illustration is particularly apparent in light of the facts of \textit{Sprecher}. The independent risk of land movement posed by the natural landslide condition had existed for hundreds, perhaps thousands, of years.\textsuperscript{71} The risk of landslide was not aggravated by the defendants' possession of their 90-acre parcel. In fact, an argument can be advanced that plaintiff and his predecessors in interest aggravated the risk of harm by developing their property in the path of the landslide, thus setting the stage for increased economic loss.

Finally, the court's analogy to the "hiding of the rope" illustration fails because its logic ultimately depends upon characterizing the defendants' behavior while in possession of land as misfeasance. This reasoning is unpersuasive. If such were the case, a "hiding of the rope" argument could be made in cases such as \textit{Rogers v. Jones},\textsuperscript{72} where the operator of the parking lot, although not legally responsible for the conduct of third parties, nevertheless prevented the operation of the parking lot by others who may have provided more safety measures than were legally required. Theoretically, the court's reasoning would sanction even more unlikely results, such as the argument that X's possession of a tract of land adjacent to property occupied by an indigent individual in desperate need of surgery, but without funds to pay for it, forestalls possession of the land by a benevolent person who would aid the needy neighbor. The "aggravation" by X of the independently cre-

\begin{footnotesize}
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\item[	extsuperscript{70}]{70. \textit{RESTATEMENT (SECOND) OF TORTS} § 197, which recognizes this privilege, states in pertinent part:

One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the actor, or his land . . . Where the entry is for the benefit of the actor . . . he is subject to liability for any harm done in the exercise of the privilege . . . to any legally protected interest of the possessor in the land . . .

The reporter's notes for this section state that the privilege "permits the actor in a proper case to enter the land and do reasonable acts upon it to prevent a threatened harm from taking effect outside the land . . . ." \textit{Id.}

\item[	extsuperscript{71}]{71. Defendants' brief at 2. One of the defendants' geologists testified at the hearing on the motion for summary judgment that the natural slide condition "dates back thousands of years" and may have "continued for millions of years." \textit{Id.}

\item[	extsuperscript{72}]{72. 56 Cal. App. 3d 346, 128 Cal. Rptr. 404 (1976). \textit{See supra} notes 54-59 and accompanying text.}
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ated risk of harm would, under the court’s reasoning, impose on X a tort duty to finance his neighbor’s surgery.

The *Sprecher* defendants neither participated in the creation of the risk of landslide, nor did they aggravate the danger posed by the natural landslide condition. In short, the *Sprecher* court failed to establish that the defendants’ conduct constituted misfeasance.

C. Exceptions to the Rule: Imposition of Liability for Nonfeasance

1. The tree exception

Numerous jurisdictions73 and the Restatement (Second) of Torts74 have recognized an exception to the natural condition immunity rule for trees on a landowner’s property that fall and cause injury to others. The exception first emerged in the early case of *Gibson v. Denton,*75 in which a decayed tree fell during a storm and damaged the home of an adjoining landowner. The *Gibson* court likened the decayed tree to a dangerous artificial condition, and noted that the tree “was as much under the [owner’s] control as a pole or building in the same position would have been.”76

The rationale underlying the tree exception focuses on the relative ease of abating the danger presented by a decayed or otherwise dangerous tree. The burden imposed on the landowner by requiring him to remedy the situation “is not large when compared with the increased danger and potential for damages represented by the fall of such a

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74. RESTATEMENT (SECOND) OF TORTS § 363(2) states:

A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

75. 4 A.D. 198, 38 N.Y.S. 554 (1896).

76. Id. at —, 38 N.Y.S. at 555.
tree.” Thus the courts have been particularly willing to recognize the tree exception in urban areas where the dangerous tree threatens harm to many people and in cases where the property the landowner must inspect is not extensive.

By the same token, the courts have been unwilling to invoke the tree exception when the result would be the imposition of a broad and burdensome duty based solely on the defendant’s status as a possessor of land. This consideration led the Kentucky Court of Appeals in *Lemon v. Edwards* to hold that the defendant had no duty to inspect rural forest land for hazardous trees that lined seldom-used roads.

In suggesting that the tree exception to the natural immunity rule should be allowed to swallow the entire rule, the *Sprecher* court failed to consider the exception’s conceptual foundations. This enabled the court to conclude that there was no substantial difference between the nonfeasance involved in allowing a decayed or otherwise dangerous tree to topple and cause injury, and that involved in failing to abate the danger posed by the active landslide condition in *Sprecher*.

There are, however, significant differences between the two kinds

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77. Barker v. Brown, 236 Pa. Super. 75, 81, 340 A.2d 566, 569 (1975); see also Mahurin v. Lockhart, 71 Ill. App. 3d 691, 693, 390 N.E.2d 523, 524 (1979) (not “unduly burdensome” for a small property owner to inspect his property for dangerous trees and take reasonable precautions to prevent harm to those outside the land).


79. See, e.g., Mahurin v. Lockhart, 71 Ill. App. 3d at 393, 390 N.E.2d at 524. In addition to limiting the exception to situations in which users of public highways are injured by falling trees, see supra text accompanying note 75, the RESTATEMENT confines the exception to cases involving trees in urban areas. Comment (e) to section 363(2) states:

The rule stated in Subsection (2) is an exception [to the principle of nonliability for harm caused by natural conditions] which has developed as to trees near a public highway. It requires no more than reasonable care on the part of the possessor of the land to prevent an unreasonable risk of harm to those in the highway, arising from the condition of the trees. In an urban area, where traffic is relatively frequent, land is less heavily wooded, and acreage is small, reasonable care for the protection of travelers on the highway may require the possessor to inspect all trees which may be in such dangerous condition as to endanger travelers. It will at least require him to take reasonable steps to prevent harm when he is in fact aware of the dangerous condition of the tree.

80. 344 S.W.2d 822, 823 (Ky. 1961).

81. See also Albin v. National Bank of Commerce of Seattle, 60 Wash. 2d 745, 375 P.2d 487 (1962), where the court refused to assign liability to a county government which had no actual notice of a decayed tree that had fallen and killed a traveller on a rural road over which the county had maintenance responsibility. The court reasoned it would not be feasible to impose a duty on the county to discover dangerous trees: “[T]his is neither practicable nor desirable. The financial burden would be unreasonable, in comparison with the risk involved.” Id. at 749, 375 P.2d at 489.

82. 30 Cal. 3d at 365, 636 P.2d at 1124, 178 Cal. Rptr. at 786.
of nonfeasance. A dangerous tree presents an immediate risk of harm to any property or person within its zone of danger. Although a duty assigned to abate the risk caused by a dangerous tree is grounded in nonfeasance, the duty is easily confined. The materialization of immediate harm is foreseeable and the risk is inexpensive to diagnose; it requires no sophisticated scientific evaluation to determine that a tree is dangerous. The hazardous condition can thus be alleviated with little inconvenience or cost to the possessor of land on which the tree stands.  

On the other hand, a landslide condition like that present in Sprecher poses more complex problems. It cannot be remedied with a chainsaw. An attempt to remedy the condition in Sprecher would have entailed corrective action on numerous properties along the entire width of the landslide area. 84 Furthermore, a geologist for the defendants testified that a necessary investigatory study of the slide area would have cost approximately $100,000. 85 Defendants would have been obliged to incur this expense prior to taking any corrective action.

The Sprecher court failed to consider the extensive burdens the defendants would face if a duty were imposed upon them. That failure signifies a radical departure from the principles enunciated in the tree exception cases cited by the Sprecher court in support of its holding. 86

83. See Weinrib, supra note 4. A parallel situation, the common law's refusal to recognize a duty to rescue an imperiled person, illustrates the need to limit the duty imposed in a nonfeasance context. Professor Weinrib argues that neither economic nor philosophic foundations of the common law should preclude a court-imposed affirmative duty to rescue when an emergency exists and the rescuer can act with little inconvenience to himself. Id. at 250. In advancing his argument for a judicially recognized duty to rescue, however, he does not argue for complete abandonment of nonfeasance immunity principles. Such abandonment would necessarily result in the imposition of a general duty to come to the aid of others in need. Rather, Professor Weinrib carefully restricts the types of situations in which a duty to rescue would be imposed. The duty would arise only in emergency situations when the rescuer could effect the rescue without significant cost to himself. Id. at 256. These two restrictions—emergency situations and insignificant burden on the rescuer—embrace fundamental notions about the separation of contract values and tort obligations. Professor Weinrib, by thus narrowly confining his proposed duty, seeks to avoid the immense legal and economic problems that would arise if a general duty to aid others were recognized. These problems would include: encouragement of officious intermeddling; discouragement of beneficence, because the obscuring of the distinction between the praiseworthy and the required would reduce stimuli for persons to be beneficent; and the fact that legally enforced altruism would be self-defeating because "any potential recipient of aid would himself be an altruist, who must accordingly subordinate the pursuit of his own projects to the rendering of aid to others." Id. at 281-82.

84. 30 Cal. 3d at 374, 636 P.2d at 1130, 178 Cal. Rptr. at 792 (Richardson, J., concurring).
85. Defendants' brief at 10.
86. See supra notes 73-81 and accompanying text.
2. Artificial conditions and nonfeasance

A landowner who succeeds in interest to property which contains a dangerous artificial condition is liable to adjoining property owners for damages caused by the condition even though he did not participate in the creation of the original risk of harm.\textsuperscript{87} From this rule, the \textit{Sprecher} court drew the conclusion that maintenance of a distinction between artificial and natural conditions on land is meaningless because the boundary separating misfeasance and nonfeasance has already been crossed.\textsuperscript{88}

In reality, however, the boundary has not been crossed because the liability of a successor in interest for injury occasioned by an artificial condition involves misfeasance, not nonfeasance. The misfeasance-nonfeasance distinction is relevant to whether a duty is created; it is not relevant to whether a duty, once created, can be assumed by or assigned to another party. If a previously existing duty is assumed by an individual who played no part in the creation of the risk of harm which gave rise to the duty, that individual must discharge the duty in a reasonable fashion or negligence will result.\textsuperscript{89}

In the case of a dangerous artificial condition, a duty is assumed by the person who succeeds in title to the land containing the condition.\textsuperscript{90} The assumption of an already existing duty with potential lia-

\textsuperscript{87.} \textit{See supra} text at notes 39-42. The \textit{Restatement (Second) of Torts} § 366 sets forth the rule:

One who takes possession of land upon which there is an existing structure or other artificial condition unreasonably dangerous to persons or property outside of the land is subject to liability for physical harm caused to them by the condition after, but only after,

(a) the possessor knows or should know of the condition, and
(b) he knows or should know that it exists without the consent of those affected by it, and
(c) he has failed, after reasonable opportunity, to make it safe or otherwise to protect such persons against it.

It is interesting to note that subsection (b) exculpates a possessor from liability if the threatened landowner consented to the risk posed by the artificial condition. Assuming arguendo that the \textit{Sprecher} court correctly maintained that the principles in section 366 should apply to natural conditions as well, the court failed to address the possibility that the plaintiff had consented to the risk posed by the landslides condition in that he purchased his property with notice of the threat.

\textsuperscript{88.} 30 Cal. 3d at 369-70, 636 P.2d at 1127, 178 Cal. Rptr. at 789.

\textsuperscript{89.} \textit{See} \textit{Prosser, supra} note 1, at 343. Prosser states:

When we cross the line into the field of “misfeasance,” liability is far easier to find. A truck driver may be under no obligation whatever to signal to a car behind him that it may safely pass; but if he does signal, he will be liable if he fails to exercise proper care and injury results.

\textsuperscript{90.} \textit{See} \textit{Prosser, supra} note 1, at 414. "The vendee to whom possession is transferred becomes himself an occupier, and subject to all of the obligations of a possessor."
bility for its breach contrasts sharply with the Sprecher situation, in which defendants had succeeded in interest to property containing only a dangerous natural condition. In Sprecher, because no common law duty of care ever existed to burden the property, there was no duty for the successor in interest to assume. There was no misfeasance, so the rationale for assigning a duty to the successor in interest does not apply.

C. The Basis of Nonfeasance Immunity

The law of torts is predicated upon the realization that not all relationships in our society can be governed by statute or contract law. The existence of a tort duty is "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Nonfeasance immunity embraces the notion that there exists no general tort duty of beneficence. This notion reflects the elevated status that individual liberty enjoys in the legal system. Individuals are not compelled to confer benefits on others based upon the utilitarian ideal that such action should be taken whenever the cost of conferring the benefit is less than the value of the benefit conferred. If such action were compelled, individual liberty would be severely undermined.

As Professor Epstein has observed:

Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty.

91. Id. at 5-6.
92. Id. at 325-26.
93. See F. Bohlen, Studies in the Law of Torts 293-95 (1926):

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance.

In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. In cases of nonfeasance plaintiff is in reality no worse off at all. His situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him. . . . [B]y failing to interfere in the plaintiff's affairs, the defendant has left him just as he was before; no better off, it is true, but still in no worse position; he has failed to benefit him, but he has not caused him any new injury nor created any new injurious situation.

94. See supra note 83.
95. Epstein, supra note 93, at 198. Professor Epstein states that "the first task of the law of torts is to define the boundaries of individual liberty." Id. at 203. He goes much further in recognition of the validity of nonfeasance immunity than does Professor Weinrib.
Abrogation of nonfeasance immunity should address the concern that it be accomplished in a principled fashion. This can be done by focusing on the extent to which a nonfeasance duty encroaches on individual liberty, and whether the duties and rights at issue can be effectively assigned by contract rather than tort law.

Assuming that contract law "provides the principal embodiment in the law of individual liberty," nonfeasance tort duties which impinge upon contract values necessarily impinge on individual liberty. That tort duties and contract values overlap in certain kinds of transactions is not remarkable; the problem concerns the extent of the interference with individual liberty when tort duties are imposed in nonfeasance situations, because by definition exchanges in this context are compelled when the duty-laden defendant has in no way participated in the creation of the risk of harm. Conversely, in situations where contract values do not exist and a duty can be imposed on the defendant that is not unduly burdensome, imposition of such a duty will not significantly impair individual liberty. This is the basis of the argument for recognition of an affirmative duty to rescue an imperiled person.

When negotiation of an enforceable contract between parties situated in a nonfeasance context is possible, refraining from imposing a burdensome tort duty not only protects individual liberty, it also serves to advance economic efficiency. When transaction costs are not high

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**supra** note 83. Epstein posits that principles of causation and volition, not principles of duty and reasonableness, should determine tort liability. *Id.* at 203-04. Consequently, Epstein opposes any legally enforceable duty on one to effectuate a rescue, even in the presence of emergency and lack of inconvenience to the rescuer. *Id.* at 199.

96. Weinrib, *supra* note 4, at 268.

97. Once [nonfeasance-based] forced exchanges . . . are accepted, it will no longer be possible to delineate the sphere of activities in which contract . . . will be required in order to procure desired benefits and the sphere of activity in which those benefits can be procured as of right.

Epstein, *supra* note 93, at 199.

98. See *supra* notes 4-5 and accompanying text.

99. See *supra* note 83. Professor Weinrib distinguishes the duty he proposes from the broader duty of beneficence which he acknowledges would greatly undermine contractual values:

In the rescue context, the resource to be expended (time and effort directed at aiding the victim) cannot be traded on the market . . . . In the charity context, by contrast, the resource to be expended (money) can be traded on the market . . . .

Weinrib, *supra* note 4, at 272.


There is no occasion for compelling transactions where negotiations are feasible . . . . [A] system of liability that coerced people into performing services in circumstances where negotiations between them and the beneficiaries of the services were possible would be economically unsound.
the legal system is inferior to market transactions in allocating resources because the market can more efficiently value competing uses.\textsuperscript{101} In the market, individuals must substantiate their claims as to value with money, while often claims as to value made in court are less trustworthy.\textsuperscript{102}

Nonfeasance immunity, therefore, embraces the value of individual liberty and recognizes that economic efficiency can best be served by market transactions. The impact of nonfeasance liability on these factors should be carefully considered before abrogating the immunity.

\subsection*{D. Sprecher Nonfeasance Liability}

The \textit{Sprecher} court abrogated an area of nonfeasance immunity without regard for the protection of individual liberty or the promotion of economic efficiency. An emergency situation such as that present when a person is drowning did not exist. The risk of harm did not develop rapidly and without warning; the landslide condition "[had] been evident since the area was first developed in the early 1900's."\textsuperscript{103} These factors contrast markedly with a rescue situation and indicate that contract values were not suspended; negotiations between the parties were possible.\textsuperscript{104} Furthermore, unlike a rescue situation, the benefit conferred in \textit{Sprecher}—the plaintiff's increased property value—can be traded on the market.\textsuperscript{105} These considerations, in addition to the

Professor Posner rejects Epstein's contention that there is no logical stopping point in imposing an affirmative duty on an individual in order to induce him to benefit another, and notes that a rescue situation is one such stopping point. Posner argues that in a rescue situation transaction costs are so high that imposition of an affirmative duty on a potential rescuer is justified. "[W]hen I see a flower pot about to fall on someone's head I cannot pause to negotiate with him over an appropriate fee for warning him . . . ." \textit{Id.} The social benefits accruing from the saving of a life or avoiding injury would generally exceed the costs to the rescuer, and efficiency would thereby be served by inducing such a rescue. \textit{Id.} at 218-19.

Posner, however, has also argued that imposing a duty to rescue would not necessarily promote economic efficiency. He suggests, as an example, that if a duty to rescue were recognized, strong swimmers might avoid crowded beaches, or persons might lose incentive to become strong swimmers in the first place. Additionally, an imposed duty to rescue would diminish the incentive to rescue held by altruists. The number of rescues by altruists might therefore be reduced. R. Posner, \textit{Economic Analysis of Law} 132 (1977).

\begin{itemize}
  \item \textsuperscript{102} See Posner, \textit{A Theory of Negligence}, 1 J. Legal Stud. 29, 76-77:
    \begin{quote}
      If I testify in a negligence suit that the loss of my little finger was a source of unbearable psychological agony, for which $100,000 would barely compensate me, I am likely to be disbelieved; not so if I refuse a bona fide offer of $100,000 for my little finger.
    \end{quote}
  \item \textsuperscript{103} 30 Cal. 3d at 361, 636 P.2d at 1122, 178 Cal. Rptr. at 784.
  \item \textsuperscript{104} See \textit{ supra} note 83 and accompanying text.
  \item \textsuperscript{105} See \textit{ supra} note 99.
\end{itemize}
burdensome nature of the duty imposed by the Sprecher court,106 suggest that the court sanctioned a significant encroachment on individual liberty.

Because negotiations were feasible and transaction costs would not be high, efficiency would best be served by the market, not the legal system, in allocating the resources at issue in Sprecher.107 This factor also discredits the Sprecher court's invocation of section 840 of the Restatement (Second) of Torts108 as authority supporting its holding. Section 840, in recognizing the duty of a possessor of land to protect persons traveling on public highways from all natural conditions on his land, recognizes the prohibitive transaction costs that would arise if such a traveller were forced to negotiate a safety agreement with each possessor of land along his route.

The ultimate position that Sprecher mandates is a substantial transfer of wealth from landowners whose property contains dangerous natural conditions to landowners threatened by those conditions. The following table illustrates hypothetically this forced exchange, and demonstrates the argument109 that such decisions as to resource allocation can best be handled consensually by contract. The table is based on the assumption that failure to abate the dangerous condition would subject the uphill landowner to liability if he owed a duty of reasonable care to the downhill owner.

<table>
<thead>
<tr>
<th>Pre-Sprecher</th>
<th>Uphill Value with D\textsuperscript{NC}\textsuperscript{110}</th>
<th>Uphill Value with D\textsuperscript{NC} abated</th>
<th>Downhill Value before abatement</th>
<th>Downhill Value with D\textsuperscript{NC} abated</th>
<th>Cost to abate</th>
</tr>
</thead>
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<td>$90,000</td>
<td>$100,000</td>
<td>$60,000</td>
<td>$100,000</td>
<td>$30,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(less share of abatement cost)</td>
<td></td>
<td>(less share of abatement cost)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-Sprecher</td>
<td>$50,000</td>
<td>$100,000</td>
<td>$100,000</td>
<td>$30,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(less $30,000 abatement cost)</td>
<td></td>
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<td></td>
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</tr>
</tbody>
</table>

Before Sprecher, the uphill property value with the unabated dangerous natural condition reflects the probability that some devaluation

106. See supra text accompanying notes 84-86.
107. See supra notes 100-02 and accompanying text.
108. See supra note 38 and accompanying text.
109. See supra notes 100-02 and accompanying text.
110. Dangerous Natural Condition.
will take place if a landslide occurs. Hence, the uphill property value is increased if the landslide condition is abated. Similarly, the downhill property value, prior to the taking of corrective measures on the uphill parcel, reflects the risk of harm posed by the landslide condition. Because the total increase in property value that would result if the condition were abated ($50,000) exceeds the cost of abatement, the efficient solution would be for the parties to negotiate an agreement dividing the $30,000 needed to correct the condition. Obviously, the uphill owner should be able to obtain an agreement whereby he pays substantially less of the abatement cost than the downhill owner. Because the incentive for the downhill owner to have the condition corrected is high, the focus of negotiations would be how much less than $10,000 (the uphill owner's gain after abatement) the uphill owner would have to pay. An agreement should be reached that increases both the combined value of the two properties and the value of each individual property. The important point is that transaction costs for the parties to negotiate this agreement are low, and no one is in a better position than the parties to determine the relevant factors surrounding their negotiations and agreement (or lack of agreement).  

As a result of Sprecher, the uphill owner must now decide whether he will compensate the downhill owner through abatement of the condition or through the legal system if the risk materializes and causes damage. The uphill owner should expend $30,000 to correct the condition (assuming the probability of realization of the risk is high) because this would cost less than compensation after the damage. If compensation is sought after the damage is done, as was the case in Sprecher, transaction costs are greatly increased by resort to the legal system. By abating the risk, the uphill owner would spend $30,000 for a gain of $10,000 in property value, for a net loss of $20,000. Yet, under the Sprecher rule, this is the rational course of action for him to follow. If the uphill owner waited until after the downhill owner was damaged he would be obligated to pay $40,000 (assuming the pre-abatement values accurately represent the amount of damage actually caused by the condition, and the trier of fact actually arrives at this same damage figure), and additionally would not realize the $10,000 of his possible increased property value. If the uphill owner pursues the economically rational course and abates the risk, thereby taking the net loss, society will benefit from an increase in total property value, but that benefit will have

111. See supra notes 100-02 and accompanying text.
been exclusively at the expense of the uphill owner, who suffers substantial economic loss.

V. CONCLUSION

The Sprecher court substantially realigned property rights, which will result in forced exchanges of wealth, notwithstanding the significant encroachment on liberty caused by such realignment and the desirability of effectuating such exchanges consensually. The holding has both practical and conceptual implications.

From a practical perspective, transaction costs underlying disputes between landowners are likely to increase dramatically. The imposition of a per se duty on landowners will have the effect of converting heretofore market transactions into legal transactions. A landowner who alleges damage from any type of condition on an adjoining property will henceforth be entitled to have a trier of fact determine whether the duty had been reasonably discharged by the possessor of the adjoining property. Plainly, litigating whether a duty has been breached is likely to be more costly than deciding only whether a duty existed. For example, an owner of forested land may need to defend before a trier of fact the reasonableness of his failure to take corrective action when lightning strikes a tree on his land, starts a forest fire and damages adjoining property.

Conceptually, the Sprecher holding raises issues as to what standard, if any, the court will apply when abrogating nonfeasance immunity. The court's failure to address the primary concerns expressed by scholars and in case law—the burden of imposing a duty on the landowner, whether contract values exist, and transaction costs—suggests that the court has yet to formulate a principled basis for imposing nonfeasance liability.

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