

Law and Economics
Session 8
Tort Law 1

Elliott Ash

Columbia University
June 9, 2014

The purposes of tort law

- A “tort” is a harm or wrong, intentional or accidental, committed against an individual.
- Under tort law, the victim can sue the injurer for damages to compensate for the injury.
- Thus, the two functions of tort law:
 - Insures potential victims against loss
 - Deters negative externalities by having injurers internalize them.

- Battery: A person punches another (intentional harm)
- Negligence: car accident injures a pedestrian (accidental harm)
- Libel: A newspaper publishes a false, defamatory statement about a citizen.
- Products Liability: The lawn mower cuts your arm off.

Distinguishing Tort Law

- From crimes, which are prosecuted by the state in the criminal court system.
 - Crimes are “wrongs committed against society,” whereas torts are wrongs against an individual.
 - As we’ll see later, tort liability often provides insufficient deterrence incentives, so you may want criminal punishment as well.
- Contract law:
 - In tort, there is no prior contract.
 - Exceptions: product liability, medical malpractice
- Property law:
 - The harm does not involve land
 - The harm is from a single incident rather than a durable nuisance
 - Injunction is inadequate because harm already occurred.

Why is there tort liability?

- Situations in which transaction costs between potential injurers and potential victims are so high that they cannot bargain about liability prior to an accident.
- How can we affect pre-accident behavior when victim and injurer cannot assign liability by contract?

- There must be a realized harm – a cost, monetary or otherwise, imposed on the victim.
 - An exposure to a risk alone is not sufficient.
- In the default tort remedy, damages award reflects perfect compensation for:
 - Tangible losses: Medical costs, the costs of replacing or repairing damaged property, lost income (sometimes).
 - Intangible losses: Distress, duress, loss of companionship, and “pain and suffering.”
 - How to price the death of a child?

TABLE 6.1

Example of Accidents and Precaution

Accident	Injurer's Precaution	Victim's Precaution
Faulty electrical wiring causes house fire	Manufacture wiring more carefully	Fireproof house
Moving car hits parked car	Drive more safely	Park car in safer space
Car hits pedestrian	Drive more safely	Walk more safely
Software fails	Better design of software	Back up data at risk
Exploding coke bottle	Improve quality control by bottler	Handle bottles carefully
Medicine causes side effects	Improve warning on medicine	Study warning on medicine

- The baseline “rule” is that the court won’t award any damages.
- E.g., accidentally hurting someone’s feelings
 - Cf. intentional infliction of emotional distress

- Was the defendant negligent?
 - That is, did he exercise insufficient precaution?
- The negligence standard for “reasonableness” (sufficient precaution) is subjective and vague.
- Nonetheless, this is the standard rule in tort law.

- Under a strict liability doctrine, the injurer is responsible for the harm regardless of his level of care (precaution).
- Examples of use:
 - Hazardous materials
 - Wild animals

- Did the plaintiff's negligence contribute to the harm?
 - If so, he is barred from recovering any damages (*Butterfield v. Forrester*).
- “Last clear chance”: Who has the last chance to avoid accident? (*Davis v. Mann*)

- The court tries to parcel out the responsibility for the harm.
- For example, in a tort case for Ariel with damages of \$100:
 - The jury find that Ariel is 20% responsible, Brad is 50% responsible, Cameron is 30% percent responsible.
 - Brad pays \$50 and Cameron pays \$30.
 - Less than perfect compensation.
- The most common rule now (tort liability is determined by state law).

Summary of Liability Criteria

- Strict Liability:
 - Harm + Causality
- Simple Negligence:
 - Harm + Causality + D negligent.
- Contributory Negligence:
 - Harm + Causality + D negligent + P not negligent.
- Comparative Negligence:
 - Harm + Causality + %D negligent

Numerical example

- Possibility of an accident between a driver and a pedestrian
- The pedestrian will suffer \$100 in losses.
- Precaution by each party costs \$30 but reduces the probability of accident by 0.4.
- Outcomes under:
 - No liability
 - Strict liability
 - Negligence
 - Contributory negligence
 - Comparative negligence

TABLE 6.2
Efficiency of Incentives Created by Liability Rules*

yes indicates efficient incentives;
 no, inefficient incentives; and
 zero, no incentive.

Legal Rule	Precaution	
	Victim	Injurer
No liability	yes	zero
Strict liability	zero	yes
Simple negligence	yes	yes
Negligence + contributory negligence	yes	yes
Strict liability + contributory negligence	yes	yes
Comparative negligence	yes	yes

*Assumes perfect compensation and legal standards equal to efficient precaution.

- Another advantage of the negligence rule:
 - As long as the negligence rule \tilde{x} is set to the optimal precaution level x^* , modest errors in the damages set do not change the precaution level.
 - This is due to the discontinuity in expected costs for the injurer at the threshold.
- Moreover, under negligence:
 - Small random errors in the legal standard \tilde{x} cause injurers to increase precaution.
 - This is because too-high precaution has a low marginal cost, while too-low precaution has a high marginal cost (again due to the discontinuity).

Court Errors under Different Liability Rules

TABLE 6.3
Consequences of Errors of Excess

Liability Rule	Court's Error	Injurer's Error	Effect on Injurer
Strict liability	Excessive damages	Overestimates damages	Excessive precaution
Negligence	Excessive damages	Overestimates damages	None
Negligence	Excessive legal standard	Overestimates legal standard	Excessive precaution
Strict liability	Random error in damages	Random error in damages	None
Negligence	Random error in legal standard	Random error in legal standard	Excessive precaution

- Negligence rules appear to be good in theory.
 - But require proof of negligence, which may be difficult and/or costly to obtain.
 - Alternative negligence rules may have different incentives in the presence of such errors.
- Decoupling:
 - Another system could have (some of) the damages be paid to the state, rather than to the victim, preserving the victim's incentives.
 - This may be the function of taxes on tort awards.
 - Criminal law has this feature as well.

- Judicial process for tort trials is very costly to litigants and to the taxpayer. The tort system is often criticized for encouraging too many lawsuits.
- No liability (e.g., no fault collision laws)
 - Better insurance, but perhaps insufficient precaution incentives
- Strict liability
 - Better insurance, but perhaps too many trials

- At the beginning, we identified two functions of tort law:
 - ① Insures potential victims against loss
 - ② Deters negative externalities by having injurers internalize them.
- Insurance can protect victims much more cheaply than the tort system.
- Can taxes or regulation provide precautionary incentives as efficiently as tort law?