
Tort Liability and Negligence

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1. Scope: This file continues on to tort liability, liability rules – especially negligence, and their effects on economic efficiency, plus tort compensation.

2. General Description: Once someone is said to have committed a wrongful act, the tort liability must be established for that person. There are many rules of doing so. By studying each rule, we can see what the behaviour of people involved in tort are and trace back to the underlying reasons behind each of them. Moreover, we should be able to apply the appropriate rule of tort liability in various situations to achieve the economic efficiency.

3. Rules of Tort Liability: Basically, there are 5 broad rules to determine whether someone shall be liable for his/her action which is considered a tort or a wrongful act, i) no liability, ii) strict liability, iii) negligence, iv) contributory negligence, and v) comparative negligence. We can regroup them into 2 categories – negligence and non-negligence.

4. Non-negligence (No Liability and Strict Liability): these two are totally opposite to each other.

4.1 No Liability implies that the injured is the one who bears costs of injury incurred (the injurer is not liable for anything). This is more or less like the natural cause of injury, self-harm, or acts of gods where no one is held responsible for anything except the victim him/herself. As a consequence, the injured is the one who has to change the behaviour to increase his/her own precaution. This kind of rule has nothing to do with tort law at all (it is not covered in the law). Once we know that for a particular injury we have to be on our own, we know exactly how much we shall be careful. This rule is suitable for the injury which occurs on and harms mainly ourselves and a slight self-care can reduce the probability of occurrence tremendously.

4.2 Strict Liability is simply an opposite of 4.1. The injurer is the one who bears all costs of his/her action and subsequent injury. No matter how much the injured contributes to that injury or even the injured *provoke* the injury to commit the wrongful act. Subsequently, the injurer has sole responsibility to his/her action and (s)he has to adjust his/her behaviour accordingly by increase precautionary efforts to prevent him/herself to be liable for something. The strict liability imposes very harsh burden on the injurer even the injured did contribute to the harm; therefore, it is prescribed by law. It must be determined that, prior to establishing tort liability, the injurer had actually committed the action which is prohibited by law and shall be strictly responsible for the injury. The one who shall be careful is the injurer. Strict liability is suitable for the injury that can be significantly reduced by the injurer's caution of the injurer. For example, guns and weapons are strictly responsible by their owners because if their owners took care of them well enough they will have very low chance to cause any injury or the *lèse-majesté* law.

5. Negligence: This is the most common cause of tort or wrongful act. If the injury is intended, it can be easily determined – much easier than when the injurer is negligent. Basically, negligence is the situation when you **can** exert your care or your precaution to prevent something that can harm others to occur **but** you **failed** to do so. One big problem is how we can determine whether one's care is due, or justified, or optimal, or not negligent. If it is determined, the following question is what if the injured also negligent.

5.1 Negligence vs Reckless: Reckless is more severe than negligence whereby you know that by doing something the probability of accident/injury is drastically increased but you still willing to do it. It is not only that you lack of due care you should have but you are taking chances.

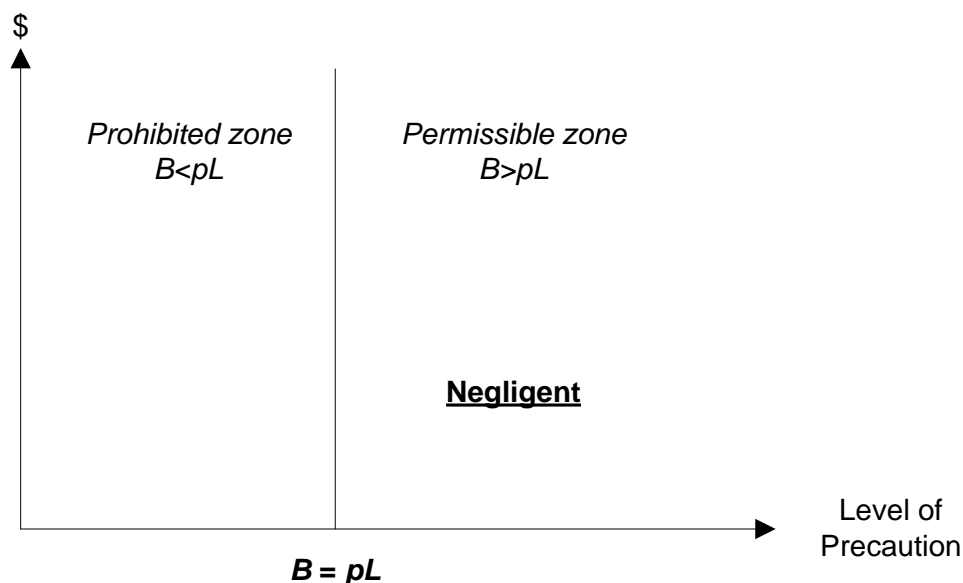
5.2 Hand's Rule: This rule is a fundamental breakthrough in US legal innovation of how the level of due care is determined. Judge Billing Learned Hand suggested, in the case between *United States v Carroll Towing Co*, that someone is negligent if and only if (s)he has the cost of preventing injury is less than the probability of accident times the level of injury. Otherwise, (s)he is not negligent, i.e., exercises due care.

Let L be the level of injury, p be the probability of accident/injury, B be the cost of preventing injury, the injurer is **negligent** when $B < pL$. We can see B as a private cost of an individual to use his/her precaution; while pL can be interpreted as an *expected* social cost imposed by the injuring individual. The resource used to prevent the accident is less than the resource wasted if the accident happened – this is an economic justification.

On the other hand, if $B \geq pL$, the injurer is **not negligent**; (s)he has exerted due care. If the accident still occurred and injury is still realised, (s)he shall not be responsible for negligence. We can see that the resource used to prevent the accident is more than the resource wasted if the accident happened; thus, we shall let the accident occurs to sacrifice less resource.

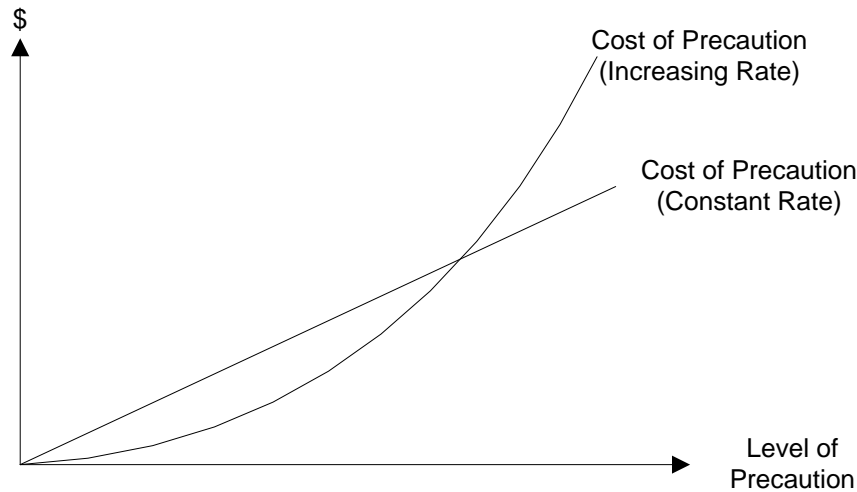
Notably, B is varying from person to person depending on many factors. However, the law must be somehow certain. In Thailand's Civil and Commercial Code, the standard of care is implied from the hypothetical (imaginary) person with characteristics similar to the injurer. The court has to investigate whether, under the identical situation, how much the hypothetical person will invest in his/her carefulness just to prevent the accident to happen – this is B for a particular case where $B = pL$. Most importantly, we have to consider if Hand's rule is economically efficient to create incentive for injurer to be sufficiently precautionous.

Figure 1



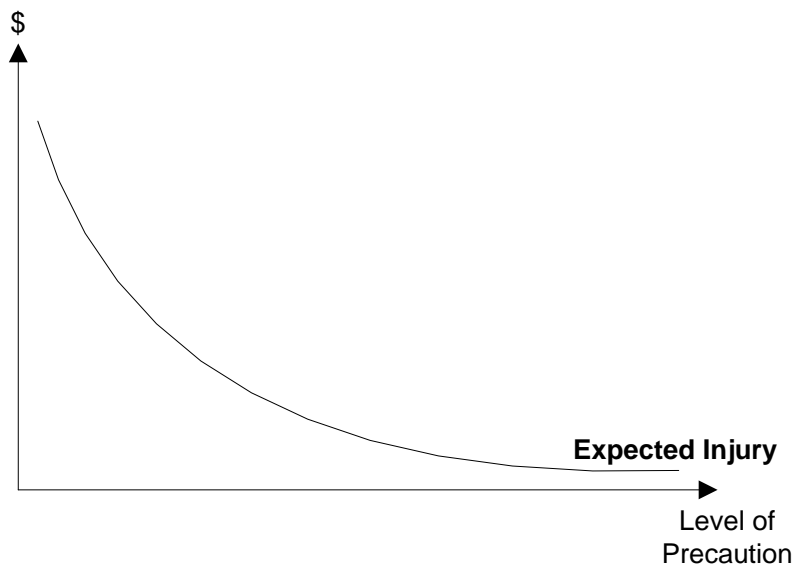
5.3 Cost of Precaution: Investing in precaution is costly. The more careful you are, the less comfortable you have (the more expensive the living). The marginal cost can be constant or exponentially increasing (see Figure 2).

Figure 2



5.4 Cost of Injury: Injury or damage is decreasing with the level of precaution. More cautious injurer has lower expected injury. The totally reckless injurer causes maximum injury in each case. However, the injury cannot be fully eliminated since there is an element of natural cause, i.e. zero injury is unattainable – no matter how hard the injurer tried, the chance of accident is still there (see Figure 3).

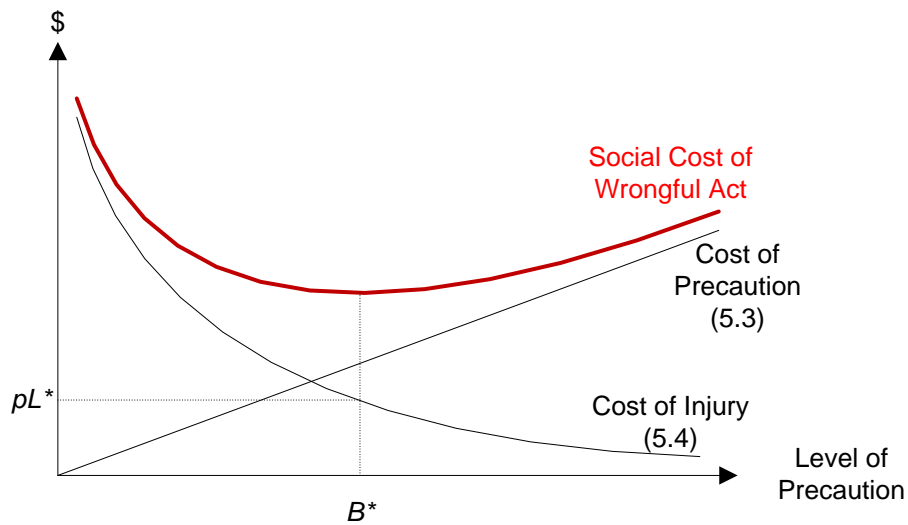
Figure 3



5.5 Social Cost of Tort: The society has to bear the costs of tort which combine the costs of precaution (5.3) and injury (5.4). One way or another, some resources are wasted. If there is too little precaution, most resources are wasted through injury from tort (some resources are saved by underinvestment of precaution). On the other hands, if there is too much precaution, most resources are wasted through overinvestment of precaution (some resources are saved by low

expected injury). We can superimpose Figures 5.3 and 5.4 to get the total social cost of tort (a thick red line) in Figure 4.

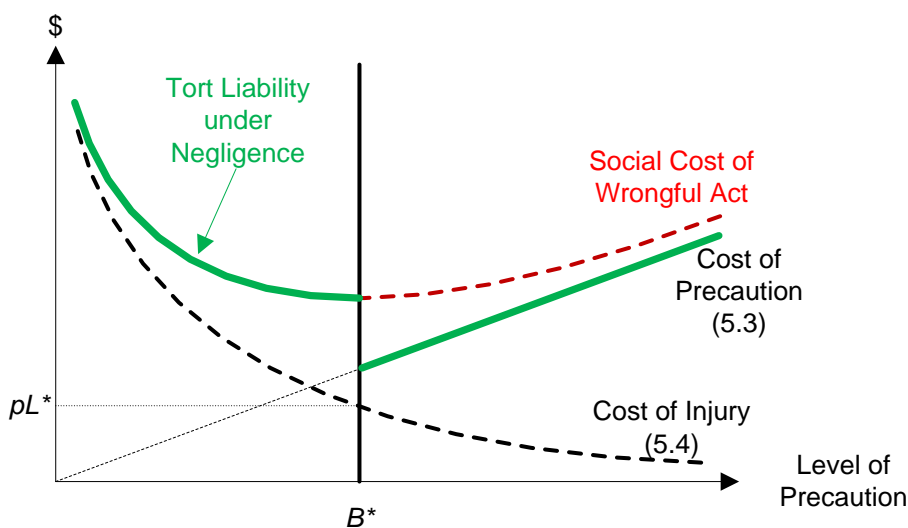
Figure 4



From Figure 4, we can see that the socially optimal level of precaution is B^* in which it induces the lowest social cost of wrongful act. This B^* will associate with the expected level of injury on the Cost of Injury curve, pL^* , the optimal expected injury. To make Hand's Rule applicable, Hand's B must equal to B^* and Hand's pL must equal to pL^* in order to reflect the cost of precaution.

5.6 Tort Liability under Negligence: The next important question is how to determine the tort liability if the injurer is negligent. At any B to the left of B^* , the injurer is negligent and the tort law is designed in such a way that the expected injury of the injured is imposed on the injurer (thus, the injurer is responsible for his own precautionary cost (5.3) plus the expected injury (5.4) imposed by the tort law. For any B to the right of B^* , the injurer faces the increasing cost of precaution which is privately borne by him/herself. We can notice the discontinuity at B^* , to the left of it, it is the transfer of injury from the injured to the injurer; to the right of it, it is a private cost faced by the injurer (see a thick green line in Figure 5).

Figure 5



Subsequently, the injurer needs to 'guess' the standard of due care or B^* and adjust his/her investment on precaution accordingly. The reason why the tort liability acts as an incentive for injurer to invest in precaution is because it is always cheaper to take precaution (evaluating at and around B^* , to the left, the green curve is higher than the green line to the right). Everyone is minimising cost and so does the injurer. (S)He will choose to be on B^* or slightly to the right of it.

6. Contributory Negligence: This rule is devised to capture the fact that, in many accidents, the injured or the victim contributes to the occurrence of accident and injury. Under simple negligence (in 5), only person who optimally invested in precaution is the injurer. Analogous to the breach of contract whereby the innocent party sometimes has to be responsible for the breach, tort law also tries to create the incentive for *bilateral precaution*. Both injured and injurer should invest optimally in their precautionary efforts. Therefore, the probability of injury will be reduced even more (i.e. the cost curve in 5.4 shifts downward or be more convex).

Under contributory negligence, we shall evaluate injured's and injurer's investments in precaution. The condition for the injurer to be responsible for tort liability is when i) (s)he is **negligent AND** ii) the injured (victim) is **NOT negligent**. Alternatively, the condition for the injurer **NOT** to be responsible is when i)(s)he is **NOT negligent** (has exercised sufficient due care) **OR** ii) the injured is **negligent**. Notice the logical operators **AND** and **OR**.

This implies if both are negligent, the victim shall be responsible for his/her own injury. Same thing applies when both are not negligent.

7. Comparative Negligence: This alternate rule of tort liability tries to modify the noted situation when both are negligent (or not negligent) at the same time. Conditions are slightly modified as follow. For the injurer to be responsible for tort liability, i)(s)he is **negligent AND** ii) the victim is **NOT negligent**. The injurer shall NOT be responsible if i) (s)he is **not negligent AND** ii) the victim is **negligent**. Notice the logical operator **AND** (compare to **AND** and **OR** in 6).

Thus, if both are not negligent, the victim is responsible for his/her own injury. However, if both are negligent, both share the injury proportionate to their levels of negligence – who is more negligent responsible for injury more.

Mathematically speaking, if the injury is L , the standard of care for the injurer is B_i^* and the standard of care for the victim is B_v^* , the actual levels of precaution of the injurer and the victims are B_i and B_v respectively, the proportion is:

$$\frac{B_v^* - B_v}{[(B_v^* - B_v) + (B_i^* - B_i)]} + \frac{B_i^* - B_i}{[(B_v^* - B_v) + (B_i^* - B_i)]} = 1$$

The victim shall be responsible for: $\frac{B_v^* - B_v}{[(B_v^* - B_v) + (B_i^* - B_i)]} \cdot L$

And the injurer shall be responsible for: $\frac{B_i^* - B_i}{[(B_v^* - B_v) + (B_i^* - B_i)]} \cdot L$

8. Vicarious Liability: When the injurer has his/her 'supervisor' or 'superior,' the liability may fall onto this 'supervisor' or 'superior' in order to ensure that the victim or the injured is sufficiently protected or compensated. Simultaneously, this 'supervisor' or 'superior' has this burden on behave of its advisee or inferior in order to induce or give an incentive for a proper precautionary supervision. In other words, a supervisor is the one who has the lowest transaction and monitoring costs to control his/her advisee; thus, the cost of preventing injury is low for the supervisor.

9. Punitive Damages (*aka* Treble Damages): This is the compensation or liability that the injurer has to pay to the injured in such a way that it is punishing the injurer (in other words, more than the actual injury). This increases the *ex ante* incentive of the injurer to be very careful. Awarding punitive damages is the trade-off of optimal precaution for excessive precaution or trade-off of *ex post* efficiency for *ex ante* efficiency. In many civil wrongs, it is very costly to compensate if the injury has already occurred; such as defamation in which the false information spread out very quickly and form the perception on large-scale recipients.