Wrongful Act or Tort

0. Study PPT File: EE301-403 13 Nov.pptx

1. **Scope:** This file covers the basic concept of tort, its difference from the contract, what constitutes tort, and the role of tort law from economics perspectives. The subsequent file (expected on Wed 16 Nov) would be on tort liability, liability rules – especially negligence, and their effects on economic efficiency, plus tort compensation.

2. General Description: *Wrongful act* is the term used in the 'civil law system,' while *tort* is the equivalent term in the 'common law system.' Both refer to the same thing which is called **civil wrong**. Civil wrong can be seen as the legal obligations forced by law to bind two or more parties together without their willingness or without prior negotiation. Parties, in this situation, have no intention to be legally bound or to negotiate for anything that mutually improving their welfare. Their bondage or legal obligations are prescribed by laws – when a particular incidence happens, parties involved in that incidence are compelled to have rights and responsibilities and, then, behave accordingly.

An obvious example of tort is an accident. Every accident has at least two parties. No one forms any contract to be injured by or to injure someone else beforehand. Both of them are not willing to be involved in the accident because it does not improve their welfare. To be precise, at least one is worse off in an accident without making anyone better off.

The economic objective of tort law is to reduce and/or to spread the cost incurred to parties from such situation. On the other hand, it tries to restore everyone as if there was no accident from the beginning – preserving *status quo*. In plain English, tort law attempts to reduce the accident. In economics, it reduces the negative externalities from the accident and keeps the economical and optimal level of accident (See Slide 3 for more information).

3. Comparison with Contract: A contract is deemed as a *juristic act* whereby contracting parties are willingly and voluntary bound themselves to negotiated rights and responsibilities in order to achieve something making them better off (**they negotiated and agreed upon rights and responsibilities**). A tort is a *juristic cause* whereby parties have no willingness or intention to be bound but rights and obligations are created by the law when a certain prescribed incidence occurred (**they have not negotiated nor agreed on anything but rights and responsibilities imposed by law**). Tort is more or less like a compelled contract.

Parties must oblige and perform according to their rights and responsibilities.

Among economic objectives of contract law (discussed earlier), one is to induce the enforcement of the *Pareto* improving agreement which is privately negotiated; another is to prevent the breach of contract unless it is efficient so by imposing compensation on the breaching party. Like a mirror, one economic objective of tort law is to prevent the accident or any incidence that makes at least one worse-off; another is to restore the welfare of the injured by imposing liability on the injurer if it is more efficient 'not' to avoid the accident (too costly to prevent the accident).

4. Components of Tort: An incidence that constitutes a tort is i) an *action* (intended or negligent) which is ii) *unlawful* and it must iii) *causing* iv) *injury or damage* to *others* – no matter that injury is pecuniary or not. See the sample of Section 420 of Civil and Commercial Code.

<u>4.1 Action</u>

There must be an action exerted by someone, whether it is intended (that someone aims for something to happen) or negligent (no intention but insufficient precaution). Causality of the action is discussed in 4.4. The action is important because it must be a result of human-being, not the act of god or natural disaster or something beyond human capability. This is crucial since precautionary effort of human can reduce the chance of such action to happen. If something happens without being dependent on human action, no one shall be responsible for it.

4.2 Unlawful

Compare *unlawful* and *illegal*. Both terms are not equivalent. See Section 421 for specific definition in Thai law which is similar to other jurisdictions. Unlawful is the broader term. Any exercise of right in which harming others is unlawful. Illegal is the narrower term. Anything that contradicts or coming in conflict with the law is illegal. In other words, unlawful is a superset of illegal or illegal is a subset of unlawful. Thus, being unlawful can be interpreted in an economic term as someone has been made worse off regardless of it was the result of the illegal action, i.e., a legal action can be unlawful.

4.3 Injury

Injury must be apparent but can be tangible or intangible. It is the degree of being made worse-off. Similarly, it is comparable to the damage in the breach of contract. The damage in the breach of contract occurs because the contract is not perform and the innocent party is made worse-off due to the benefit from that contract has not been realised. The injury in tort occurs because, instead of being free from accident, someone is made worse-off due to the happening of that accident. If there is no accident, everyone will **not** be worse-off.

Injury can be pecuniary (calculable in money term) or non-pecuniary. Unlike in contract, the damage in the breach of contract must be pecuniary only (since the benefit must be realised in money term).

4.4 Causality (see Slide 8)

The causality is important to establish the cause-effect between the action (4.1) and the injury (4.3). It must be ascertained somehow that the action contributes to the occurrence of the injury. There are two legal theories (borrowed from the criminal wrong) trying to explain what would be counted as causality.

-*Conditional Theory*: aka *Cause-in-fact* and *But-for Test* – if the cause is not exist, the effect is not happened; thus, there is a causality.

-*Proximate Cause Theory*: The conditional theory can be too rigid[1] or too extensive.[2] This theory uses the proximity of the cause to the injury. If the cause significantly contributes to the occurrence of the injury, the causality exists. Alternatively, if the risk of being injured is significantly enhanced by the action, the causality is established. For example, if I know that you have a lot of enemies who wants to kill you in advance and I drove my car which later hit you. I shall be able to

[1] Coexistence of cause and effect may not be fully determined; e.g., if you were not hit by my car, could you still be hit by another car?

[2] Infinite expansion of causality; e.g., there is only my car on the road and you were hit by a car, you definitely are harmed by my car. However, if I don't buy the car, I won't hit you (the car manufacturer is liable) and if my parents don't have me, I will not exist and unable to drive to harm you (my parents are liable); and if my grandparents don't have my parents, I will not be born (my grandparents are liable)…… and so on….

foresee the increase chance that you might be killed at the hospital. Otherwise, I shall be responsible for your injury only car accident, not your death. I with the knowledge of your enemies should be more cautious than I without that knowledge.

5. Legal Consequences of Tort: When all components of tort (in 4) are fulfilled, tort liability is established. Tort liability implies the creation of legal obligations (or equivalent to the formation of involuntary contract). There are two sides of this obligation: the injured (who is harmed by someone's action; also known victim, petitioner, and plaintiff respectively (depending on the stages of legal procedures)) and the injurer (who inflicts harm on the injured; also known as wrongdoer, tortfeasor, and defendant respectively).

The injurer must be liable for compensation to the injured to restore the injured to his/her *status quo* as close as possible.

6. Compensation for Tort: (See Slide 10-12) Economically speaking, the injurer makes the injured worse off by his/her action; thus, the law forces both of them to be engaged in the tort liability (involuntary contract) in which the injurer has to compensate the injured in order to make the injured ***indifferent*** between being harmed or stay unharmed.

Practically, every aspect of injury shall be examined by the court (circumstance and gravity of wrongful act). The determination of compensation shall correspond to the nature of injury and not confine to pure pecuniary means. Compensation shall take into account the possible loss of future income and support too.

7. Contribution of the Injured: In many cases, victims are contributory to the injury. More contribution of the injured to the injury implies less compensation (s)he shall receive from the injurer.