

**EE403**

**Law & Economics**

**TORT 1**



# AN ECONOMIC MODEL OF TORT LAW

- Tort law is branch law that holds persons or private organizations responsible for damage they cause another person as a result of an accident or deliberate action
- Examples include personal injuries, products liability, workplace accidents, medical malpractice, and environmental accidents.



[Click Liebeck v. McDonald's Restaurants](#)

# Tort Law

- Risk is a necessary by product of many socially beneficial activities (ex. driving, use of vaccines, medical procedures). We cannot eliminate the risk without cutting out the activity altogether
- Many ways of controlling risks: safety regulation, taxation, and criminal penalties for risky activities (for example, fines for speeding). These are all examples of “public” controls imposed by the government.
- Torts impose externalities. A goal of tort liability is to provide appropriate incentives for both the **injurers** and **victims** to take care of (*internalize*) these externalities, i.e., to take precautions against accidents
- This topic is concerned instead with a **private remedy—the right of accident victims to sue injurers for damages under tort law.**

# Tort Law

- The primary social functions of tort law :
  - to compensate victims for their injuries and
  - to deter “unreasonably” risky behavior. (duties)
- Tort law are designed to give parties engaged in risky activities an incentive to undertake all reasonable means of minimizing the costs arising from those risks.

# Differences between Crimes and Torts

- A crime is a wrong arising from a **violation of a public duty**.
- Criminal law concerns with prosecutions brought on behalf of the state for breaches of duties imposed upon individuals for the protection of society.
- A tort is a wrong arising from the **violation of a private duty**. (private individuals against other individuals)

# TORT vs CRIMINAL LAW

- A crime can also constitute a tort.
- For example, assault is a tort, but it is also a crime. A person who is assaulted may bring criminal charges against the assailant and may also sue the assailant for damages under tort law.
- Criminal prosecutions are dealt with by criminal courts and the standard of proof is more stringent than in civil cases.

# An Economic Theory of Tort Law

- Economists describe harms that are outside private agreements as *externalities*.
- The economic purpose of tort liability is to induce injurers and victims to *internalize* the costs of harm that can occur from failing to take care.
- The economic essence of tort law is its use of liability to internalize externalities.

**TITLE V**  
**WRONGFUL ACTS (ละเมิด)**  
**CHAPTER I**  
**LIABILITY FOR WRONGFUL ACTS**

**Section 420. (Liability for Wrongful Acts)**

A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make **compensation** therefore.

ลักษณะ 5

ละเมิด

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หมวด 1

ความรับผิดเพื่อละเมิด

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**มาตรา 420**

ผู้ใดจงใจหรือประมาทเลินเล่อ ทำต่อบุคคลอื่นโดยผิดกฎหมายให้เขาเสียหายถึงแก่ชีวิตก็ดี แก่ร่างกายก็ดี อนามัยก็ดี เสรีภาพก็ดี ทรัพย์สินหรือสิทธิอย่างหนึ่งอย่างใดก็ดี ท่านว่าผู้นั้นทำละเมิดจำต้องใช้ค่าสินไหมทดแทนเพื่อการนั้น

## Section 433. (Liability for Animal)

If damage is caused by an animal, the owner, or the person who undertakes to keep the animal on behalf of the owner, is bound to compensate the injured party for any damage arising therefrom, **unless he can prove that he has exercised proper care in keeping it according to its species and nature or other circumstances**, or that the damage would have been occasioned notwithstanding the exercise of such care.

The person responsible under the foregoing paragraph may exercise a right of recourse against the person who has wrongfully excited or provoked the animal or against the owner of another animal which has caused the excitement or provocation.

- มาตรา 433

ถ้าความเสียหายเกิดขึ้นเพราะสัตว์ ท่านว่าเจ้าของสัตว์หรือบุคคลผู้รับเลี้ยงรักษาไว้แทนเจ้าของ จำต้องใช้ค่าสินไหมทดแทนให้แก่ฝ่ายที่ต้องเสียหายเพื่อความเสียหายอย่างใด ๆ อันเกิดแต่สัตว์นั้น เว้นแต่จะพิสูจน์ได้ว่าตนได้ใช้ความระมัดระวังอันสมควรแก่การเลี้ยงการรักษาตามชนิดและนิสัยของสัตว์ หรือตามพฤติการณ์อย่างอื่น หรือพิสูจน์ได้ว่าความเสียหายนั้นย่อมจะต้องเกิดมีขึ้นทั้งที่ได้ใช้ความระมัดระวังถึงเพียงนั้น

อนึ่งบุคคลผู้ต้องรับผิดชอบดังกล่าวมาในวรรคต้นนั้น จะใช้สิทธิไล่เบี้ยเอาแก่บุคคลผู้ที่เร้าหรือยั่วสัตว์นั้นโดยละเมิดหรือเอาแก่เจ้าของสัตว์อื่นอันมาเร้าหรือยั่วสัตว์นั้น ๆ ก็ได้

มาตรา 436

บุคคลผู้อยู่ในโรงเรือนต้องรับผิดชอบในความเสียหายอันเกิดเพราะของตกหล่นจากโรงเรือนนั้น หรือเพราะทิ้งขว้างของไปตกในที่อันมิควร

**Section 436. (Liability for Falling Items from Inside the Building)**

An occupier of a building is responsible for damage arising from things which fall from it or are thrown into an improper place.

## Section 437. (Automobile Accidents)

A person is responsible for injury caused by any conveyance propelled by mechanism which is in his possession or control, **unless he proves that the injury results from force majeure or fault of the injured person.**

The same applies to the person who has in his possession things dangerous by nature of destination or on account of their mechanical action.

### มาตรา 437

บุคคลใดครอบครองหรือควบคุมดูแลยานพาหนะอย่างใด ๆ อันเดินด้วยกำลังเครื่องจักรกล บุคคลนั้นจะต้องรับผิดชอบเพื่อการเสียหายอันเกิดแต่ยานพาหนะนั้นเว้นแต่จะพิสูจน์ได้ว่าการเสียหายนั้นเกิดแต่เหตุสุดวิสัย หรือเกิดเพราะความผิดของผู้ต้องเสียหายนั้นเอง

ความข้อนี้ให้ใช้บังคับได้ตลอดถึงผู้มีไว้ในครอบครองของตน ซึ่งทรัพย์สินอันเป็นของเกิดอันตรายได้โดยสภาพ หรือโดยความมุ่งหมายที่จะใช้ หรือโดยอาการกลไกของทรัพย์สินนั้นด้วย (“กระแสไฟฟ้าถือได้ว่าเป็นทรัพย์สินอันเป็นของเกิดอันตรายได้โดยสภาพ”)

Note :

“ทรัพย์สินอันเป็นของเกิดอันตรายได้โดยสภาพ” เช่น?

“โดยความมุ่งหมายที่จะใช้” เช่น?

“โดยอาการกลไกของทรัพย์สิน” เช่น?

## CHAPTER II

### COMPENSATION FOR WRONGFUL ACTS

#### **Section 438. (Compensation)**

The Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused.

หมวด 2

ค่าสินไหมทดแทนเพื่อละเมิด

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มาตรา 438

ค่าสินไหมทดแทนจะพึงใช้โดยสถานใดเพียงใดนั้น ให้ศาลวินิจฉัยตามควรแก่พฤติการณ์และความร้ายแรงแห่งละเมิด

อนึ่งค่าสินไหมทดแทนนั้น ได้แก่การคืนทรัพย์สินอันผู้เสียหายต้องเสียไปเพราะละเมิดถ้าใช้ราคาทรัพย์สินนั้น รวมทั้งค่าเสียหายอันจะพึงบังคับให้ใช้เพื่อความเสียหายอย่าใด ๆ อันได้ก่อกำขึ้นนั้นด้วย

### **Section 443. (Funeral Expenses)**

In the cause of causing death, compensation shall include funeral and other necessary expenses.

If death did not ensue immediately, compensation shall include in particular expenses for medical treatment and damages for the loss of earning on account of disability to work.

If on account of the death any person has been deprived of his legal support, he is entitled to compensation therefore.

### **Section 444. (Lost Wages)**

In the case of an injury to the body or health, the injured person is entitled to receive reimbursement of his expenses and damages for total or partial disability to work, for the present as well as for the future.

If at the time of giving judgment it is impossible to ascertain the actual consequences of the injury, the Court may reserve in the judgment the right to revise such judgment for a period not exceeding two years.

#### มาตรา 443

ในกรณีทำให้เขาถึงตายนั้น ค่าสินไหมทดแทนได้แก่ค่าปลงศพรวมทั้งค่าใช้จ่ายอันจำเป็นอย่างอื่น ๆ อีกด้วย

ถ้ามิได้ตายในทันที ค่าสินไหมทดแทนได้แก่ค่ารักษาพยาบาลรวมทั้งค่าเสียหายที่ต้องขาดประโยชน์ทำมาหาได้เพราะไม่สามารถประกอบกิจการงานนั้นด้วย  
ถ้าเหตุที่ตายลงนั้น ทำให้บุคคลหนึ่งคนใดต้องขาดไร้อุปการะตามกฎหมายไปด้วยไซ้ ท่านว่าบุคคลคนนั้นชอบที่จะได้รับค่าสินไหมทดแทนเพื่อการนั้น

#### มาตรา 444

ในกรณีทำให้เสียหายแก่ร่างกายหรืออนามัยนั้น ผู้ต้องเสียหายชอบที่จะได้ชดใช้ค่าใช้จ่ายอันตนต้องเสียไป และค่าเสียหายเพื่อการที่เสียความสามารถประกอบกิจการงานสิ้นเชิงหรือแต่บางส่วน ทั้งในเวลาปัจจุบันนั้นและในเวลาอนาคตด้วย

ถ้าในเวลาพิพากษาคดี เป็นพันวิสัยจะหยั่งรู้ได้แน่ว่าความเสียหายนั้นได้มีแท้จริงเพียงใด ศาลจะกล่าวในคำพิพากษาว่ายังสงวนไว้ซึ่งสิทธิที่จะแก้ไขคำพิพากษานั้นอีกภายในระยะเวลาไม่เกินสองปีก็ได้

# Example

**Example 1:** Joe Potatoes has been driven to distraction by the escapades of his wife, Joan Potatoes. At the end of a hard night's work at the loading dock, Joe is approached by Jim Bloggs. Suspecting that Jim has been romancing Joan, Joe insults and strikes him, breaking his nose. Bloggs subsequently sues for the injury to his reputation and his nose.

**Example 2:** Three hunters go into the woods after pheasants. They are spread out in a straggling line about 25 yards apart, walking in the same direction. The hunter in the center flushes a bird that flies up, its wings pounding. The hunters to his left and right turn toward the bird in the middle and fire. The bird escapes, but the hunter in the middle is blinded by birdshot. One of the two hunters certainly caused the harm, but there is no way to determine which one of them it was. The victim sues both of them.

“intentional tort,”  
so named because  
the injurer inten-  
tionally inflicted  
the harm on the  
victim.

Unintentional



# The elements of tort claim.

- Tort law is a private remedy for accidental harms, enforcement is in the hands of victims. In order to recover damages, **a victim (plaintiff; โจทก์)** must file a lawsuit against **the injurer (defendant : จำเลย)**.
- The plaintiff has the burden of proving that the defendant is *legally responsible*. The elements of tort claim are:
  1. the presence of duty and a voluntary act or failure to act (an omission) that breaches the duty
  2. act or failure to act must *cause* the harm.
  3. Harm/damage (i.e., the breach of duty causes harm to the plaintiff).

# 1. Duty and breach of duty

- Just because someone is hurt does not mean that someone else must pay for the harm.
- There must have been a duty which has been breached.
- For example, if a burglar breaks into my house and trips over a furniture, I am not liable to the burglar because I had no duty to him. However, if a guest in my house trips over the furniture, I may have a duty to that guest.
- There are two kinds of duty that a defendant could owe the plaintiff.
  1. The first is the **general "duty of care"**. The duty of care is simply a duty to conduct yourself as **a reasonable person**, acting under similar circumstances, would conduct himself (**reasonable man test**). If the defendant's actions fall below what a court determines the reasonable man's actions would have been the defendant has breached his duty.
  2. The second duty is a **"special duty"** imposed by law. For example: A state passes a law requiring all homeowners to shovel snow from the sidewalks in front of their houses.

## 2. Causation of harm

- Proving causation in a legal sense requires the plaintiff to establish two things: first, that the defendant's action was “**cause-in-fact**” of the damages; and second, that it was also “**proximate cause.**”
- Cause-in-fact is established by using the “**but-for**” test to decide whether action *A* was the cause-in-fact of event *B*.
- Asking “But for *A*, would *B* have occurred?”
  - If the answer to this question is “no,” then *A* is the cause-in-fact of *B*.
  - If the answer to this question is “yes,” then *A* is not the cause-in-fact of *B*.

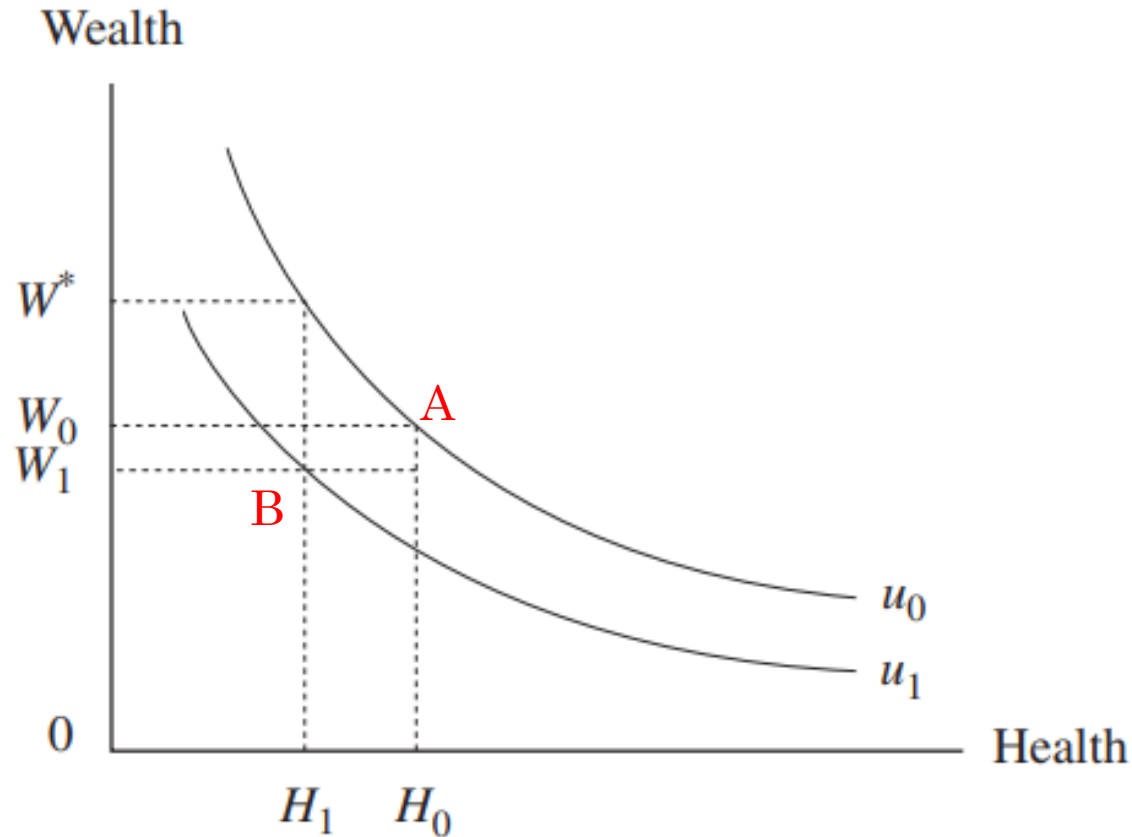
## 2. Causation of harm

- The defendant's act must not only be a cause-in-fact; **it must be the proximate** cause of the plaintiff's harm to establish legal liability. That is, the connection between the injurer's action and the harm cannot be too remote.
- The usual test for proximate cause is the **reasonable foresight** test.

Plaintiff [Mrs. Palsgraf] was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

- Railroad employee's action clearly **satisfied the but-for test but not reasonable foresight test.**
- The New York court determined that the railroad was not liable

# 3. Harm



- Harm : from A  $\rightarrow$  B
- Compensation is  $(W_0 - W_1)$  if compensation can restore health
- If accident did irreparable damage (stuck at  $H_1$ ), the compensation have to be  $(W^* - W_1)$

# Perfect Compensation

<i>Tangible harms</i>	<i>Intangible harms</i>
<ul style="list-style-type: none"><li>• Medical costs</li><li>• Lost income</li><li>• Damaged property</li></ul>	<ul style="list-style-type: none"><li>• Emotional harm</li><li>• Pain and suffering</li><li>• Loss of companionship</li></ul>

- ◆ In theory, perfect compensation should cover all losses
  - ◆ Historically, courts have been **less willing to compensate for intangible** or hard-to-measure losses
  - ◆ **Pro**: the closer liability is to actual harm done, the better the incentive to avoid these harms
  - ◆ **Con**: disparity in award sizes, unpredictability

## Liability rule:

Strict liability (ความรับผิดโดยเคร่งครัด) vs Negligence (ความรับผิดโดยประมาท)

- A liability rule is simply a rule for dividing the damages between the injurer and the victim.
- A rule of liability based upon harm and causation is called “**strict liability.**”
- A rule of liability requiring the plaintiff to prove harm, causation, and fault (breach of duty) is a “**negligence**” rule.
- Under a negligence rule, the defendant escapes liability if he satisfied the applicable standard of care to avoid the harm that he caused.

## Liability rule: Strict liability VS Negligence

<i>Strict Liability</i>	<i>Negligence</i>
1. Causation 2. Harm	1. <b>Breach of duty (fault)</b> 2. Causation 3. Harm

- ◆ When someone breaches a duty he owes to the defendant, and this leads to the harm, the injurer is at fault, or negligent
  - ◆ Injurers owe victims the duty of due care
  - ◆ Negligence rule: I'm liable if I failed to take due care – but not if I was careful and the accident happened anyway

# Strict liability versus negligence

- ◆ **Strict liability** rule: plaintiff must prove **harm** and **causation**
- ◆ **Negligence** rule: must prove **harm, causation, and negligence**
- ◆ A little history
  - ◆ Early Europe: strict liability was usual rule
  - ◆ By early 1900s, negligence became usual rule
  - ◆ Second half of 1900s, strict liability became more common again, especially for manufacturer liability in American consumer products
    - U.S. manufacturers now held liable for harms caused by defective products, whether or not they were at fault

# So under a negligence rule...

- ◆ If I **breach my duty of due care** and injure you, I am liable
- ◆ If I exercise the **appropriate level of care** but still injure you, I'm not liable
- ◆ How is the **standard of care** determined?
  - ◆ That is, how careful do I have to be to avoid liability, and who decides?
  - ◆ Is it negligent to drive 40 MPH on a particular road at a particular time of day? What about 41 MPH? 42?

# How is the standard of care determined?

- ◆ Some settings: government imposes **safety regulations** that are also used as standard for negligence
  - ◆ Speed limits for highway driving
  - ◆ Requirement that motorcyclists wear helmet.
  - ◆ Workplace regulations
- ◆ Some standards are left vague
  - ◆ “Reckless driving” may depend on road, time of day, weather...
  - ◆ Law focuses on duty of **reasonable care**
  - ◆ Level of care **a reasonable person would have taken**

# Precaution

- ◆ The more carefully I drive, the less likely I am to hit you
  - ◆ But, driving more carefully is also more costly to me
  - ◆ Must be some efficient level of care.
- ◆ Similarly...
  - ◆ Construction company can reduce accidents with better safety equipment, better training, short workdays, all of which cost money
  - ◆ Manufacturer can reduce accidents by designing/inspecting products more carefully – again, more expensive

# Actions by both injurer and victim impact number of accidents

- speed like hell
- drive drunk while texting
- cheap, hasty manufacturing
- save money
- bicycle at night wearing black

- drive slowly
- drive carefully
- careful quality control
- install smoke detectors, other safety equipment
- wear helmet and use light

***LESS EFFORT TO  
PREVENT ACCIDENTS***

***GREATER EFFORT TO  
PREVENT ACCIDENTS***



***“LESS PRECAUTION”***

***“MORE PRECAUTION”***

# We will call all these things **precaution**

- ◆ **Precaution**: anything either injurer or victim could do to reduce likelihood of an accident (or damage done)
- ◆ The next two questions should be obvious...
- ◆ **How much precaution do we want?**
  - ◆ What is efficient level of precaution?
- ◆ **How do we design the law to get it?**