

Tort Law

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1 What is Tort Law?

Sometimes events cause damage. For example, a car accident causes bodily harm to the persons involved and material harm to the owners of the cars. This harm, from the legal point of view, is called «damage». A soft drink that has stood too long in the sun may explode and cause damage to bystanders who are subsequently injured. Slander on the Internet can cause psychological harm to a school girl, which may be translated into material damage (the costs of the psychologist who treats her) and immaterial damage (the suffering of the girl who does not dare to meet her school friends anymore).

1.1 Liability Law

Liability law deals with the conditions under which someone who has suffered damage can claim compensation for this damage from someone else. Examples of persons who might claim damages (compensation of suffered damage) on the basis of liability law are:

- The victim of a bar fight whose face had to be treated by a doctor
- The school girl who was the victim of slander on the Internet
- The client of a bank who suffered a loss on his stock portfolio, because the bank did not sufficiently warn him for the risks of a certain kind of investment
- The student who had to re-sit his exam after other students had illegally acquired copies before the exam was taken
- The car owner whose car was damaged in an accident
- The owner of a school building that was set on fire by a 6-year-old pupil
- The victim of an exploding bottle of soft drink that stood too long in the sun

Contractual Liability and Tort Liability

Liability for someone else's damage often occurs in a contractual setting. For example, the window cleaner who damages the window he cleans will normally be liable for the damage of his client on the basis of contract. The law deals with this kind of liability under the heading of contractual liability.

The rules for this contractual liability are similar, although not identical, to the rules for liability outside contract (extra-contractual or tort liability). This chapter mostly deals with the rules for extra-contractual liability, which go by the name of «tort law».

The field of liability law is governed by the demands of two different kinds of justice: corrective and distributive justice. These two kinds of justice are discussed in ► Sect. 2, preceding the rest of this chapter.

Justice

The main rule in liability law is that damage must be borne by the person who suffered it in the first place. If a house collapses as result of an earthquake, the house owner must normally bear this damage himself. The main exception to this rule is when the damage can be attributed to an act of somebody else. The other person has caused the damage, and if he did this intentionally or negligently, he must for that reason compensate it. We then speak of fault liability. Most of the above examples illustrate this kind of fault liability. Fault liability will be discussed more extensively in ► Sect. 3.

Fault Liability

There are a number of situations in which the damage is not the result of an act at all or is the result of a circumstance where the agent did not act intentionally or negligently. In some of these situations, the law nevertheless imposes liability on someone other than the direct victim. Examples are that parents are liable for the damage caused by their young children or that the possessor of a defective object (e.g., a bottle of soft drink that explodes when exposed to direct sunlight) is liable for the damage if the danger is realized. We then speak of strict liability. Strict liability exists when the law assumes there is liability, but does not base it on a fault of the person who must pay damages. There are several kinds of strict liability, which will be discussed more extensively in ► Sect. 4. This section also briefly highlights alternative mechanisms for the distribution of damage over society.

Strict Liability

Both in the case of fault liability and of strict liability, the damage is shifted from the person who suffered it to somebody else. Sometimes there is reason not to shift the damage to one or more specific persons but rather to distribute it over a larger part of society. One reason for doing this is that the damage is too big to be borne by individual persons. Think, for instance, of the damage resulting from a nuclear disaster. Another reason is that the existence of a certain kind of damage is the responsibility of a larger set of persons. In this case, it is in the interest of victims that all members of this set contribute to the compensation of that damage. An example would be that car drivers collectively create the risk of car accidents, and therefore it makes sense to hold them collectively responsible for compensating the damage that results from the use of cars. Damage funds and (mandatory) insurance are mechanisms that distribute the costs of the damage over larger parts of society; they are discussed in ► Sect. 5.

Mechanisms for the
Distribution of Damage

Limitations

If somebody has the obligation to compensate damage, either on the basis of fault liability or of strict liability, there is a need to determine who can claim compensation and exactly which kinds of damage must be compensated. The law also recognizes several grounds for limiting the liability for somebody else's damage, such as causation and contributory negligence, and these grounds will be the topic of ► Sect. 6.

1.2 Tort Law

The expression «tort law» suggests that tort law is a homogeneous field of law, with a few rules regulating the compensation for all kinds of damage. In reality tort law can be applied to very heterogeneous topics, such as bodily harm, manslaughter, insult, libel, infringement of privacy, trespassing land or home, damage to goods, violation of copyright, unfair competition, poor infrastructure, unhealthy food, and so on. What all these situations have in common is that an event causes damage to a victim and there may be reason to let someone else compensate it. For the rest, however, there seems to be little similarity concerning the abovementioned situations.

It would be possible to develop distinct rules for each different situation. These rules could be fine-tuned to the various kinds of cases and the differences between them. Actually this was the case for English law; it developed rules for several kinds of torts. For this reason, the rules about the different situations were originally called the «law of torts», in the plural. The persons who commit torts are called «tort-feasors».

The very expression «tort law» is derived from the common law tradition. The word «tort» is originally French and stands for «wrong». A tort is a wrongful act which is ground for a legal action for damages.

However, stemming from the *Donoghue v Stevenson* case, a development has started in English law in which one particular tort, the tort of negligence, has come to dominate the field.

Donoghue v Stevenson [1932] AC 562

On August 26, 1928, Ms. May Donoghue visited a bar in Paisley, Scotland. The owner of the bar poured part of a bottle of ginger beer on top of her ice cream. After Ms. Donoghue had eaten some of the ice cream, her friend poured on the remainder of the ginger beer. In doing so, a snail in a state of decomposition came out of the dark-glass bottle. Ms. Donoghue later contracted gastroenteritis from eating the ice cream mixed with the ginger beer, and therefore she wanted to be compensated financially by Stevenson, who had manufactured the bottle. She

The Common Law of Torts

claimed that Stevenson owed a duty of care to protect her from this damage. This case between Ms. Donoghue, who allegedly suffered damage from consuming the contaminated ginger beer, and Stevenson, who produced this bottle, has become a classic of tort law.

Someone commits the tort of negligence if they breach a legal duty of care owed to another person and their interests and if this breach resulted in damage to that person. The dominance of this kind of liability has changed the «law of torts» into «the law of tort»; however, the field of tort law still exhibits the traces of the old situation in which there were separate rules for the different torts. Although the tort of negligence may be the most important one, other torts such as trespass still exist.

In the civil law tradition, there are not as many torts as far as legislation is concerned. However, in applying relatively few rules, judge-made case law has differentiated various kinds of wrongful acts.

Civil Law

For instance, in the case of intentional causation of damage such as physical mistreatment, liability is more easily assumed than in case of an accident. The liability for inherently dangerous activities also tends to be greater than for events where the cause of the damage is by way of coincidence. These distinctions cannot be found in original legislation but are based on case law.

Since relatively few rules have been interpreted differently for different kinds of wrongful acts, case law in the civil law tradition created a greater differentiation than appears to exist on the basis of legislation only. The result is that in tort law the difference between the civil law and the common law tradition is mainly one of style.

2 Two Kinds of Justice

During the fourth century BC, the Greek philosopher Aristotle wrote a treatise on ethics in which he distinguished two kinds of justice: corrective justice and distributive justice.

Corrective justice (also called «compensatory justice» or «retributive justice») involves rectifying something that has gone wrong. A typical example is the justice that is involved in the proper punishment of criminals or the compensation of the damage that one person caused to another.

Corrective Justice

As the name «corrective justice» suggests, the idea behind this kind of justice is that a wrong must be corrected. In the case of the punishment of crimes, it may not be clear what this

involves precisely. However, in the case of damage, it is relatively easy. The damage must be remedied, that is, the person who suffered the damage must be brought to the same position he or she was in before the damage occurred. For example, if Jane stole Cathy's necklace, she must return the necklace or – if that is not possible anymore – give Cathy the value of the necklace in money.

Typically the person who must restore the situation to its previous condition is the one who disturbed it. This means that there must be an act that caused the damage and that this act must be attributable to the person who is held liable for the damage. If Jane stole Cathy's necklace, the theft can be attributed to Jane, and she is the obvious candidate to compensate the damage.

In cases of corrective justice, the liability to compensate depends on the wrongness of the act that caused the damage. If Carrefour opens a new supermarket in a town, thereby causing damage (loss of income) to the owner of the local Spar supermarket, Carrefour will typically not be liable for the damage on the basis of corrective justice, because free competition allowed it to open a new supermarket.

The liability based on corrective justice is typically fault liability. This does not mean that there is no liability in law if there is no fault, but such liability must have other grounds than corrective justice, for example, distributive justice.

Distributive Justice

Distributive justice is involved in the distribution of some «good» or «bad» over a group of persons. A classic example is the distribution of a cake over a number of children, but other examples are the distribution of wealth over society, of taxes over taxpayers, of pollution rights over polluters, and – most important for our purposes – of damage over society.

The idea that damage can be divided may seem strange at first sight, because damage seems to fall on persons in an arbitrary fashion. That may be the case, but as soon as the compensation of damage is considered, it becomes a matter of justice whether and how the damage will be compensated and who will bear which damage. If the question is dealt with as a matter of corrective justice, compensation is used as a means to restore the distribution that existed before the damage occurred. Under distributive justice, compensation does not necessarily restore the status quo, but can be used to achieve a fair distribution of wealth over society. For example, distributive justice may demand that damage is distributed over all tax payers, as when the damage caused by an earthquake is compensated from a government fund that is filled with money from taxes. It may also demand that the damage

caused by car drivers is paid by their insurance companies and therefore make insurance compulsory for all car owners. (See ► Sect. 5.)

3 Fault Liability

Fault liability exists when one person is liable for the damage caused to another because the former wrongfully caused the damage of the latter.

Examples of fault liability are the liability of:

- The thief for the damage caused by his theft
- The seller of hot chocolate who serves the drink too hot, for the burns caused to the buyer
- The car driver who drives too fast in a residential area, which makes it impossible to stop in time for a child that inadvertently crosses the road, for the injuries of the child
- The supervisor of the financial sector who does not close down a bank with insufficient financial means for the losses of the bank's clients

Examples

3.1 The Common Law Approach

English tort law contains mostly rules that require an intentional or negligent act by the liable person. A tort is intentional if the agent performed the unlawful behavior on purpose.

An example is the tort of trespass. Trespass against land takes place if somebody directly and on purpose interferes with land that is in possession of somebody else. Trespass against a person takes place if somebody directly and on purpose causes an injury to a person or threatens to do so.

The most important tort, especially after the landmark case of *Donoghue v Stevenson*, is the tort of negligence. In general, there are four conditions which must be satisfied for liability under the tort of negligence:

Negligence

1. There must have been a duty of care.
2. This duty must have been breached.
3. There must be damage.
4. This damage must have been caused by the breach.

In this section, we will only focus on the question when a duty of care exists. The notion of a duty of care is used in the common law to describe the range of persons, their relationships,

Duties of Care

and the kinds of damage for which compensation can be claimed. Criteria to determine whether a particular person or organization owes a duty of care toward another are a central topic of tort law. It is not very easy to say something in general about this issue. An attempt to do so nevertheless is found in the Learned Hand Formula.

Learned Hand Formula

In 1947, in the case of *United States v Carroll Towing Co.*, the American judge Learned Hand formulated a rule of thumb to determine what standard of care would be required by a ship owner to ensure that a ship does not break loose of its mooring ropes:

The owner's duty ... to provide against resulting injuries is a function of three variables:

1. The probability that she will break away;
2. The gravity of the resulting injury, if she does;
3. The burden of adequate precautions.

The basic idea is that a balance must be struck between the costs of precautionary measures and the costs of accidents. The «costs of accidents» are the product of the costs of a «normal» accident and the probability that such an accident will occur. If the costs of a precautionary measure are less than the expected costs of the accident, this precautionary measure is required, and a breach of duty exists if such a measure is not taken.

Judge Learned Hand has become a legend, because he did not confine himself to this analysis but went further and gave it a «scientific» twist by summarizing it in the formula: «if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less likely than L multiplied by P: i.e. whether B is less than PL». This formula has become known as the «Learned Hand Formula».

The Learned Hand Formula can be used to determine whether a duty of care exists. This is of course a crucial step in determining whether somebody breached a duty of care and is as such liable for committing the tort of negligence. Its practical relevance is, however, disputed.

In England, the counterpart of the Learned Hand formula is the «neighbor principle», which was formulated by Lord Atkin in the *Donoghue v Stevenson* case. According to this principle, one must take reasonable care to avoid acts or omissions which could be reasonably foreseen as likely to injure a neighbor. Neighbors are persons who are so closely and directly affected by an act that one ought to have them in contemplation when directing one's mind to the acts or omissions called into question.

The threefold mention in the formulation of this principle of what is reasonable gives this neighbor principle a wide scope of application. The drawback, however, is that the wide scope gives poor clues as to when a duty of care actually exists.

3.2 The Civil law Approach

The civil law approach to tort law differs from the common law approach in that the basic rules for tort liability are formulated in statutes and that these rules appear to be relatively uniform. However, because statutory rules have to be interpreted in case law, the actual situation does not differ greatly from that of common law.

In general, the following two conditions hold for the existence of fault liability in the civil law tradition:

1. There must be an intentional or negligent act or an omission that violates a legally protected right or interest of another person.
2. The unlawful act or omission must have caused damage of a type which qualifies for compensation.

The various civil law jurisdictions differ in the manner in which they specify what counts as such a violation of a legally protected interest. The French *Code Civil* keeps it simple, with two provisions:

Code Civil, Article 1382

Any act whatever of a person, which causes damage to another, obliges him by whose fault (*faute*) the damage was caused to compensate it.

Code Civil, Article 1383

Everyone is liable for the damage he has caused not only by his act, but also by his negligence or by his carelessness (*imprudence*).

The *Code Civil* is not very specific about which acts lead to liability. This is different with the German *Bürgerliches Gesetzbuch*. The following central provision gives an example:

Bürgerliches Gesetzbuch § 823

1. A person who intentionally or negligently, unlawfully injures the life, body, health, freedom, property, or another right of another person, is obliged to compensate the other party for the damage arising there from.

2. The same duty arises for a person who infringes a statutory provision intended to protect another. If, according to the contents of the statute, an infringement is possible even without fault, the duty to compensate only arises if the case of fault.

The Dutch *Burgerlijk Wetboek* compromises between the abstraction of the *Code Civil* and the concreteness of the *Bürgerliches Gesetzbuch*:

Burgerlijk Wetboek, Article 6:162

1. He who commits a wrongful act against another, which can be attributed to him, is obliged to compensate the damage suffered by that other as a consequence thereof.
2. An act counts as wrongful if it is a violation of a right, or if it is an act or omission contrary to a legal duty or to what is socially acceptable according to unwritten law, unless there is a ground of justification.

Different as these provisions may be, they have in common that they protect individual rights and interests against both intentional and negligent violations.

4 Strict Liability

Strict liability exists when somebody is liable for damage that was not caused by his or her own wrongful act. It is possible to distinguish two kinds of situations:

1. Liability for damage caused by someone else's act (► Sect. 4.1)
2. Liability without a tort-feasor for damage caused by a defective or dangerous thing or activity (► Sect. 4.2).

Strict liability requires a specific basis in legislation or case law; there is no general liability for damage caused by somebody else's act or damage caused by a defective or dangerous thing or activity, in the way that there is a general liability for damage caused by one's own unlawful acts.

4.1 Liability for Damage Caused by Other Persons

Cellar Hatch, HR 05-11-1965, NJ 1966, 136

Mr. Sjouwerman was an employee of the Coca-Cola Company. He made a delivery to 'De Munt', an Amsterdam pub. He left the

cellar hatch of the pub open whilst making his delivery. Mathieu Duchateau was a customer having a beer at 'De Munt'. He fell through the open cellar hatch when he was on his way to the men's room, and he had to be taken to hospital. Mr. Duchateau claimed compensation from the Coca-Cola Company, adducing that Mr. Sjouwerman had not taken sufficient precautions because he left the cellar hatch open.

Why would the Coca-Cola company be liable for the fault of Mr. Sjouwerman? There is both a brief and a long answer to this question. The brief answer is a description of the law as it actually is, while the longer answer addresses the issue of why the law is what it is. The brief answer is that according to the law of many jurisdictions, including Dutch law, employers are liable for damage that is negligently caused by their employees in the course of their employment. This is called «vicarious liability».

Vicarious liability

If Mr. Sjouwerman was negligent, the Coca-Cola company as his employer would therefore be liable for the resulting damage.

The longer answer addresses the question why someone should be liable for damages caused by other persons. In many jurisdictions, strict liability does not only exist for employers with regard to their employees but also for parents with regard to their children. The first observation in this situation is that a person who is liable for damages caused by someone else must have a special relation to this person. Normally, this is a relationship where one has the ability to influence the behavior of the other. An employer has this relationship with his employee, and parents have this relationship with their children.

There are two possibilities for liability in this situation, depending on whether the employers or the parents did something wrong themselves. If the employer or the parent did something wrong, for instance, a lack of supervision, they would be liable for their own faults, and not for the faults of their employees or children.

In Germany, this form of fault liability is the way in which employers can be liable for the wrongs of their employees and parents for their children. In England, such fault liability is the basis on which parents and teachers may be liable for damages brought about by their children and pupils, respectively.

In most legal systems, the basic requirements for employer liability are:

1. The employee must have been at fault, which means that he acted intentionally or negligently.
2. The employer must have had sufficient power of direction and control over the employee's activities.
3. The harm must have been caused in the course of the employment.

Century Insurance C v Northern Ireland Transport Board ([1942] AC 509)

Davison was employed by the Transport Board as driver of a petrol tanker. While petrol was being pumped from his truck into the underground tank of a petrol station, he lit a cigarette and threw the match on the ground. This caused a fire and finally an explosion which resulted in significant damage to property.

Was his employer vicariously liable for Davison's conduct? Did Davison act in the course of his employment in lighting his cigarette? The Court of Appeal found that the driver was acting in the course of his employment. The House of Lords upheld the judgment of the Court of Appeal. One of the lords, Viscount Simon, put it this way:

Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow and to turn off the tap when the proper quantity had passed from the tanker. Waiting and watching was part of his duties. That is why his act – throwing the match on the ground - was within his course of employment. The course of employment broadly comprised all acts done concomitantly to the accomplishment of the tasks which were entrusted to the employee.

Deep Pocket Theory

Placing liability on someone other than the tort-feasor also has an advantage for the victim who suffered the damages, namely, that she is protected against insolvency of the tort-feasor. Parents tend to have more money than their children, and employers are often wealthier than their employees. They are also usually insured against liability. The idea that if the circumstances allow it, liability should be placed where the money is, is known as the «deep pocket theory».

There are also other reasons for making employers and parents liable. One is that the employer sometimes benefits from the torts of the employee – e.g., speeding to arrive faster to serve the next customer. As such, it is fair to make the employer liable for the negative consequences.

Another reason is that the liability of employers and parents makes it possible to take this liability away from employees and children, for whom the damages might not be bearable.

All of the mentioned reasons illustrate that liability for damage is not always a matter of restoring the situation before the damage occurred by the person who is held responsible for creating the damage. Sometimes it is a matter of distributive justice and of policy considerations that give content to this kind of justice.

4.2 Liability Without Tort-Feasor

It happens quite often that an event causes damage and that this is not due to someone's intentional or negligent behavior. In that case the principle that everyone has to bear his own damage plays a central role. However, there are a number of cases in which the law requires that the damage should be shifted to somebody other than the victim. These cases have in common that the person who becomes liable is somehow either responsible for, or profits from, the fact that there is a possibility of faultless damage. Typical examples concern damage brought about by animals or by objects which are dangerous by nature or defective.

By keeping an animal, the keeper creates the risk that this animal will cause damage. As such, there is reason to hold the keeper of this animal liable when the actual damage was caused, even if the keeper did not do anything wrong. Similarly, the owner of a car creates the risk that the car will cause damage, even if the owner is not driving or at fault in a particular case. Cars make society more dangerous, and this is a reason to hold car owners liable. They profit from these danger-creating objects, even when they do not act intentionally or negligently.

Whereas fault liability relates to the obligation to pay damages for wrongful behavior on the side of the tort-feasor, this link between liability and fault is not present in the case of strict liability. As for deciding between fault and strict liability, it is necessary to first establish the criteria on which the choice is to be determined. When we are dealing with the liability for defective products, for example, there are reasons in favor of strict liability. These reasons are that strict liability may offer:

- More protection for the injured party
- An incentive for improving safety
- Better options for insurance
- Fewer problems in determining liability, which saves procedural costs

Reasons for Strict Liability

Differences Between Countries

There are no general rules for strict liability. Every rule of strict liability has its own requirements, and there are substantial differences between countries with regard to the question which kinds of strict liabilities are recognized. We have already seen that English law hardly recognizes any strict liabilities. France on the contrary recognizes many kinds of strict liability – including strict liabilities for holders of motor vehicles, for custodians of dangerous or defective things, and for the owners of animals. Here, fault liability has become relatively less important in cases of personal injury and property loss.

5 Mechanisms for the Distribution of Damage

Sometimes the law chooses not to leave damages with the victim, nor does it shift the burden to another person. It rather distributes the damage over society, either as a whole or in part. In this connection, we will take a look at two such mechanisms: insurance and damage funds.

5.1 Insurance

Tort law regulates the shift of damage from the original bearer of the damage to somebody else. This other person or organization may be someone who caused the damage intentionally or negligently (fault liability) or someone who is responsible for another person or for a dangerous or defective object regardless of whether they acted intentionally or negligently (strict liability). This last kind of liability may seem unfair, but this seeming unfairness is often mitigated by insurance, a mechanism for the distribution of damage over a larger group of persons. People who insure themselves against damage pay a premium to an insurance company and receive in return the right to be compensated for the kinds of damage against which they insured themselves. Typical examples are health insurance and home insurance.

Many kinds of insurance are voluntary but some are mandatory. Car owners typically have to insure themselves for their liability to victims of accidents in which their cars are involved. This kind of mandatory insurance may be combined with strict liability. The result of this combination of strict liability and compulsory insurance is that the damage of accidents in which cars are involved is distributed over all car

owners. In this way car owners, as a collective, pay for the damage which occurs as result of the introduction of cars into society. Those who profit from the benefits of cars must pay for their drawbacks.

5.2 Damage Funds

Another mechanism for the distribution of damage over society is damage funds from which damage to individual persons or groups of persons can (in part) be compensated. For example, Article 3 of the European Convention on the Compensation of Victims of Violent Crime imposes on member states who are parties to the convention the duty to compensate by and large the nationals of member states who fall victim to intentional crimes of violence, who have suffered bodily injury or impairment of health, or are the dependents of persons who have died as a result of such crimes. Moreover, the Council of the European Union has issued a directive relating to compensation for the victims of crime (Council Directive 2004/80/EC of 29 April 2004). If the states pay this compensation from tax money, the damage of the victims is distributed over all tax payers.

Another example is the Canadian Environmental Damages Fund. The money for this fund stems from, among others, fines and court orders and is used to benefit the environment and pay for the restoration of damage. This fund follows the principle that the polluter pays; the compensation for the damage to the environment is not distributed over all tax payers but rather over those forced by the government to contribute to the fund because they are guilty of pollution.

6 Limitations

The main rule in connection to damage is that everybody bears his or her own damage. Liability of others is the exception, and exceptions tend to have limitations. Apart from the general requirements for fault liability and strict liability, these limitations concern:

- The persons who can shift their damage to somebody else (► Sect. 1)
- The defense that the damage should also be attributed to the person who suffered it (► Sect. 2)
- The kinds of damage that can be shifted (► Sect. 3)
- The extent to which damage can be shifted (► Sect. 4)

6.1 Who Can Shift Their Damage?

If somebody is in principle liable for damage that results from an act or omission, or from some other event for which they are (strictly) liable, this does not automatically mean that everybody who suffered such damage can claim compensation. Only those persons whose interests are protected by law can claim compensation.

For instance, a football player tackles his opponent in an unlawful manner. The opponent is injured, and because the tackle was extraordinarily unfair, the person who made it must compensate the damage of his opponent. Suppose that the victim of the tackle was the best player of his team and that as a result of the tackle his team lost the match. An outsider who had placed a bet that this team would win loses money. Can she ask for compensation of this lost money? No, she cannot, because the rule that forbids unfair tackles is there to protect potential victims of such tackles against bodily harm, but not outsiders who happen to place bets on the outcome of football matches.

6.2 Contributory Negligence

Somebody who is liable for damage caused by negligent behavior can sometimes avoid being liable for all the damage by pointing out that part of the damage can be attributed to the negligent behavior of the victim.

For instance, a person who violated a traffic rule and thereby caused an accident may be liable for less than the victim's full damage if he can show that the victim could have avoided the accident if only he would have paid more attention.

In such a case, we speak of «contributory negligence» as a reason to divide the damage over the tort-feasor and the victim in proportion of the way they each contributed to the damage.

6.3 Recoverable Damage

Not all kinds of damage qualify for compensation in connection with all kinds of damage-causing events. Some kinds of damage lend themselves better to compensation than others, and some

kinds of damage will be compensated to a greater extent than others. This differentiation between kinds of damage is made explicit in the Principles of European Tort Law (PETL).

The Principles of European Tort Law are nonbinding rules, drafted by a group of lawyers, aimed at finding the common core of tort law.

Article 2:101 of the PETL provides a definition of recoverable damage: damage according to the PETL consists of material or immaterial harm to a legally protected interest.

What constitutes a protected interest is subsequently indicated in:

Protected Interest

Article 2:102 PETL:

1. The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive its protection.
2. Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.
3. Extensive protection is granted to property rights, including those in intangible property.
4. Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the agent and the endangered person, or to the fact that the agent is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.
5. The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.
6. In determining the scope of protection, the interests of the agent, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

► Sections 2 and 3 make clear that the protection of the human body and mind goes further than the protection of property rights such as rights in material goods, copyrights, and patents.

A person who is wounded in a car accident may also begin to suffer psychosomatic effects, such as a change in character, weakness in mental performance, speech disturbances, paralysis, and reduction in libido. The German Bundesgerichtshof (April 9th, 1991) decided that if these defects could be attributed to the accident (which was probable), they should be taken into account in determining the amount of immaterial damages which could be compensated.

The protection of purely economic interest does not extend far. An example of a purely economic interest would be the loss of income suffered by a driver (e.g., travelling salesman) who was caught in a traffic jam caused by a car accident. The chances are slim that the tort-feasor who caused the car accident will also have to pay for this pure economic loss.

If a person is injured and as a consequence cannot work for some time, the damage is not a purely economic interest anymore, since it is connected to a noneconomic interest, namely, physical integrity. The compensation of such damages is handled under the category of bodily integrity and therefore tends to be allowed more easily.

6

Losses of Third Persons

In the Draft Frame of Common Reference (DCFR), a project led by the German professor Christian Von Bar and partly financed by the European Commission, we find a special provision for «Loss suffered by third persons as a result of another's personal injury or death».

Book VI, Article 2:202:

1. Non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person.
2. Where a person has been fatally injured:
Legally relevant damage caused to the deceased on account of the injury to the time of death becomes legally relevant damage to the deceased's successors;

Reasonable funeral expenses are legally relevant damages to the person incurring them; and
Loss of maintenance is legally relevant damage to a natural person whom the deceased maintained or, had the death not occurred, would have maintained under statutory provisions or to whom the deceased provided care and financial support.

Comparable provisions can be found in many jurisdictions, either in a civil code or in the case law.

6.4 Causation

Even if the victim and the kind of damage qualify for compensation, it is still possible that the damage will not be shifted. This is the case if the damage was not caused by the act or event on which the claim for compensation was based. It

seems obvious that damage which was not caused by such an event does not qualify for compensation.

For instance, if somebody causes a car accident, this person does not have to pay for the damage of an unrelated person who happens to have lost his job.

However, sometimes there is a causal link from a damage-causing event to a particular damage, and yet this damage is not attributed to the event in question. That may, for instance, happen if the causal link is too long, or too unlikely, or if there was an intervening act. An example that illustrates all three possibilities is the following:

Fireman Pierre participates in an illegal strike and does not extinguish a fire in a house that was assigned to him. The house burns down completely. The house owner is not insured and must move to another smaller house. His wife does not like the new house and divorces him. Their children need psychological care because of their parents' divorce, and the mother, who had to pay for this care, demands compensation from Pierre. Pierre may not be liable for the costs of the psychological care, first because the chain from his unlawful act to the costs is too long, second because the consequence is rather unlikely (nobody could have predicted those costs), and third, the divorce may be considered to be an intervening act which interrupts the causal chain between the strike and the costs for the psychologist.

7 Conclusion

Liability law consists of rules that specify whether and under which circumstances exceptions are to be made to the basic rule that everybody bears his own damage. One major category of exceptions concerns situations where one person intentionally or negligently causes damage to another person. In such a case, fault liability requires that the former, the tortfeasor, compensates the damage of the latter. The situation that existed before the tort must be restored as much as possible, at least financially.

The other major category can only be defined negatively. It concerns cases where some person is liable for damage of somebody else, even though he did not intentionally or negligently cause that damage. These cases represent strict liability

(in one of the variants adopted in the legal systems). Strict liability may concern damage caused by animals or by dangerous or defective objects. It may also concern damage caused by a third person for whom the liable person is held responsible. Where the rules for fault liability are by and large the same in most civil law and common law countries, there are major differences between countries where the rules for strict liability are concerned.

Recommended Literature

Van Dam C (2013) *European tort law*, 2nd edn. Oxford University Press, Oxford

Van Gerven W, Lever WJ, Larouche P (eds) (2000) *Tort law, common law of Europe casebooks series*. Hart Publishing, Oxford