



## Tort Law

### Law of Obligations (Borçlar Hukuku)

- Turkish Code of Obligations is applicable. The new Turkish Code of Obligations, enacted by the Grand National Assembly on 11 January 2011, took effect on 1 July 2012.
- An obligation is a legal bond by which one or more parties (obligants: Obligor and Obligee) are bound to act or refrain from acting.
- An obligation imposes on the *obligor* a duty to perform, and simultaneously creates a corresponding right to demand performance by the *obligee* to whom performance is to be tendered.

## Law of Obligations (Borçlar Hukuku)

Elements of an obligation relationship:

- ✓ **Obligor (debtor)**: obliged or responsible person *borçlu*
- ✓ **Obligee (creditor)**: benefits from the obligation *alacaklı*
- ✓ **Prestation (indebted performance/ subject matter of obligation)**: the performance of which the creditor may demand from the debtor) *edim/ borcun konusu*

Everything with an economic or financial value can be pointed out as the **indebted performance**. To its nature one distinguishes three types of performances:

- a. delivery of an object (**to give /yapma borcu**): transfer of a good or the payment of a sum of money
- b. performance of a work (**to do /verme borcu**): the employee who has the duty to carry out certain labour activities on behalf of his employer
- c. refrain from doing something (**to do not /yapmama borcu**) (debtor has the obligation to refrain from doing something which he otherwise would have been allowed to do) non disclosure clauses )In an employment agreement, employee is obliged to keep confidential information of the employer confidential)

## Law of Obligations (Borçlar Hukuku)

- Obligations are divided into categories according to their origin.
- These three causes of obligation are:
  - 1) **Contract**: the fulfillment of the expectations engendered by binding promise (*Sözleşme*)  
A contract is a voluntary agreement between the parties.
  - 2) **Unjust enrichment** (restitution) (unjust enrichments must be reversed) (*sebebsiz zenginleşme*)
  - 3) **Tort** (the compensation of wrongful harm) (*Haksız fiil*)

## 1) Obligations of contractual origin (Sözleşmeden doğan borç ilişkileri)

- Eg. A promises to sell his computer to B for 1000 TL and B agrees to buy it.

A's obligation: to transfer the ownership of the computer to B.

B's obligation: to pay 1000 TL in return.

This voluntary agreement between them will be enforced by a court if one fails to fulfill his duty.

## 2) Obligations arising from Unjust Enrichment (Sebepsiz zenginleşmeden doğan borç ilişkileri)

TCO Art. 77 'A person who has enriched himself without just cause at the expense of another is obliged to make restitution.'

Eg. A pays B 1000 TL in settlement of a debt. If he subsequently forgets about this payment and makes a second payment for the same debt, B is unjustly enriched. A may demand that B returns the second payment.

Eg. Student S finds student P's copy card on the floor in the law library. S uses the card to make 50 photocopies.

### Conditions of Unjust Enrichment:

- 1) Unjustness (Zenginleşmenin haklı bir sebebinin bulunmaması)
- 2) Enrichment (Zenginleşme)
- 3) Enrichment at the expense of another (impoverishment) (Fakirleşme)
- 4) Causal link between such enrichment and impoverishment (Zenginleşme ve fakirleşme arasında nedensellik bağı)

Debtor: Enriched person (zenginleşen)

Creditor: the other person who impoverished (fakirleşen)

Performance : restitution (iade borcu)

### 3) Obligations arising from Tort (Haksız fiilden doğan borç ilişkileri)

- ✓ A **tort** is a breach of a duty imposed by law which results in **injury to another**. When a breach of a duty causes injury, the party causing the injury is held responsible, and is required **to compensate the injured party**.
- ✓ A person may commit a tortious act and may be under an obligation to pay for **damages**.

*A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.*

Idea behind: those who injure others should take responsibility for their actions!

- ❑ Some torts may also be **crimes**, such as assault, battery, wrongful death, fraud, theft and trespass on property and also form the basis for a lawsuit for damages by the injured party. This is in scope of criminal law but not in law of obligations!
- ❑ **Civil vs. Criminal Wrong**: A tort is a "civil" wrong, punishable by compensating, or paying damages to, the injured party, rather than a "criminal" wrong, punishable by paying a fine to the government and/or being imprisoned.

### What is a Tort?

- ✓ Eg. You drive your car negligently and knocked me down. You have committed the tort of negligence. Harm has wrongfully been inflicted upon me and you must compensate me.
- ✓ The aim of the award of compensation is not to fulfill my expectations. It is to restore me to the position which I was in before the accident occurred.
- ✓ Tort is not a contractual relationship between the obligor and the obligee!
- ✓ **Tort vs. Contract**: A tort, with a few well-defined exceptions, does **not** arise from a breach of contract or other agreement. Therefore, the duty that is violated by the *tortfeasor* (i.e., the "wrongdoer") must exist as a matter of law, not as a consequence of any agreement between the tortfeasor and the injured party.

## What is a Tort?

*Art. 49 TCC Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.*

*Kusurlu ve hukuka aykırı bir fiille başkasına zarar veren, bu zararı gidermekle yükümlüdür.*

### **Tort Liability:**

- ❖ Obligee: Injured Party
- ❖ Obligor: Tortfeasor (person who commits the tort)
- ❖ Performance: Compensation/ recovery of the damage

## Tort Requirements:

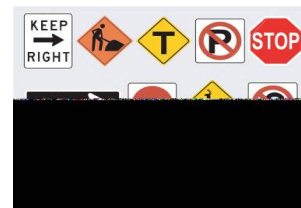
- 1) Act against law
- 2) Damage
- 3) Causation
- 4) Negligence

## Tort Requirements: 1) Act against Law

- a breach of a duty that the law imposes on persons
- misconduct attributable to the defendant (ACT or OMISSION/INACTION)
- The violation of a legal or moral obligation A person who, wilfully or negligently, unlawfully **injures the life, body, health, freedom, property or other right of another** is bound to compensate him for any damage arising therefrom.

Eg. A lifeguard at a municipal pool has the duty to save life (It is possible to commit a tort by silence and inaction)

Eg: If you drive a car, you have a duty to obey the rules of the road



## Tort Requirements: 1) Act against Law

### Excuses

There are several different defenses in tort law which may excuse a tortfeasor of wrongdoing and prevent him from being held liable for damages.

**In these occasions, the unlawful behaviour/act is permitted (privileged/ not unlawful)**

- 1) self-defence
- 2) necessity
- 3) legitimate use of force (public officers' immunity)
- 4) consent of the injured party
- 5) superior private or public interest

## Tort Requirements: 1) Act against Law Excuses

### 1) self-defence

Where a person has acted in self-defence, he is not liable to pay compensation for loss or damage caused to the person or property of the aggressor.

### 2) necessity

A person who damages the property of another in order to protect himself or another person against imminent damage or danger must pay damages at the court's discretion.

### 3) legitimate use of force

A person who uses force to protect his rights is not liable in damages if in the circumstances the assistance of the authorities could not have been obtained in good time and such use of force was the only means of preventing the loss of his rights or a significant impairment of his ability to exercise them.

### 4) Consent of the injured party

When a tort is committed, meaning that a defendant's actions interfered with the plaintiff's person or property, a plaintiff's consent will excuse the defendant of the wrongdoing.

### 5) superior private or public interest

A person's actions can sometimes be justified without the injured parties consent in the case of an emergency. A doctor has the right to offer medical attention to a patient who has been injured in an accident, without consent, under certain conditions.

## Tort Requirements: 1) Act against Law Excuses: Self-defence

**Privilege of Self Defence:** Tort law recognizes the personal right to defend oneself when attacked using reasonable force. This defense is used by a defendant to justify his actions. When a person is attacked or threatened he has the right to cause harm to the attacker in order to protect himself under certain conditions.

Self defence is only lawful if certain conditions are fulfilled:

- 1) Defence presupposes and attack directed to a person or a property.
- 2) Defence must be necessary to avoid actual and imminent harm
- 3) The person attacked must act within the intention of defending himself or another.
- 4) The force used in defence must be proportional to the attack. Using of excessive force is not permitted.

✓ Revenge does not qualify as self defense !

## Tort Requirements: 1) Act against Law

### Excuses: Necessity

#### Privilege of necessity:

An act of necessity is an injury inflicted on the person or property of another in order to remove an actual or imminent danger threatening either the person or the property of the actor himself or of a third party. The danger may be caused by man, beast or thing.

- ✓The damage done to a third party, but not to the author of an unlawful attack !

## Tort Requirements: 1) Act against Law

### Excuses: legitimate use of force

#### **Privilege of legitimate use of force**

Police officers are generally allowed to use whatever force is necessary to make an arrest or defend themselves.



## Tort Requirements: 1) Act against Law Excuses: Consent

If the victim of the tortious act agrees to the tortfeasors actions, provided that the victim understands (or reasonably should understand) the consequences of tortfeasors behaviour.

Eg. A persons agreement to allow something to happen (like surgery)

Eg. Wrestling, boxing



## Tort Requirements: 2) Damage

The basic idea of damages is fairly simple: All injuries can be reduced to a monetary amount.

Damage means material or immaterial harm to a legally protected interest and includes pecuniary and non-pecuniary damage.

**Burden of Proof:** A person claiming damages must prove that loss or damage occurred.

### 1) **Material Damage (pecuniary damages)**

- Personal injury
- Property damage etc.
- Pecuniary damage corresponds to the difference between the actual state of the victim's patrimony and the state it would have been in if the tort had not occurred. Traditionally, that consists of actual loss and loss of gains which someone is entitled to expect in the normal course of events (compensation for loss of anticipated gains eg. in case of loss of the ability to work)

Damage  
(materi)  
(materi)

1) pecuniary  
2) non-pecuniary

## Tort Requirements: 2) Damage

II) **Immaterial Damage (non-pecuniary damages):** Compensation for/recovery of pain and suffering – value of the mental anguish the injured has suffered and will continue to suffer

- ✓ Non-pecuniary damage relates to the pain and suffering or other mental distress which arise as a result of the injury suffered.

→ need of law

## Tort Requirements: 3) Causal Relation (Causation)

- Causal relationship between conduct (unlawful behaviour) and result (causal link between the damage and the act or circumstance upon which the liability is based)
- There are two aspects of causation that must be considered: cause in fact and proximate cause.
  - 1) Cause in fact: The cause without which the event could not have occurred
  - 2) Proximate cause: A cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor
    - Also known as legal cause

Foreseeability: A defendant is liable only for consequences of his negligence that were reasonably foreseeable when he acted.

**Burden of proof**: The injured person has to prove the causal link between his or her damage and the behaviour.

## Tort Requirements: 3) Causal Relation (Causation)

### How to limit the defendant's liability as to the lack of causal link ?

Example: A hits B in the leg with a golf club. B's leg would not have been injured if A had not hit him in the leg with a golf club.

B took an ambulance after the accident to go to the hospital.  
Ambulance made a traffic accident and B injured seriously.

Is A liable for the injury in the ambulance?

According to the ordinary course of events and the general experience of life, is the cause was very likely to generate the second result?

## Tort requirements: 4) Negligence

- If A fires a gun in the middle of the Desert, he intends to fire the gun, but when the bullet hits B, who is in the desert without A's knowledge, A does not intend that result. A has not committed a tort against B.
- A throws a bomb into B's office in order to kill B. A knows that C is in B's office and that the bomb is substantially certain to injure C, although A has no desire to do so. Has A committed a tort against C?

### Wilfully OR Negligently? (intentional or accidental ?)

**Negligence** – the tortfeasor does not intend for the bad consequences to result. **Negligent torts:** Negligent torts, are torts that are caused by the negligence of the tortfeasor, or person who commits the tort.

**Intentional torts:** Intentional torts, are torts caused intentionally by the tortfeasor. Intent, as used in tort law, does not require a hostile or evil motive. Rather, it means that (1) the actor desires to cause the consequences of his act, or that (2) he believes that the consequences are substantially certain to result from the act.

## Tort Requirements: 4) Negligence

- Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.
- Must take reasonable care to avoid acts or omissions that you can reasonably foresee would be likely to injure your neighbour
- "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

## Tort: Statute of Limitations (Zamanaşımı)

- TCO Art. 72- A claim for damages or satisfaction becomes time-barred **two years** from the date on which the injured party became aware of the loss or damage and of the identity of the person liable for it but in any event **ten years** after the date on which the loss or damage was caused.
- **TBK MADDE 72-** Tazminat istemi, zarar görenin zararı ve tazminat yükümlüsünü **öğrendiği tarihten başlayarak iki yılın** ve **her hâlde fiilin işlendiği tarihten başlayarak on yılın** geçmesiyle zamanaşımına uğrar.

2 yıl olayın  
olduğundan itibaren

10 yıl geçmez  
Zaman aşımına  
uğur

## Haksız Fiilden Doğan Borç

BK m. 49 '*Kusurlu ve hukuka aykırı bir fiille başkasına zarar veren, bu zararı gidermekle yükümlüdür.*'

Haksız fiil sorumluluğu, bir kimsenin hukuka aykırı bir fiil ile başka bir kimseye verdiği zararı tazmin etme borcudur.

**Zarar veren (fail/BORÇLU) ve zarar gören (mağdur/ALACAKLI) arasındaki ilişkiden doğan tazminat borcu (EDİM/BORCUN KONUSU)**

Unsurları:

1. Hukuka aykırı fiil
2. Kusur
3. Zarar
4. İlliyet (nedensellik) bağı