

Private law: Tort law

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What is tort law?

- The part of private law concerned with non-contractual liability
 - Prohibition of harming others
 - Which norm? Which interest is being harmed?
- Aims:
 - Compensation
 - Prevention
- Different kinds of liability
 - Fault liability
 - Strict liability
 - Vicarious liability

Contract law

Tort law

Property law



Tort law analysis

- Damage
- Who do you want to hold liable?
- On what ground?

Liability in civil law



Civil law: general fault liability

- In general at least three elements
 1. Fault
 2. Causality
 3. Damage

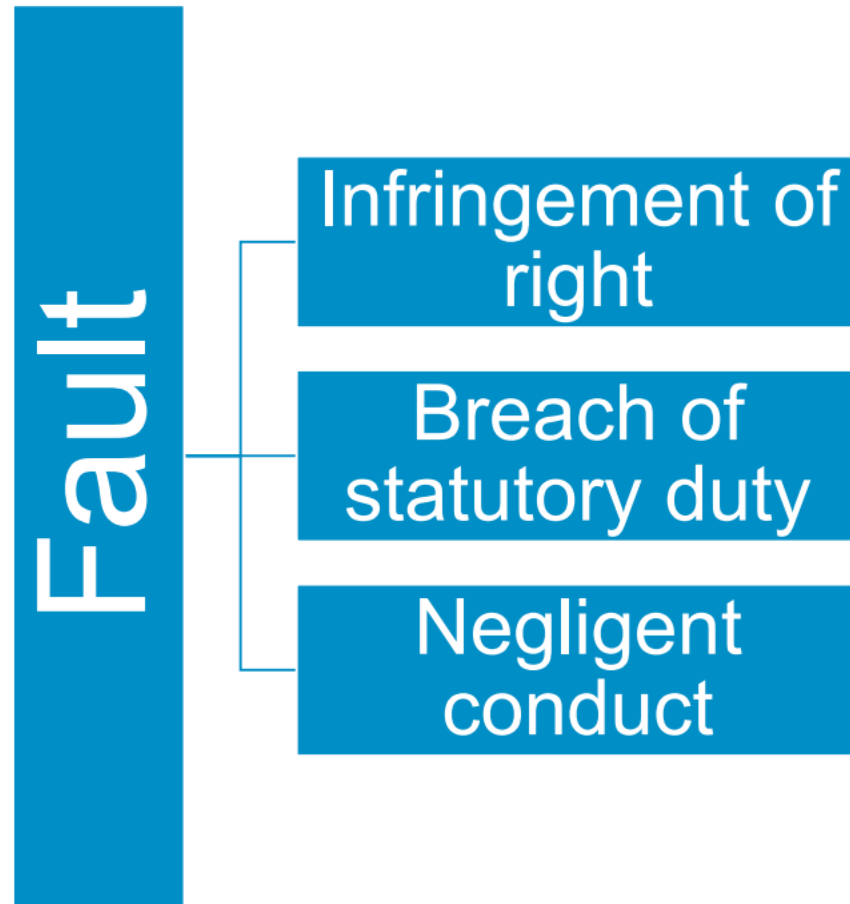
1. Fault

E.g. Art. 6:162 section 2 Dutch Civil Code

“The following acts are unlawful: the infringement of a right, violation of a statutory duty or a rule of unwritten law pertaining to proper social conduct.”

- Infringement of right
- Breach of statutory duty/rule
- Violation of a rule of unwritten law pertaining to proper social conduct
 - Open norm of negligence (compare with negligence in common law)

Possible categorization of fault (in Dutch law)



Negligence in civil law

- Open norm of fault-based liability
- Acts and pure omissions.
- Take into account other's interests
 - No undue risks
 - Try to avoid harming other's interest – but not completely prohibited.

Contents of an open norm

- Common knowledge (**reasonable man**)
- Morality
- Case law
- Experience
- Domain-knowledge
 - Business rules ('soft law')
- When in doubt: call an expert.

2. Causality



Factual Causation
for **establishing** a causal connection

Legal Causation
for **limiting** the extent of liability



2. Causality: Factual and legal causation

- The damage is a consequence of the act that forms the basis of the action in tort
- *Conditio sine qua non* (“but for” test) – **Factual causation**
- Extra requirement depending on the jurisdiction (**Legal causation**)
 - Direct and immediate consequence; or
 - Attributability of damage to the fault; or
 - Remoteness or foreseeability; or
 - Etc.
- Problem of proof

3. Damage

- Harm to some interest
 - Material damage: physical injury, property damage...
 - Immaterial damage: violation of privacy, slander....
 - Common law: punitive element
- Not all kinds of damage are always compensated
- Problem of proof

- **Common law: tort law**

Common law: tort law

- Several torts with specific names
 - Trespass, negligence, fraud, etc.
- For every kind of tort, there is a different regime
 - Torts can be broadly perceived as more detailed categorization of fault
 - Torts mostly do include three basic requirements (fault, causality, damage)
- Focus on negligence

Negligence in the common law

- Three requirements for negligence
 - Duty of care (reasonable man test)
 - Breach of that duty
 - Harm as a consequence of the breach
- Pure omissions
- Causality and harm is also required!

Damage and causality

- Punitive element
- Pure economic loss in cases of negligence
- “Data Breach Negligence Claims Not Recognized in Pennsylvania”
Dittman v UPMC
- Also in common law systems more than c.s.q.n: also remoteness/foreseeability.

Overview

	Fault	Damage	Causality
Civil law	Infringement of right OR	Harm/Loss	C.s.q.n. AND Attributability/remoteness/foreseeability
	Statutory duty OR		
	Negligence		
Common law	Other torts	N.B. Be aware of pure economic loss	

Defences and remedies

- Defences
 - Consent
 - Contributory negligence
 - Prescription
- Remedies
 - Award of damages
 - Injunction
 - order

Other kinds of liability

- Strict liability
- Liability based on duty of care of the guardian
 - Actual possibility to prevent/lower risk damage
 - Profit
- Vicarious liability
- Liability for objects

Vicarious liability

Torts committed by other persons

- Vicarious liability for employees
 - Employees, also in a similar position
 - Torts: some connection to the employment
 - Employer bears the damages



Strict liability for objects

- Mostly for animals and motorized vehicles
 - Liability for the keeper/owner
 - Ratio to protect the one who suffered the damage.
- Product liability
 - Liability of the manufacturer
 - Tangible objects

- Autonomous vehicles?
- Algorithms?

Torts connected to data

- Defamation
- IP infringement → statutory law (IP-law)
- Destroying/interfering with data?
 - Criminal law prohibitions!
- Privacy violation → statutory law (privacy law)
- Security breach → insufficient protection?

ISP liability

- Digital Services Act and Digital Single Market Directive
- Types of ISP
- Exemption of liability in specific circumstances
- If exemption does not apply, liability is determined by national law (ie. negligence, defamation, IP infringement)

Developments

- Upload filtering
 - Freedom of expression
 - Digital Single Market Copyright Directive (DSM Directive)

Case

- **Case (10 points total)**
- John is suffering from rheumatism in the early phases. His general practitioner has treated him (with the help of other professionals) since he encountered the first symptoms.
- On February 1st, 2020, his general practitioner was the victim of a hack and the medical information of its patients were leaked.
- When John applies for a new job, the company tells him they do not want to hire him because of his disease and the financial risks that would bear in it for them. John is devastated, as this was his dream job. Angry as he is, he wants to sue his general practitioner for damages due to not getting the job.

Questions

- a. Can John claim damages arising from the loss of not getting the job from his general practitioner? Take into account issues that can arise between different jurisdictions.

His practitioner tells him that it is not certain that his not getting the job was caused by the security breach, since he also talks about his disease on his own (public) Instagram page.

- b. Explain what defence the general practitioner raises

Answer

- *This is a tort law question there are differences between common law and civil law jurisdictions*
 - *Common law: negligence*
 - *Civil law: there are 3 requirements:*
 - *Fault: negligence (no sufficient security protection)*
 - *Causality: it must be sufficiently close AND a condicio sine qua non*
 - *Damage: the loss of salary is regarded as pure economic loss. In common law jurisdictions this is not awarded. However, in civil law this could be.*
- *Conclusion: it would not be likely to claim damages because of the pure economic loss, but could be the case in civil law jurisdictions.*

Additional question:

- b. This seems to be his own fault, contributory negligence. Or possibly: lack of causal connection.*