

Prof. Dr. Alexander Trunk

Vorlesung / Course

Einführung in die Rechtsvergleichung
Introduction to Comparative Law

Winter term (WS) 2015-2016

<http://www.eastlaw.uni-kiel.de>

20.10.2015: Basic questions and structures of comparative law
27.10.2015 Basic structures of comparative law (contd.)
03.11.2015: Methods of comparative law
10.11.2015: Methods of comp. law (cont'd.). Legal families (overview)
17.11.2015: German legal family (deutscher Rechtskreis)
24.11.2015: French legal family
01.12.2015: Anglo-American legal family
08.12.2015: Exercise (voluntary test)
15.12.2015: The legal systems in Northern and Eastern Europe
12.01.2016: Legal systems in Asia. Religious laws (overview)
19.01.2016: Islamic law
26.01.2016: Contracts law
02.02.2016: Torts law
09.02.2016: Property law (Sachenrecht)
16.02.2016: Civil procedure and arbitration

Steps of comparison

- 1) Formulate the research question
- 2) Find applicable legal norms or jurisprudence.
Quote exactly!
- 3) Common elements
- 4) Differences
- 5) Which are the underlying (possibly divergent) value judgments?
- 6) Make your own evaluation
- 7) Consequences, e.g. proposal de lege ferenda

Comparative tort(s) law

- What is a tort? (notion)
- Where are torts regulated? (sources, system)
- What are the prerequisites of tortious liability?
- Which are the legal consequences of a tort?





Illustration of the "War" banner on the globe, showing the chaos and confusion of the time.

Law of torts

Starter case: Cass. Civ. 8.5.1970, Bull.Civ. II Nr.122, Allamigeon Frères c Lafarge

Construction firm Lafarge damages during works a gas pipe, which interrupts the production Allamigeon Frères.

→ C.cass awards damages, as damages are „conséquence directe“ of the detrimental act.

→ **Topic of comparison of jurisprudence:** e.g. Germany: Stromkabelfälle, England: Spartan Steel and Alloy Ltd v Martin and Co. (Contractors) Ltd. [1973] Q.B. 27 (C.A.).

Cour de Cassation, Chambre civile 2, du 8 mai 1970, 69-11.446, Publié au bulletin des arrêts de la Cour de Cassation Chambre civile 2 N. 160 P. 122

SUR LE MOYEN UNIQUE : ATTENDU QUE, SELON L'ARRET INFIRMATIF ATTAQUE, UNE CANALISATION DE LA COMPAGNIE FRANCAISE DU METHANE, ALIMENTANT L'USINE DE LA **SOCIETE ALLAMIGEON DE GAZON FRERES ET LACROIX**, FUT ROMPUE PAR UN BULL-DOZER, AU COURS DE TRAVAUX EFFECTUES **PAR LAFARGE, ENTREPRENEUR**;

QU'IL EN RESULTA UN **PREJUDICE** POUR CETTE SOCIETE, CONTRAINTE **D'INTERROMPRE SON ACTIVITE**;

QU'ELLE A ASSIGNE LAFARGE EN REPARATION DE SES DOMMAGES;

ATTENDU QU'IL EST FAIT GRIEF A LA COUR D'APPEL, QUI A DECLARE LAFARGE RESPONSABLE, DE N'AVOIR PAS TIRE LES CONSEQUENCES JURIDIQUES DE SES CONSTATATIONS, DESQUELLES RESULTAIT UN **PREJUDICE INDIRECT** NE POUVANT DONNER LIEU A REPARATION;

MAIS ATTENDU QU'APRES AVOIR RELEVE QUE LES FAITS NE FAISAIENT L'OBJET D'AUCUNE CONTESTATION ET QUE L'ACTION TROUVAIT SON FONDEMENT DANS LES DISPOSITIONS DES **ARTICLES 1382 ET 1384 DU CODE CIVIL**, L'ARRET ENONCE QUE LE PREJUDICE SUBI, PAR LA SOCIETE ALLEMIGEON FRERES ET LACROIX, APPARAISSAIT COMME UNE **CONSEQUENCE DIRECTE** DE LA RUPTURE DE LA CANALISATION PUISQUE CE PREJUDICE AVAIT ENTRAINE L'INTERRUPTION DE L'ACTIVITE DE L'USINE, QU'IL S'AGISSAIT BIEN LA D'UN DOMMAGE EN RELATION DIRECTE AVEC LE FAIT DOMMAGEABLE;

ATTENDU QU'EN STATUANT COMME ELLE L'A FAIT LA COUR D'APPEL A, SANS ENCOURIR LES CRITIQUES DU POURVOI, DONNE UNE BASE LEGALE A SA DECISION;

PAR CES MOTIFS : REJETTE LE POURVOI FORME CONTRE L'ARRET RENDU LE 15 JANVIER 1969 PAR LA COUR D'APPEL DE BORDEAUX

Torts law (overview)

- **System of the law of torts and damages (in a historic and comparative perspective)**
 - Torts law – criminal law
 - Separate torts – general clause (deliktische Generalklausel)
- **Legal sources.** *Example: art. 1382 C.civ. (US) Restatement of the Law on Torts (2nd and 3rd).*
International and European harmonization? **DCFR Book VI Non-Contractual liability arising out of damage caused to another**

Torts law: some important issues

- **General clause or separate torts?**

Common law torts: Trespass, conversion, fraud, negligence, defamation, etc.

- **Relationship between tort and contractual liability**

- **Strict liability (Gefährdungshaftung)**

- **Proof of causality**

- **Liability for auxiliary persons (vicarious liability)**

- **Example for synopsis:**

General clause or separate torts?

| D | CH | F | England | USA | China | RF |
|---------------------------------|--|---|---------------|---|--|--|
| 3 „small“ general clauses | General clause, but practice similar to D | Gen. clause plus some specific rules | Sep. torts | Sep. torts. <i>Cf.</i> <i>Restatement</i> | General clause and sep. torts. <i>Torts Act.</i> <i>Detailed!</i> | General clause and sep. torts |

DCFR?

General clause and sep. torts, detailed and logically structured, but complicated system

Legal Sources

German law

Swiss law

French law

English law

US law

Chinese Law

Russian law

Compare with DCFR

German Civil Code (BGB)

Title 27 Torts Section 823 Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Section 826 Intentional damage contrary to public policy

A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.

Swiss Code of Obligations

Division One: General Provisions - Title One: Creation of Obligations

Section One: Obligations arising by Contract

Section Two: Obligations in Tort

Art.41

1 Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.

2 A person who wilfully causes loss or damage to another in an immoral manner is likewise obliged to provide compensation.

Legal sources (1)

French Civil Code

BOOK III: OF THE VARIOUS WAYS HOW OWNERSHIP IS ACQUIRED Articles 711 to 2283

TITLE IV: OF UNDERTAKINGS FORMED WITHOUT AN AGREEMENT Articles 1371 to 1370

CHAPTER II: Of Intentional and Unintentional Wrongs [Of Torts] Articles 1382 to 1386

Art. 1382: Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.

Art. 1383

Everyone is liable for the damage he causes not only by his **intentional** act, but also by his **negligent** conduct or by his imprudence.

Art. 1384

A person is liable not only for the damages he causes by his own act, but also for that which is caused by the **acts of persons for whom he is responsible**, or by **things which are in his custody**.

TITLE IV bis OF LIABILITY FOR DEFECTIVE PRODUCTS Articles 1386-1 to 1386-18

English tort law

From Wikipedia, the free encyclopedia

English tort law concerns [civil wrongs](#), as distinguished from [criminal wrongs](#), in the [law of England and Wales](#). Some wrongs are the concern of the criminal case. A tort is not enforced by the police, and it is a civil action taken by one [citizen](#) against another, and tried in a court in front of a [judge](#). *English* for "injury", from Anglo-French, from Medieval Latin *tortum*, from [Latin](#), neuter of *tortus* "twisted", from past participle of *torquēre*.

Contents [hide]

- History
- Negligence
 - Duty of care
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 - Psychiatric injury
 - Pure economic loss
 - Public bodies
 - Omissions and third parties
- Specific torts
 - Product liability
 - Occupiers' Liability
 - Other statutory torts
 - Nuisance
 - Rylands v Fletcher
 - Trespass
 - Defamation
 - Intentional torts
 - Economic torts and competition
- Vicarious liability

action. The tort of negligence is however increasing in importance over other types of tort, providing a wide scope of protection, especially since *Donoghue v Stevenson* under negligence a **duty of care** must be established owed to a group of persons to which the victim belongs, a nebulous concept into which many other categories

Negligence [edit]

See also: *Negligence and Professional negligence*



A decomposed snail in Scotland was the humble beginning of the modern law of negligence

Liability for negligence arises when one person breaches a duty of care owed to another. The landmark case of *Donoghue v Stevenson* is the starting point for defining the current scope of liability. In this case, Ms Donoghue, the **claimant**, consumed part of a drink containing a decomposed snail in a public house in **Paisley, Scotland**. The snail was not visible, as the bottle of **ginger beer** in which it was contained was **opaque**. Neither she nor the person who purchased the drink for Ms Donoghue, nor the shopkeeper, were aware of the snail's presence. Ms Donoghue could not sue the shopkeeper under contract or under consumer protection legislation as the drink was purchased by her friend, so she pursued Mr Stevenson instead, the manufacturer of the drink.

The members of the **House of Lords** agreed that Mrs. Donoghue had a valid claim, but disagreed as to why such a claim should exist. Lord Atkin, as above, thought this should be treated as a new product liability case. **Lord Atkin** argued that the law should recognise a unifying principle of a duty of reasonable care to our neighbour. He quoted the **Bible** in support of his argument, specifically the general, biblical principle that

neighbour."

"The liability for negligence... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay... The rule that you are not to injure your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."^[3]

Thus, in the world of law, he created the doctrine that we should not harm our neighbours. The elements of negligence are:

1. A **duty of care** (see *Donoghue v Stevenson*)
2. **Breach of that duty** (see *Nettleship v Weston*)
3. **Breach causing harm in fact** (see *Smith v Leech Brain & Co.*)
4. The harm must be not too **remote** a consequence of the breach (see *The Wagon Mound (No. 2)*)

Duty of care [edit]

Main article: *Duty of care in English law*

The establishment of a duty of care is, like negligence itself, broken up into further elements, a three-step test (or in some cases more). *Donoghue v Stevenson* laid the groundwork for subsequent developments, and from the words of Lord Atkin's speech, he can be seen to refer to firstly, the concept of reasonable foreseeability of harm; secondly, the relationship of proximity; and thirdly, and more loosely, it being fair, just and reasonable to impose liability on the defendant for his careless actions. This three step test was further refined in *Caparo v Dickman*.^[4] In this somewhat complicated case, a company called Caparo took over another company, by buying up a majority of its shares. It did this because the target was financially sound. The audit was prepared by a group of accountants (Dickman) and was intended for shareholders, not outsiders. Once Caparo owned

Legal sources (2)

Restatement (Second) of Torts (1965)

Division 1 Intentional Harms to Persons, Land, and Chattels

Division 2 Negligence

§ 281 Statement of the Elements of a Cause of Action for Negligence

The actor is liable for an invasion of an interest of another, if:

- (a) the interest invaded is protected against unintentional invasion, and
- (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
- (c) the actor's conduct is a legal cause of the invasion, and
- (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

Division 3 Strict Liability

Division 6A Privacy

...

Tort Law of the People's Republic of China of 2009

Chapter I General Provisions

Chapter II Constituting Liability and Methods of Assuming Liability

Chapter III Circumstances to Waive Liability and Mitigate Liability

Chapter IV Special Provisions on Tortfeasors

Chapter V Product Liability

Chapter VI Liability for Motor Vehicle Traffic Accident

Chapter VII Liability for Medical Malpractice

Chapter VIII Liability for Environmental Pollution

Chapter IX Liability for Ultrahazardous Activity

Chapter X Liability for Harm Caused by Domestic Animal

Chapter XI Liability for Harm Caused by Object

Chapter XII Supplementary Provision

Article 2 Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law.

“Civil rights and interests” used in this Law shall **include** the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, **and other personal and property rights and interests.**

Chapter II Constituting Liability and Methods of Assuming Liability

Article 6 One who is at fault for infringement upon a civil right or interest of another person shall be subject to the tort liability.

Russian Civil Code Part 2

Chapter 59. Liabilities for Damage

1. General Provisions in the Redress of Injury

Article 1064. General Grounds for Liability for Damage

1. The injury inflicted on the personality or property of an individual, and also the damage done to the property of a legal entity shall be subject to full compensation by the person who inflicted the damage. ...

The law or the contract may institute the obligation of the inflictor of injury to repay to the victims compensation over and above the compensation of damage.

2. A person who has caused harm shall be released from the redress of injury, if he proves that injury was caused no through his fault. The law may also provide for the redress of injury in the absence of fault of the inflictor of injury.

Article 1079. Liability for the Injury Inflicted by the Activity with Increased Hazard for People Around

1. Legal entities and individuals whose activity is associated with increased hazard for people around (the use of transport vehicles, mechanisms, high voltage electric power, atomic power, explosives, potent poisons, etc.; building and other related activity, etc.) shall be obliged to redress the injury inflicted by a source of special danger, unless they prove that injury has been inflicted in consequence of force majeure or the intent of the injured person....

Russian Civil Code Part 2

Chapter 59. Liabilities for Damage

1. General Provisions in the Redress of Injury

2. The Redress of the Injury Inflicted on the Life or Health of an Individual

Article 1084. The Redress of the Injury Inflicted on the Life or Health of an Individual During the Discharge of Contractual or Other Obligations

Injury inflicted on the life or health of an individual during the discharge of contractual obligations, and also during the discharge of the military duty, during the service in the militia and during the discharge of other appropriate duties shall be redressed according to the rules, provided for by this Chapter, **unless the law or the contract provide for a higher degree of responsibility.**

3. The Redress of the Injury Inflicted by Defects in Goods, Works or Services

Article 1095. The Grounds for the Redress of Injury Inflicted by Defects in Goods, Works and Services

Injury inflicted on the life, health or assets of an individual or damage done to the property of a legal entity in consequence of constructive, recipe or other defects of goods, works or services, and also in consequence of untrustworthy or insufficient information about goods (works, services) shall be subject to redress by the seller or the manufacturer of goods, by the person who has fulfilled the work or rendered the service (executor), **regardless of their fault and of the fact whether the victim has been in contractual relations with them or not.**

DCFR Book VI Non-contractual liability arising out of damage caused to another

Chapter 1: Fundamental provisions

VI. – 1:101: Basic rule

(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.

(2) Where a person has **not** caused legally relevant damage **intentionally or negligently** that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.

VI. – 2:101: Meaning of legally relevant damage

(1) Loss, whether economic or non-economic, or injury is legally relevant damage if:

- (a) one of the following rules of this Chapter so provides;
- (b) the loss or injury results from a violation of a right otherwise conferred by the law; or
- (c) the loss or injury results from a violation of an **interest worthy of legal protection**.

(2) In any case covered only by sub-paragraphs(b) or (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be **fair and reasonable** for there to be a right to reparation or prevention ...

Section 2: Particular instances of legally relevant damage

VI. – 2:201: Personal injury and consequential loss

(1) Loss caused to a natural person as a result of injury to his or her body or health and the injury as such are legally relevant damage.

Vicarious liability: The classic statement of the law until the recent cases was the formulation in *Salmond, Law of Torts* : a wrongful act is deemed to be done in the course of the employment:

If it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. However, frequently when citing the principle of vicarious of liability practitioners stop there.

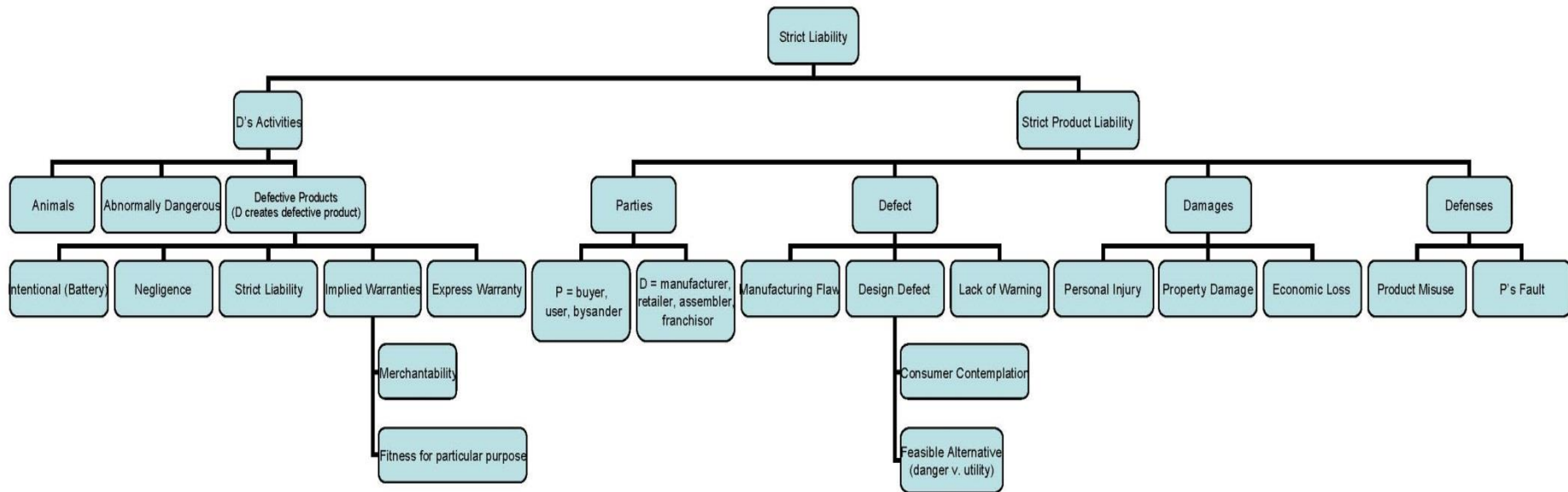
Whereas, the whole statement by Salmond needs to be considered: he continued:

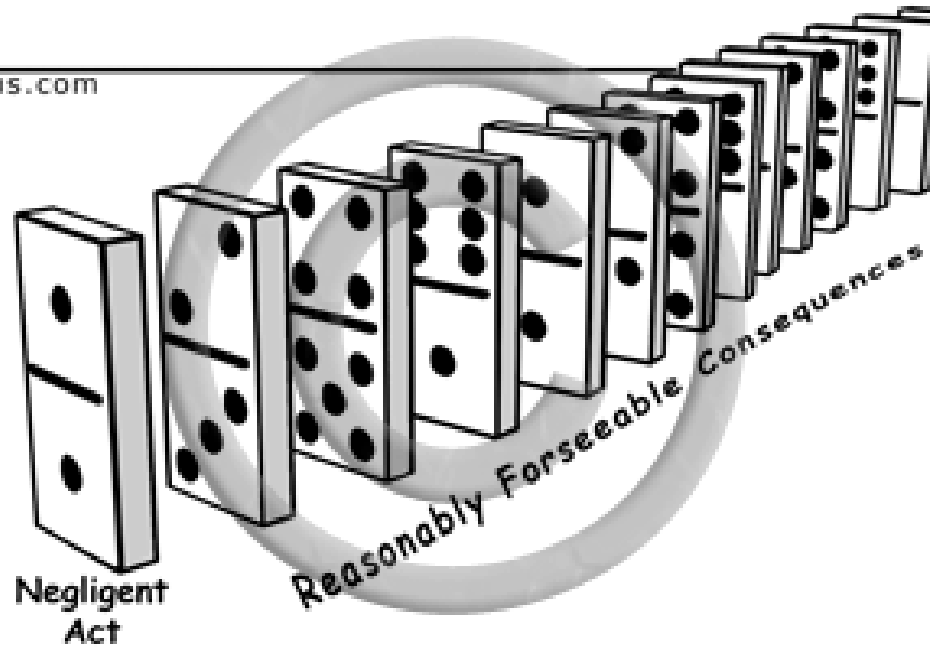
It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency and not one of service at all. But a master, as opposed to the employer of an independent contractor is liable even for acts which he has not authorised, provided they are so closely connected with the acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them.

Strict Liability

§ 519 Restatement of Law (Torts) 2d (1965)

(1) One who carries on an abnormally dangerous activity is subject to liability, although he has exercised the utmost care to prevent such harm.





"Do you have any picture books that could help a child understand tort reform?"

