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RECHT BERATUNG WEITERBILDUNG

Introduction to US business law 8. Contracts/Torts

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news

- > Court of Appeal decision yesterday that hanging 10 Commandments in public school is ok
- > Hearing of new chair of Federal Reserve Kevin Warsh
- > Iran war: indefinite extension of the ceasefire
- > Trump: approval rate historical low
- > Third „minister“ had to go (Secretary of Labor)
- > Public dispute with the Pope
- > Judge halts aboveground construction of West Wing (Senate approval)

Repetition – Last week (1)

Contracts

- > State law/UCC
- > Similar civil law
- > Main difference: consideration (agreement – contract)
- > Main relevance: time cap between concluding agreement – delivering)
- > Each party gives something in return (not past) of value (not equal value)
- > Some form of limitation, binding, no consideration if no limitation (f.e. not smoking)
- > Exceptions:
 - > Primmisory estoppel (common law, unfair)
 - > Unfair enrichment (= civil law)

Example 1

Expl. (Bonfield)

- > Prof. Banks promises to give you an A on your exam
- > Prof. Banks promises to you an A if you always attend the class
- > If you get a D although attending the class can you sue Prof. Banks?
- > Only in second expl. is consideration
 - > More serious commitment
 - > Each side has undertaken to act in exchange

Exemple 2

- > *Case: Eastwood v. Kenyon*
 - > Guardian raised loan to educate young girl to improve her marriage prospects
 - > After marriage, husband promised to pay off loan
 - > Guardian could not enforce because past.

Exemple 3

Chappell & Co v. Nestle (1)

- > House of Lords (1960)
- > Copyright case
- > Nestle advertised: for some money and 3 chocolate wrappers they would send a copy of a record „Rockin Shoes“
- > Owner of copyright entitled to 6.25% of selling price
 - > He argued value has to be calculated on money plus value of wrappers
 - > Nestle said: wrappers have no value

Chappell & Co v. Nestle (2)

- > House of Lords held that wrappers were part of consideration
- > Consideration has two parts:
 - > Buying chocolate bars
 - > Paying money
 - > Both are of value to Nestle
- > Some dissenters
 - > (AC 87 House of Lords - 1960)

IX. Carlill v. Carbolic Smoke Ball Company (1892) (1)

> <http://www.youtube.com/watch?v=vYRcKQGadRo>

IX. Carlill v. Carbolic Smoke Ball Company (1892) (2)

- > English decision
- > Carbolic smoke ball
 - > In advertisement buyer would guaranteed that it works against influenza, if not reward £ 100
- > Is this a contract?
- > Court said (in inventive ways) YES, all essential elements are there, including offer, acceptance, consideration and intention to create legal relations

IX. Carlill v. Carbolic Smoke Ball Company (1892) (3)

Court of Appeal

- > Fully binding contract – all elements
 - > Advert unilateral offer to all
 - > Satisfying conditions for using ball = acceptance
 - > Purchasing and using ball = good consideration, benefit to Carbolic
 - > Claim of £1000 deposit showed serious intention to be legally bound

Torts

(Haftpflichtrecht)

Torts – definition (I)

- > Tort = civil wrong which can be redressed by awarding damages
 - > As difference to criminal wrong
 - > Something that should not be done
- > Tort = civil wrong recognized by law as ground for a lawsuit
 - > Damage compensation
 - > punitive damages possible
- > Torts include
 - > injuries to persons (medical malpractice)
 - > injuries to property (trespasses)
 - > injuries to reputation

Torts – definition (II)

> Recognised damages

- > Loss of earnings capacity, pain and suffering, reasonable medical expenses
- > Present and future expected losses

> Intentional/negligence tort

- > Intent = Deliberate and purposeful state of mind or knowledge with substantial certainty that consequences would result from that act
- > Distinguished from negligence, which requires a foreseeable risk which a reasonable person would avoid

Torts Law = state law

- > Created primarily through judges (common law) but more recently also by legislatures (statutory law)
 - > Supremacy of statutory law over common law
- > Restatement of Torts (2nd)
 - > Influential guide used by many judges
 - > Prepared by American Law Institute
 - > It summarizes the general principles of common law
 - > Aim: some kind of harmonization
 - > Section 402A of this Restatement, discussing strict liability for defective products, is by far the most widely cited section of any Restatement



Elements of torts law

3 elements must be established in a tort action

- > Plaintiff must establish that defendant was under a **legal duty to act** in particular fashion (standard of care)
- > Plaintiff must demonstrate that defendant **breached this duty**
- > Plaintiff must prove that he/she suffered **injury** or loss as a direct result of defendant's breach of duty
 - > **causation**

Three general categories

- > Intentional torts
 - > Know or should have known
 - > Ex: Intentionally hitting a person
- > Negligent torts
 - > Actions were unreasonably unsafe
 - > Ex: Causing an accident by failing to obey traffic rules
- > Strict liability
 - > Do not depend on degree of carefulness
 - > Requirement to make safe
 - > Ex: Producing dangerous goods (nuclear power)
 - > animals / ultra-hazardous activities

Intentional torts (I)

- > Actions that are intentional and voluntary and are made with knowledge and intent to harm somebody

- > Prima facie case
 - > Act (voluntary)
 - > Intent of consequences
 - > Causation
 - > Damages

Intentional torts (II)

- > Intentional torts include:
 - > Battery (Körperverletzung)
 - > Assault (Drohung)
 - > False imprisonment (Freiheitsberaubung)
 - > Intentional infliction of emotional distress
 - > Malicious prosecution
 - > Abuse of process
 - > Trespass to land (Grundstückbetretung)
 - > Trespass to chattels (Besitzentziehung)
 - > Conversion (Zerstörung von Eigentum/Besitz)

Intentional torts - Defense

- > Mistake (Irrtum)
- > Self-defense
- > Defense of others
- > Defence of property and chattel
- > Necessity
- > Authority of law/immunity
- > Consent (important in sport, medicine)
 - > Ice-hockey game
 - > Puck hits spectator
 - > Liability?
 - > Consent?
- > **Must be reasonable**

Trespass – Expl.

- > Intel Corp. v. Hamidi (2003)
- > Former employee Hamidi sent critical e-mails about Intel to current employees which caused discussions.
- > Intel: trespass to chattels (new form of trespass – internet!)
- > Court rejected Intel
 - > Declined to extend common law trespass claims to computer context
 - > Claimed injury not related to the possession or value of personal property

Assault and battery- Expl.

- > *Katko v. Briney (1971)*
- > Briney installed shotgun in his unoccupied house which severely injured Katko.
- > Court ruled that using deadly force on unoccupied property was not reasonable or justified
 - > No duty for landowner to make his land safe, but no right to install deadly traps
 - > Out of proportion (human life v. property)

Defamation – Expl.

- > In US less plaintiff-friendly (due to 1. Am.)
- > Barret v. Rosenthal (2006)
 - > Barret sued women's health advocate Rosenthal because of publication of libelous information about him in the internet (2nd publication)
 - > Publishing critical letter (twice)
 - > Question: immunity under Section 230 of Community Decency Act?
 - > Against claims which primarily try to chill valid exercise of freedom of speech
 - > Only originator should be liable, not internet user
 - > Court: immunity for both (intent legislator)

Negligent torts (I)

> Negligence torts most common source of common law

= extracontractual liability based upon a failure to comply with the duty of care of a reasonable person

> Reasonable person standard

> Person acts negligent when behaviour departs from ordinary (reasonable) conduct

> Cause of damages

= damage would not have occurred without that cause and damages were reasonably foreseeable

Negligent torts (II)

- elements to be considered

> **Duty**

- > did the defendant owe any duty to the plaintiff, if so, what standard of care did the defendant owe to the plaintiff under the circumstances?
- > Objective standard (reasonable, ordinary prudent person=

> **Breach**

- > did the defendant by his conduct violate that duty of care?

> **Harm and Causation**

- > did the defendant's conduct factually («but for») bring about actual harm to the plaintiff?

> **Proximate Cause**

- > assuming a factual causal connection between the defendant's conduct and the actual harm, was the defendant's conduct the proximate cause of the harm to the plaintiff?

Negligent torts (III)

- > Proximate (legal) cause & cause in fact
 - > Close causal connection between action and injury
- > Damages
 - > Actual losses suffered
 - > Duty to mitigate, punitive

Donoghue v. Stevenson, Expl. (1)

> England 1932

> <http://www.youtube.com/watch?v=yLleV7XhkRI>

Donoghue v. Stevenson, Expl. (2)

- > Mrs. Donoghue consumed drink (gift from a friend) and found dead snail
- > Claimed that she got ill
- > No contractual basis – bought for a friend
- > Torts? Product liability?
 - > The House of Lords held that the manufacturer owed a **duty of care** to her, which was breached, because it was reasonably foreseeable that failure to ensure the product's safety would lead to harm of consumers

MacPherson v. Buick Motor Co. (1916) Expl.

- > MacPherson got injured when one of the wooden wheels of his Buick collapsed
- > Wheel was bought by Buick
 - > Fault by Buick?
- > Defective wheel could have been discovered upon inspection
- > Court said yes to liability, when someone sales risky products (general duty of care)
 - > **first product liability case in the USA!**

Product liability (I)

- > When a person or property is injured by a defective product
 - > Manufacturer (sometimes also distributors and retailers) are liable for their negligence in manufacturing or handling a product that causes harm to persons or properties
- > The majority of product liability laws are determined at the state level and vary widely from state to state.
- > Each type of product liability claim requires different elements to be proven to present a successful claim.

Product liability (III)

- > three major types of product liability claims:
 - > **Defective Design**
 - > Not only negligence for production but also design
 - > **Duty to Warn**
 - > If product can not reasonable be designed to be safe, then duty to warn
 - > **Duty to Inspect**
 - > Manufacturers should make reasonable inspections and tests of products before distribution

Product liability (IV)

- > Product liability is (and was originally) a form of negligence torts
 - > Legal duty
 - > Breach (lack of reasonable care)
 - > Causation
 - > Damages
 - > Defenses (contributory negligence, assumption of risk)

Product liability (V)

Strict liability

> **Strict liability**

- > Developed over time to hold **manufacturers/suppliers** of defective products strictly liable without proof of negligence
 - > Not only – like common law – for abnormally dangerous activities
- > If an article placed on market proves to have a defect that causes injury to a human being.
- > Sufficient to prove that plaintiff can prove that he was injured while using the product in a way it was intended to be used, as a result of a defect of which the plaintiff was unaware, that made the product unsafe
- > Consumer expectations/warnings/reasonable standard

Escola v. Coca-Cola Bottling Co (1944)

- > **Important product liability case!**
- > Escola was waitress, putting aside glass bottle of Coke when that bottle spontaneously exploded in her hand
- > One of Coke's delivery drivers confirmed that bottles had exploded
- > Court:
 - > bottle was in some form defective
- > Although no negligence proved strict liability

Escola today

- > Today *Escola* is widely recognized as a landmark case in American law
 - > *“Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public”.*

- > In the 40 years after *Greenman*, the highest courts of nearly all U.S. states and territories followed California's example in imposing strict liability on manufacturers, distributors, and retailers for defective products.

Concept of negligence – first day at a new job in law firm!!!

> <http://www.youtube.com/watch?v=u6ynTbY944Q>

Emotional distress (I)

Miller v. National Broadcasting Co. (1986)

- > NBC camera crew followed a firefighter and paramedics team on night shift
- > Call from Miller (heart attack)
- > Camera crew entered home without consent, filmed Miller dying, aired film without consent
- > Millers widow sued for invasion of privacy and infliction of emotional distress
- > *Question:* does media have same access privilege like police or paramedics?

Emotional distress (II)

Miller v. National Broadcasting Co. (1986)

- > Court said:
 - > *„one seeking emergency medical attention does not thereby ,open the door‘ for persons without any clearly identifiable official reason who may wish to enter“*
 - > Clear line between public interest and privacy **must not be** obscured

Medical malpractice (I)

Ewing v. Goldstein (2004)

- > Former police officer C received medical treatment by Dr. Goldstein for loss of girlfriend
- > Dr. Goldstein learnt that he was considering harming Ewing who was his ex-girlfriend's new boyfriend
- > Goldstein recommended voluntary hospitalization to C but did not warn Ewing or police
- > When C was released he murdered Ewing and committed suicide
- > *Was Dr. Goldstein wrong?*

Medical malpractice (II)

Ewing v. Goldstein (2004)

- > Court ruled that Goldstein was negligent and guilty of wrongful death
- > He did not sufficiently discharge his duty to protect by initiating voluntary hospitalization but only by warning the potential victims
- > **Not only duty to protect but also duty to warn!**

IX. Damages (I)

Walt Disney World Co. v. Wood (1986)

- > **Joint liability**
- > Wood was injured in a bumper-car ride at Walt Disney when then-fiance rammed her car
- > Jury verdict: liability
 - > Wood 14% fault, Fiance 85%, Disney 1%
 - > Damages accordingly

IX. Damages (II)

BMW of North America v. Gore (1996)

- > **Punitive damages – (exceptionally bad)**
 - > Exemplary damages/make an exemple
 - > Mostly common law (judges)
- > Gore bought new BMW and later discovered that car had been repainted
- > BMW: policy to sell damaged cars as new if damage <3% of car costs
- > Jury: \$4'000 compensatory damages (lost value of car), \$4 million punitive damages
 - > Later reduced to \$2 million, excessive punitive damages violates Due Process clause of USC

Punitive Damage

General damage - Punitive damage

- > Damages assessed in order to punish the defendant for outrageous conduct and to deter others
- > Purpose is not to award plaintiff but he gets usually most of the money
- > Outside the US punitive damages may be difficult to enforce in jurisdictions that do not recognize them.
 - > Specifically European court punitive damages are most likely to be considered to violate ordre public

Criticism

- > Excessiv – caps?
- > As a result of jury system?
- > Combined with class actions?

IX. Excessive damages? Liebeck v. McDonald (1994)

- > 79-year-old woman bought coffee in drive-through
- > Placed coffee between her knees and pulled over to parking
- > She spilled entire cup on her lap
- > Suffered third-degree burns, 2 years of medical treatment
- > Award: 2.86 million (case was later settled)

- > Need for reform (article)?
 - > <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=2053&context=law-review>

X. Strict liability (I)

- > Liability without fault for activities that create exceptional dangerous risks to society (common law)
 - > Product liability (modern courts)
- > Prima facie case
 - > Absolute duty to make safe
 - > Creation of undue risk of harm
 - > Breach
 - > Casue
 - > Damages

X. Strict liability (II)

> Cases

> Animals

> Liable for reasonably foreseeable damage

> Ultra hazardous activity

> Activity not commonly engaged in which involves risk of serious harm and cannot be performed with complete safety

> Storing of explosives in populated area

> Building a water reservoir on own property that can flood neighbouring coal mine

> Nuclear power station

XI. Relevance of torts law

- > Today is touching nearly all aspects of life in USA
 - > Remedy for business against unfair competitors
 - > To protect employees from emotional distress
 - > To regulate environment (air pollution, etc.)
 - > Surviving family members in case of wrongful death to recover pecuniary loss

XII. Tort reform

- > Primary criticism is economic (out of proportion)
- > Damages often very high
 - > 3 kind of damages (economic, non-economic, punitive damages)
- > Limitation of damages
 - > President Clinton (cap. of 250'000) on non-economic damages for medical malpractice claims
 - > States (currently in effect)
- > Antitrust damages have come under special scrutiny
- > Punitive damages?

Some kind of reptition!

<http://www.youtube.com/watch?v=jlzsIME4p38>

Next week:

Company Law