

# **Comparative Private Law**

Dr. Anna Plisecka

**Tort law Systems in Europe**

I. Introduction to Tort Law

II. Concepts of Wrongfulness, especially liability of children (case study)

# Meaning and functions of tort law

Functions common to different legal systems:

- **compensation** for the injury to, or deprivation of, rights and interests
- **deterrence**: the application of tort law may deter wrongdoing
- **loss-spreading**: in conjunction with other compensatory techniques

# English Law

## House of Lords: Donoghue v. Stevenson

Facts:

Ms D went with a friend to a café. The friend bought her a tumbler with ice cream, over which the shopkeeper poured ginger beer from a bottle.

After Ms D had drunk out of the tumbler, the remains of a decomposed snail floated out of the bottle. Ms D became ill.

Liability of shopkeeper even without contract between him and Ms D?

The „neighbour principle“:

Lord Atkin: „Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question“.

# Judgment of the House of Lords

- Classifications of duties in respect of property and in respect to particular relations → case law, but no principle is yet established
- Liability for negligence is based upon a general public sentiment of moral wrongdoing, but not every person injured can demand relief → limits to liability are necessary
- The rule that you are to love your neighbour becomes in law: You must not injure your neighbour
- Definition of neighbour → persons so closely and directly affected by my act that I ought reasonably to have them in contemplation

# In this case

- The beer supplied to Ms D was to be used immediately by her
  - It was obvious to the shopkeeper that Ms D would not examine the beer and discover any defect it might have
  - The defect of the beer (the decomposed snail) was of such a nature that it could cause danger to Ms D or her property
- ➔ The shopkeeper was liable to Ms D even without a contractual relationship between them

# Tort of negligence

## Conditions:

1. Whether the harm was reasonably foreseeable
2. Whether the relationship between plaintiff and defendant was sufficiently proximate
3. Whether it is fair, just and reasonable to impose a duty of care

# French Law

art. 1382 and 1383 C. civ.

Liability under three conditions:

(1) fault

(2) damage (existing, certain and personal)

(3) causation

➔ all rights and interests are protected

➔ all persons are protected, if they can prove a damage (with the characteristics described above)

# Principle of full compensation

- all **material** injury to the bodily integrity of a person, to his property and to his estate generally, including material loss sustained by dependent third parties
- **non-material** injury such as injury resulting from direct interference with the right of personality and injury consequential on interference with a person's bodily integrity (pain and suffering, aesthetic damage or loss of amenity; pain and suffering by third persons suffering from the death or injury to the primary victim)

# Modern conception in French Law

Geneviève Viney:

- The traditional view of civil liability as „private punishment“ seems to narrow
  - Civil liability as „a method of asserting and protecting rights“ and by this „a method of complementing and improving the legal systems, and bringing it up to date“
  - The principle of *réparation intégrale* has encouraged the courts to be lay in determining the measure of damages in the heads of recoverable damage
- ➔ better distribution of the budget is necessary (insurance)

# German Law

§ 823 I BGB: liability only arises, if the injury affects the victim in one of the legal interests (*Rechtsgüter*)

§ 823 II BGB: liability arises, if a statute designed to protect another is culpably contravened

§ 826 BGB: intentionally causes harm to another in a manner contra *bonos mores*

# The concept of legal interests

§ 823 I BGB

*Rechtsgüter*: life, body, health, freedom, ownership and „any other right“

Other right: right, that the legal system protects *erga omnes*

- real rights (rights *in rem*)
- industrial property rights
- some specific rights (right to one's name or image)
- rights created by legal practice

example: „right to an established and active business“ = interest of the owner of an existing business in that business; „right to personality“ = an abstraction which comprises attributes such as honour, integrity, image, name, privacy and autonomy

# German Law

BGB tries to **restrict** claims in tort by:

- **Enumeration** of a number of interests protected against culpably unlawful behaviour (§ 823 I BGB)
- **Allowing claims only in** cases, in which:
  1. a statute designed to protect a person or a group of persons has been contravened (§ 823 II BGB)
  2. harm is caused intentionally in a manner offending *bonos mores* (§ 826 BGB)

# Convergences in different European Systems

- All systems protect life, mental and physical health, bodily integrity, and the right to property
- All tend to award compensation for pure economic loss sustained as a consequence of negligent professional conduct
- All compensate close relatives who sustain economic loss as a result of the victim's death or invalidity

## II. Concepts of Wrongfulness, especially liability of children

1. Comparison of the basic notions in English, French and German Law
2. Comparison of cases
3. Conclusions about persisting differences between different legal systems

# French Law: basic notions

The unitary notion of **fault** (*faute*) covers

1. an objective element: **unlawfulness** (*illicéité*)
  2. a subjective element: **imputability** (*imputabilité*) or culpability (*cupabilité*)
- **unlawfulness** = the failure to abide by a legal duty or obligation
  - **imputability** = a conduct that is regarded as unacceptable behaviour in society (no longer a morally reprehensible conduct)

# The objective notion of fault (*faute*)

- In 1968, art. 489-2 C. civ. was introduced in the French Civil Code
- Art. 489-2 C. civ. : «someone who has caused injury to another under the influence of mental disturbance is nonetheless liable to make good the injury»
- Prevailing opinion (especially fostered by the *Cour de cassation*) that fault is no longer linked to capacity to understand the consequences of ones conduct
- But it is sufficient that the wrongdoer's conduct is regarded objectively as unacceptable

# German Law: basic notions

- 1. Set of facts** (*Tatbestand*) = the kind of behaviour against which tort law provides protection (e.g. interference with life, body...)
- 2. Unlawfulness** (*Rechtswidrigkeit*) = violation of a legal norm in the absence of a legally recognised excuse
- 3. Culpability** (*Verschulden*) = state of mind of a person who intentionally or negligently causes damage to another

# The distinction between unlawfulness and culpability

1. The traditional explanation: **Result Theory** (*Erfolgstheorie*)
  - unlawfulness is present as soon as the set of facts (interference with protected rights) is made out
2. The modern explanation: **Conduct Theory** (*Handlungstheorie*)
  - the result itself (i.e. interference with protected rights) is not sufficient to found unlawfulness;
  - unlawfulness flows from the wrongful character of the tortious conduct = the conduct that led to the interference must be objectively blameworthy

# English Law: basic notions

No general principle in Torts law, the model is provided by the most important Tort: the tort of negligence

1. Defendant owed a duty of care to the victim
2. Defendant committed a breach of that duty

«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 to»

➔ no distinction between objective and subjective elements of wrongfulness (as found in French and German law)

# Example for tort of negligence: Glasgow Corporation v. Muir

## Facts:

Mrs. Alexander is manager of a public tea room. As a heavy tea urn was carried in by Mr. McDonald and a boy, Mr. McDonald dropped his side of the urn and six children were scalded by hot tea.

The plaintiffs alleged that Mrs. Alexander was negligent in allowing the urn to be carried into the tea room through a narrow passage where children were buying sweets.

- The Court of Appeal allowed the claim
- The House of Lords reversed that judgment

# House of Lords: Glasgow Corp. v. Muir

- «There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life.»
- «The precept *alterum non laedere* requires us to abstain from intentionally injuring others, but it does not impose liability for every injury which our conduct may occasion.»
- On a duty of care:  
«The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element.»

# In this case

- «The question, as I see it, is whether Mrs. Alexander, (...) ought to have had in mind that it would require to be carried through a narrow passage in which there were a number of children (...).»
- «If, as a reasonable person, she ought to have had these considerations in mind, was it her duty to require that she should be informed on the arrival of the urn, and, before allowing it to be carried through the narrow passage, to clear all the children out of it (...)?»
- «In my opinion, Mrs. Alexander had no reason to anticipate that such an event would happen as a consequence of granting permission for a tea urn to be carried through the passage way where the children were congregated.»
- «The immediate cause was not the carrying of the urn through the passage, but McDonald's losing grip of his handle. How he came to do so is entirely a matter of speculation.»

# Cass. Civ. 2e 15 dec. 1965 Buguel v. Morin

## Facts:

The defendant, who had been drinking heavily for two days, shot the plaintiff and injured him seriously; the penal proceedings against him were terminated on the ground of insanity.

The court of appeal granted compensation to the plaintiff.

# Cour de cassation

- «The judgement states... that it was clear from the conduct [of the defendant] that his mental deficiency left him with sufficient awareness and free will.
- It was up to [the defendant], who had just been released from a psychiatric institution, without having fully recovered, to take care of himself.
- By omitting to take all necessary precautions and continuing to drink heavily instead, [the defendant] certainly committed a fault for which he was to be held liable.
- This reasoning shows that the [defendant's] mental deficiency, which continued to exist, did not deprive him of all awareness and free will. The court of appeal therefore correctly decided.»

# Observations

- The court of appeal considered the mental awareness of the mentally deficient person.
- It found out that the person was left with enough awareness and free will to be responsible in concreto.
- The person could be held liable in civil proceedings even if the penal proceeding could not be brought because of his mental deficiency.

# Cass. civ. 2e 12 December 1984

## SAMDA v. Molina

### Facts:

- While playing tag in a schoolyard Jean-Claude Sabatier (7 years old) pushed a schoolmate, who fell and struck a bench, causing a bursting of his spleen and a haemorrhage
- The court of first instance dismissed the claim against the minor
- The court of appeal held the minor liable

# Cour de cassation

- «The judgment of the court of appeal is attacked on the following grounds: ... in failing to try to determine whether Jean-Claude Sabatier had the ability to appreciate the consequences of his act, ... the court of appeal applied Article 1382 C. civ. Incorrectly.»
- «The court of appeal found that Jean-Claude Sabatier pushed ...[his schoolmate] against a bench in the schoolyard, with such violence that this caused a bursting of the spleen and ... bleeding.»
- « Having regard to those statements, the court of appeal, which was not required to verify whether Jean-Claude Sabatier was capable of appreciating the consequences of his actions, established fault committed by him.»

# BGH 28 February 1984, Children with candles

## Facts:

- The defendants, two ten-year-old boys, were playing in a hay-loft. In order to illuminate the room, they had bought candles, and had been offered matches by another boy.
- The candle fell down several times and set fire to the hay on the floor.
- The children failed in their effort to put out the fire and the whole shed burnt down, including agricultural tools stored there.
- The farmer to whom the shed and the tools belonged sued the two boys.
- According to the plaintiff, the boys had the insight required to be aware of their responsibility for their conduct.

# Bundesgerichtshof

«A general understanding that a course of conduct may create some danger is sufficient; the law does not further require that the minor had the capacity to envisage the legal and economic consequences of his conduct in practice

According to § 828 (2) BGB only the discernment of the minor can be examined and not the individual capacity of the minor to behave in accordance with such insight....

If according to his individual intellectual development, a minor possesses the ability to discern the wrongful nature of his conduct – presumed by the law in the case of children as from their seventh birthday – then he is fully liable, insofar as he also acted culpably within the meaning of § 276 BGB.»

# Court of Appeal (1998) Mullin v. Richards

## Facts:

- The plaintiff and the defendant were both 15-year old schoolgirls. While sitting at their desks during a mathematic lesson, they engaged in a mock sword fight using plastic rulers. One of the rulers snapped and a fragment of plastic entered the plaintiff's eye, ultimately causing her to lose sight in that eye.

## Held:

- The court of first instance allowed the claim.
- The Court of Appeal reversed the decision of the court of first instance and dismissed the claim

# Court of Appeal

- The test of foreseeability is an objective one.
- In that case the question for the judge is not whether the actions of the defendant were such as an ordinarily prudent and reasonable adult in the defendant's situation would have realised gave rise to a risk of injury, it is **whether an ordinarily prudent and reasonable 15-year-old-schoolgirl in the defendant's situation would have realised** that her action gave rise to the risk of injury.
- There certainly was no evidence as to the propensity or otherwise of such rulers to break or any history of having done so.
- The question of foreseeability has to be judged against that background: the prevalence of the practice, the absence of prohibition, the absence of warning against it or its dangers and the absence of any evidence of there having been any previous injury as a result of it.