

Tort Law and Human Rights

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The factual and the legal problem

- **factual problem:** western companies causing large scale problems in developing countries, such as
 - environmental degradation (Shell pollution in Niger Delta)
 - dangerous working conditions (Rana Plaza)
- low level regulation and enforcement in developing countries
- why not imposing human rights obligations on businesses?
- **legal problem:** human rights obligations do not apply to businesses because they are not party to the human rights treaties
- human rights obligations for States:
 - **respecting:** not infringing human rights by acts or omissions
 - **protecting:** actively preventing third parties from causing harm
 - **fulfilling:** improving human rights: better education, cleaner environment, etc.

Regulatory: from soft law to hard law

Phase 1: United Nations Guiding Principles (2011)

- non-binding soft law: businesses have responsibility to respect human rights
- regardless of rules applying in jurisdictions where they operate

Phase 2: legislation (since 2015)

- parts of UNGPs implemented in binding national and EU legislation
- => respecting human rights is a binding obligation for businesses, not through a treaty but through legislation
- needed to compensate for the low-level regulation and enforcement in developing countries and the virtual absence of tort law as an instrument for remedies

Tort law and the rights of humans

- **respecting** rights of humans by companies (by acts or omission) is embedded in national tort laws
- sometimes explicitly (BGB 1900), often implicitly
- companies may also be obliged in tort to **protect** human rights by preventing third parties from causing harm (parent-subsidiaries: Vedanta, Shell)
- **fulfilling** human rights is not part of tort law (but an opportunity under SDGs)
- emphasising human rights aspect is appropriate in case of large corporates against individuals
- but companies know the power of human rights and downplay it by talking about ESG: the environmental, social and governance framework

Actionable damage (EN): Rothwell (2007)

- claimants were exposed to asbestos at work
- they developed *pleural plaques*: fibrous thickening of pleural membrane that surrounds the lungs
 - plaques were symptomless (save in the most exceptional cases)
 - did not increase the susceptibility of the claimants to diseases
 - did not shorten their life expectancy
 - had no effect upon their health at all
- => symptoms were evidence of exposure, but this exposure had not had any negative effect upon their health
- => no actionable damage

Tort law and ECHR

- ECtHR: where does right to health begin when individuals are exposed to industrial pollution?
 - with the sheer exposure to toxic substances?
 - when they get ill or die?
 - somewhere in between?
- what are the consequences of this case law for identifying relevant (or actionable) damage in tort

ECtHR: *Fadeyeva v Russia* (2005)

- Severstal steel plant emitted excessive levels of hazardous substances
- substances produced by steel plants were found where Ms Fadeyeva lived
- expert: steel plant emissions were primary cause of increased number of health conditions
- ECtHR: Fadeyeva's health had deteriorated because of prolonged exposure to industrial emissions
- even if pollution did not cause quantifiable health damage, it rendered her more vulnerable to various illnesses
- increased vulnerability constitutes an infringement of the right to health and the enjoyment of one's home under Art. 8
- environment-related harm falls under Art. 8 if it attains a certain minimum level, which is relative and depends on all the circumstances (intensity, duration, physical or mental effects)

ECtHR: *Cordella v Italy* (2019)

- applicants lived near the Ilva steel plant which toxic emissions damaged health and environment (Art. 8)
- authorities had failed to adopt appropriate measures to limit Ilva's emissions
- => Art. 8 is violated if the pollution significantly reduces the individual's capacity to enjoy her home or her private or family life
- scientific reports established causal link between emissions and sanitary records of people living in the relevant municipalities
- ECtHR concluded that Italy had violated Art. 8 ECHR

ECtHR: *Pavlov v Russia* (2022)

- applicants lived 2-15km from large industrial plants
- permissible emission levels for hazardous substances were exceeded
- mortality rates and medical indicators correlated with pollution levels
- ECtHR: applicants were exposed to increased health risk by living in an area with pollution levels clearly exceeding applicable safety standards
- applicants' quality of life had deteriorated to such an extent that their right to private life was infringed (Art. 8)
- no obstacle that there was no medical evidence to establish that industrial air pollution had necessarily caused harm to the individual applicants' health

ECtHR case law and tort law (1)

- what could tort law learn from the ECtHR case law about the right to health for its concept of relevant damage?

bottom line of the right to health (Art. 8):

- scientific uncertainties as such do not lead the Court to dismiss cases
- Court avoids a juridical no-mans-land, where states would evade scrutiny purely based on the complexity of the case
- same should apply in tort to companies exposing residents to pollution
- protection in tort must not be less than under ECHR
- also because in tort cases courts are ECHR state organs
- tort is not just about damage but often ultimately about human rights

ECtHR case law and tort law (3)

relevant (actionable) damage in tort

- increased risk to health is relevant damage in tort
- in particular if higher vulnerability to contracting diseases (*Fadeyeva*) or having a lower life expectancy
- also if this risk has not yet materialised

proof of damage

- individual medical evidence is not required to establish that industrial air pollution caused an increased risk to health (*Fadeyeva, Cordella, Pavlov*)
- establishing relevant damage in tort should work in a similar way

ECtHR case law and tort law (4)

causation

- causation is established if there is scientific evidence indicating that severe environmental pollution poses specific health risks to the population at large (*Cannavacciuolo*)
- no individual causal connection required
- the but-for test in tort should work in a similar same way

remedy/compensation

- ECtHR awarded non-pecuniary damage to applicants
- in tort it would primarily be the same
- pecuniary damage cannot be excluded and will apply if increased risk to health has materialised

Concluding remarks

- ECtHR: increased risk to health is infringement of Art. 8
- minimum level to be determined by circumstances of the case
- in tort: company owes people in the vicinity of their plants a duty to prevent an increased risk to their health
- minimum level to be determined by circumstances of the case
- to be an infringement of Art. 8 or to be relevant damage in tort
 - increased risk to health does not have to have materialised
 - does not require individual medical evidence
- in tort cases, evidentiary rules from ECtHR case law should be used as guidance

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