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Over de grens van de onrechtmatige daad: een onderzoek naar de plaats van de rechtvaardiging in het buitencontractuele aansprakelijkheidsrecht

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Summary

ON AND BEYOND THE BOUNDARY OF TORT

A study of the position of the justification in non-contractual liability law

Article 162(2) of Book 6 of the Dutch Civil Code sets out the central concept of non-contractual liability law by providing a definition of what is deemed a tortious act. The list of different types of tortious acts concludes with the qualification: *'except for the presence of a ground of justification'*. Thus, the door to the exception to the core of non-contractual liability law has been left wide open. A fascination for this 'escape' incorporated in Dutch liability law was one of the motives for this dissertation. In addition, a sense of wonder at the way in which the legislature implemented the exception: with little guidance, substantiation or examination of the consequences of this exception. This study thus set out on a journey of discovery through the full breadth of non-contractual liability law, constantly viewed from the perspective of the exception to the rule. To a certain extent, this starting point also determined the methodology of the dissertation. Without a doubt, the dissertation is exploratory in nature, in the sense of the meaning given by the Dutch Van Dale dictionary to the verb 'to research': 'an attempt, or effort, to learn about a subject or its nature in more detail'.

It is obvious from the above that the research for this dissertation did not set out with a clearly defined problem. That is not to say, though, in view of the statutory provision cited above, that it is not possible to formulate the problem in simple terms: 1. What constitutes a ground of justification, and 2. How does this affect the judgement of an act that was initially qualified as a tort? The aim of the dissertation, by answering the questions 'what' and 'how', was to gain an insight into the position of justification in non-contractual liability law and, as a result, hopefully also into non-contractual liability law itself. The structure of the dissertation as set out below indicates the subquestions derived from the two main research questions and where they can be found in the chapters of the dissertation.

As far as comparative law is concerned, the choice was made for an internal comparison with criminal law – a branch of law with a long tradition in dealing with and considering grounds to justify an act, thus providing a rich source of knowledge and inspiration for a discussion of the subject. The fact that the legislature looked mainly to criminal justification defence when

introducing grounds of justification in the draft of the current Civil Code, also played a role in this choice. Where necessary, external comparative law was considered in order to provide in-depth analysis or clarification in an argument or to check whether important justifications had been overlooked. In addition, where possible, use was gladly made of sources from legal history – in the area of liability law in general, and of justification in particular.

The first part of the dissertation is a general exploration of the area of research. Chapter 1 commences with a *Definition of terms*. The different types of torts are described, the concepts of justification and grounds of justification are defined and the distinction between the grounds of exculpation is provided. Much has been borrowed from criminal law when it comes to the perception of grounds of justification in civil law. This prompts the question of to what extent it is possible that doctrines of criminal law can be applied in a civil law context. Therefore, the first part of the dissertation continues in Chapter 2 with a comparison: *Criminal law and civil law*. To what extent and in what way can insights derived from criminal law be applied in civil law research on justifications? The conclusion is that it is perfectly possible to compare criminal law and civil law when it comes to grounds of justification.

The second part of the study classifies the subject matter. For this purpose, the different types of justifications are defined and divided into categories. First to be considered are justifications that lead to the preliminary opinion of the act under review being changed from ‘wrongful’ to ‘lawful’. These justifications are referred to as *Complete justifications* in Chapter 3. This concerns justification grounds referred to in criminal law such as self-defence, statutory provisions or authority, emergency, plus management of another’s affairs. The second chapter in this part of the dissertation is an inventory of the justifications that fail to bring about a change in the judgement of the act under review as described above. These *Incomplete justifications* are considered in Chapter 4. Finally, there are justifications that can perhaps cause an act to be qualified as lawful, but which require a certain condition to be met. In Chapter 5, the final chapter in this part of the dissertation, these are referred to as *Conditional justifications*. The wrongfulness of acts carried out on the grounds of this type of justification is sought in the fact that the party carrying out the act has gambled on the existence of an unstable authority.

The third part of the dissertation is devoted to the principles of justification. The term ‘principle’ can be interpreted here in the literal sense as a ‘start’: the basic conditions that have to be met in all successful claims to a ground for justification. A ground for justification is an authority to cause loss or damage. When discussing the principles, what is meant are the conditions that apply in relation to the *exercise* of this authority. So, an assessment of the actions of the person who is invoking a justification defence. First, in Chapter 6 the criminal law notion *Culpa in causa*: a person may not invoke a justification defence if he finds himself to be in the situation under review through his

own fault. In relation to this condition, first the background in criminal law is examined and subsequently it is considered what the significance of the condition might be in civil law. The dissertation defends the view that the contributory fault defence should not be invoked too quickly against those who must rely on a justification. Chapter 7 deals with the conditions of *Proportionality* (a reasonable purpose/means relationship must exist) and *Subsidiarity* (a better option to achieve the purpose must be considered). It is examined how these conditions have been developed in criminal law, to what extent they apply to grounds of justification in civil law, and what they can teach us in relation to the unwritten law of proper social conduct in civil law. Proportionality and subsidiarity appear to be a different way to describe this standard and offer a good explanation for raising or lowering this standard in all kinds of situations of harmful negligence and representations of interests.

The focus of the book then shifts to the *content* of the justification. To that end, the position of the justification in the fourth part of the book is considered in light of the provisions of Articles 162 and 163 of Book 6 of the Civil Code. Chapter 8 (*Wrongfulness*) considers the relationship between violations of standards and justification, focusing on the effect of justifications. It discusses what role justifications and other potential lines of defence play in the judgement of whether an act is wrongful. Two approaches to justification are compared: a synthesizing approach and an analytical approach. The latter (in which the act and the justification are considered separate from each other) is the preferred approach. In the following chapter in this part of the dissertation, Chapter 9 (*Guilt*), the relationship between justification and exculpation is examined. Traditionally in civil law and criminal law, besides grounds for justification, grounds of exculpation are also distinguished. However, since the introduction of the current Civil Code, the concept of 'guilt' in civil law has changed significantly. This will clearly have an effect on the concept of grounds of exculpation. The study examines to what extent this type of ground, at least in civil law, is still viable. It leads to the conclusion that a successful plea of grounds of exculpation has no significance when it comes to the question of accountability and thus whether liability exists. The final chapter in this part, Chapter 10 (*Relativity*) is dedicated to the scope of protection of the justification. It defends the position that the justification, like its mirror image, the wrongful act, is relative in nature. Its scope extends only to protection of certain types of interests, of certain persons, against certain types of loss. This proposition is developed further using the traditional grounds of justification.

The fifth and final part of the dissertation deals with the legal effects of the presence of a justification or grounds of justification. These effects are related in the first instance to the act itself. Chapter 11 (*Impact on the judgement of the act*) considers what consequence the presence of the various types of justification has on the judgement of the potentially wrongful nature of the act. This is done partly making use of the Toulmin argument model. From

this, it follows that the presence of a justification has an impact on the judgement of the wrongfulness of an act, in a positive sense for the acting party. The extent of the impact depends on the strength of the justification put forward and of the strength of the rebuttals to the justification. In addition, the presence of a justification has an impact on the judgement of the existence and level of potential liability for compensation. This is considered in the final chapter of the dissertation, Chapter 12 (*Impact on the judgement of the obligation to compensate*). Here, again, the presence of a justification has an impact on the judgement, in a positive sense for the acting party. The chapter indicates what circumstances play a role and within which doctrines of compensation law the mitigating effect of the justification can be positioned.