

Risk Distribution as the Foundation of Attribution for Compensation in Breach of Contract

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Abstract

On a claim for damages for breach of contract, the European Continental Law adopts fault liability, while the Anglo-American Common Law sticks to strict liability. This paper contends that risk distribution between the parties to a contract is the real foundation of the contractual liability rather than the parties' fault, which is the foundation of liability in tort. In order to elaborate on this contention, this paper first discusses some types of debts which follow the same principle of attributability, i.e., fault liability or strict liability, between Continental Law and Common Law. The types of debts that follow strict liability are debts of money and debts of sales of generic goods. The types of debts that follow fault liability are debts of service contract and debts of sales of specific goods. Among these types of debts, the risk distribution of contract is the common basis of either strict or fault liability in both Continental Law and Common Law.

Further, this paper explores the real function of fault in the principles of fault liability and strict liability. In Continental Law, a debtor is liable not because of its fault but because of its inability to be excused from its breach of contract. The reason is that the fault of a debtor is presumed by law, which transfers the burden of proof of no fault to the debtor, rather than the creditor who makes a claim for damages on breach of contract. Accordingly, the concept of fault, in reality, does not play a role as a requirement to impose contractual liability on a debtor, but is seen to be a basis of excuse, which shall be proved by the debtor. In Common Law, even if a strict liability is enforced, no fault is a requirement for a debtor to allege

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an excuse based on frustration. All in all, fault plays a similar role as a base of excuses in both Continental Law and Common Law.

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