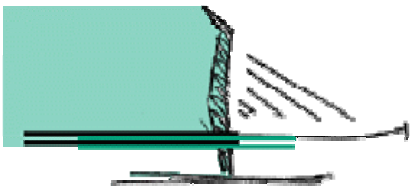

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Justifications and Excuses in the Economic Analysis of Tort Law

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Abstract:

In the economic analysis of tort law, scant attention is paid to justifications and excuses. An injurer invoking a justification argues that he did not act wrongfully. Excuses imply that the injurer acted wrongfully, but that his act cannot be imputed to him.

If torts are described in general terms, on an abstract level, the possible role of justifications and excuses is larger than if the tort is subjectively defined. After all, the specific circumstances of the case that could lead to the conclusion that the injurer should not be liable are already incorporated in a subjectively defined tort, so that there is no separate function for justifications and excuses anymore.

In this paper I argue that the use of general, abstract norms is preferable to applying subjective concrete norms. This generalization saves on administrative costs, it might lead to a better allocation of resources and it can provide better care and activity incentives. In circumstances where the objective norm would lead to undesirable outcomes, due to the specific circumstances of the case, justifications can serve as a correction. I analyze force majeure, necessity, necessary self-defense, legal duty or legal authority, authorized legal order, permission of the victim, assumption of risk and acting in the general interest. I argue that most, but not all, justifications make economic sense.

In situations where the general norm provides correct incentives but where the specific injurer at hand would not change his behaviour as result of specific circumstances, excuses might avoid liability and hence save on administrative costs. I analyze mental or physical disability or illness, excusable error regarding the law or the facts, self-defense with excessive force and unauthorized official order. I conclude that most of the analyzed excuses are problematic from an economic point of view.

Keywords: tort law, justification, excuse, force majeure, necessity, self-defense, legal duty, legal authority, official order, permission, assumption of risk, general interest, disability, illness, excusable error

JEL Classification: K13, K41.

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Justifications and Excuses in the Economic Analysis of Tort Law

1. Introduction

Justifications and excuses are legal defenses in a tort case, which can lead to the result that an injurer is not liable. Generally speaking, when invoking a justification, the injurer argues that he did not act wrongfully. Excuses, on the other hand, imply that the injurer acted wrongfully, but that his act cannot be imputed to him. The practical result of either defense, if successful, is that the injurer will not be liable.
In the economic analysis of tort law, scant attention is paid to the topic of justifications and excuses. However, in tort law itself they form an important aspect of the question whether an injurer should compensate the losses he has caused. Justifications and excuses are also explicitly dealt with in the recently published *Principles of European Tort Law*.[1]
In order to promote and improve the economic analysis of tort law and to make it more acceptable to lawyers, it is necessary that it discusses the legal topics that are relevant for this body of law. Therefore, in this paper I will describe the different justifications and excuses and I will analyze them from an economic point of view. I will investigate whether justifications and excuses can contribute to the goal of the minimization of the total costs of accidents. Obviously, any possible reduction in primary and/or secondary costs has to be compared to the increase in tertiary costs by adding justifications and excuses to the legal assessment.
The possible role of justifications and excuses depends on the way in which tort law is constructed. If the tort is described in general terms, on an abstract level, the possible role is larger than if the tort is subjectively defined. After all, the specific circumstances of the case that could lead to the conclusion that the injurer should not be liable are already incorporated in a subjectively defined tort, so that there is no separate function for justifications and excuses anymore. It is therefore necessary to analyze whether from an economic point of view, torts are better objectively or subjectively described. I will do this in Section 2. Subsequently, I will analyze justifications in Section 3 and excuses in Section 4. Section 5 contains the conclusions.

2. Objective or subjective tort law?

2.1 Introduction

In most, if not all jurisdictions, liability can either be based on an explicit rule of strict liability, or on an imputable unlawful act of the injurer. The unlawful act can consist of an infringement upon a subjective right of the victim, a breach of a statutory duty, or negligence (i.e. a failure to take due care). This unlawful act subsequently can be imputed to the tortfeasor if he is culpable, or if the law makes him accountable, even without culpa. In this paper, strict liability will not be analyzed, because justifications and excuses are less relevant in a setting where the injurer can also be held liable if he did nothing wrong.[2]
The distinction between unlawfulness and imputability is very important for my paper, because justifications lead to the conclusion that the injurer did not act unlawful, while

[1] European Group on Tort Law, *Principles of European Tort Law. Text and Commentary*, Vienna: Springer-Verlag 2005, p. 122 ff.
[2] For examples of defenses in the context of strict liability in different countries, see B.A. Koch and H. Koziol (eds.), *Unification of Tort Law: Strict Liability*, The Hague: Kluwer Law International 2002.

excuses remove imputability. Whether or not a legal system makes a clear distinction between unlawfulness and imputability depends, among others, on whether torts are defined on an abstract, general level, or if they are concentrated on the specific circumstances of the case at hand. In the latter case, all circumstances are incorporated in formulating the relevant behavioral norm, of which it then is questionable if one could still regard this as a 'norm', because it is only applicable in this particular case. There is no room for separate justifications or excuses, because the circumstances that might lead to the conclusion that liability is not warranted, are already incorporated in the constructed 'norm'. If, on the other hand, the behavioral norm is formulated on an abstract level, the specific circumstances of the case are not incorporated in this norm. Such circumstances can then be relevant when invoking a justification or excuse.

2.2 Different types of torts

In many jurisdictions, a tort can consist of infringement upon a subjective right of the victim , breach of a statutory duty, or negligence.[3] In the economic analysis of tort law, most attention is focused on negligence. Because the possible role of justifications and excuses depends *inter alia* on the type of tort, it is necessary to spend attention on the different types of torts. It should be investigated whether from an economic point of view they all have an independent rationale, or that the negligence rule ultimately determines whether the behavior of the injurer was unlawful. In this section, I will briefly discuss the different types of torts, and I will argue that they all have an independent economic rationale.

2.2.1 Infringement upon a subjective right of the victim

If an injurer infringes upon a right of someone else (e.g. he takes away or damages property of the other person), is this behavior sufficient to conclude that the injurer committed a tort, or is it necessary to evaluate whether his behavior was negligent (i.e whether he acted carelessly by damaging or taking away the property)? Both views are advocated by legal scholars, but in my view, Law and Economics supports the former.
In their seminal paper, Calabresi and Melamed have distinguished three ways in which entitlements can be protected: property rules, liability rules and inalienability rules.[4] If an entitlement is protected by a property rule, it can only be transferred in a voluntary transaction. Protection with a liability rule implies that the entitlement can be taken away from the owner, also without his consent, provided that the objectively determined value will be compensated. Under inalienability rules, the entitlement cannot be transferred at all. This last form of protection is irrelevant for my paper.
Property rules are preferred, because there the subjective valuation of parties determines whether a transaction takes place, instead of the objectively determined value, which might deviate from the subjective value. Liability rules require the courts to determine damages, and it is likely that parties know their own preferences better than the courts do.[5]

[3] For the many differences between legal systems, e.g. see H. Koziol (ed.), *Unification of Tort Law: Wrongfulness*, The Hague: Kluwer Law International 1998.

[4] G. Calabresi & A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', (85) *Harvard Law Review* 1972, p. 1089-1128.

[5] See e.g. W.M. Landes & R.A. Posner, *The Economic Structure of Tort Law*, Cambridge, Massachusetts: Harvard University Press 1987, p. 31: 'When the costs of voluntary market transactions are low, the property approach is economically preferable to the liability approach because the market is a more reliable register of values than the legal system.'

Furthermore, the court has to assess the losses under liability rules. This creates assessment costs, which might be substantial.[6] However, when transaction costs are high, property rules might hinder welfare increasing transactions, in which case liability rules are preferred.
Hence, when transaction costs are low, property rules are preferred. If an actor infringes upon a right rather than acquiring this right in a voluntary transaction, he has acted differently than we want him to. Therefore, infringement upon a right should be regarded as unlawful, irrespective of a weighing of interests as part of the negligence rule.
Also in situations where the injurer acted in a way in which only the owner is allowed to act, property rules are preferred because liability rules face several problems:[7] (1) if the owner has successfully paid off a potential injurer, other injurers might still want to commit the tort because they are willing to pay the objectively determined damages, (2) the owner invests resources to prevent the possible injurer to commit his act while the potential injurer exactly invests resources to enable the act and (3) when the tort concerns the taking of things, the owner can try to retake his property, after which the injurer tries again, *et cetera*. In these situations as well, the tort constitutes an infringement upon a right, which is in itself unlawful, because the injurer should have acquired the entitlement in a voluntary transaction. After that, he is the owner so that he can then act in the way he desires.
Summarizing, in situations where economic theory prefers property rules (so in situations of low transaction costs and in situations where the injurer acts in a way in which only the owner is allowed to act), the injurer should have acquired the subjective right. Any infringement upon the subjective right of someone else therefore is undesirable. By labeling such behavior as unlawful, tort law can provide the correct behavioral incentives. Note that this conclusion holds even if the injurer values the subjective right higher than the owner! If my neighbor who values my car at €10.000 while I value it at €8.000 steals the car from me, he increases welfare, because the car has ended up with the person valuing it the most. We therefore cannot conclude to unlawfulness on the basis of a weighing of interests. However, his theft should not be allowed, because it creates the abovementioned problems (me trying to steal back my car; my neighbor investing resources in enabling the theft and me in preventing it). Furthermore, if people know that their property can be taken away just like that by people who value it more and they can do nothing about it, this might reduce their incentive to invest in acquiring property. All these problems lower social welfare. It is therefore desirable that my neighbor, if he indeed values my car higher, buys it from me in a voluntary transaction. This prevents the discussed problems, while welfare is increased because the car still ends up with the person valuing it the most.
Coleman and Kraus rightfully note that even with property rules, a liability rule has to be added to enable a tort case for damages in situations where someone has infringed upon a right.[8] After all, if the only possible way to transfer an entitlement is a property rule (Coleman and Kraus do not regard property and liability rules as ways of protecting entitlements, but as ways to transfer them), the victim cannot sue for damages if someone has taken away the entitlement without his consent because damages form no part of a property rule. By *cumulatively* combining property and liability rules, the situation can be reached that the entitlement can only be legitimately transferred in a voluntary transaction, while the owner can sue for damages if his entitlement is infringed upon. These damages however do not lead to a transfer of the entitlement, so the owner remains the owner. This is a crucial

[6] J.E. Krier & S.J. Schwab, 'Property Rules and Liability Rules: The Cathedral in Another Light', (70) *New York University Law Review* 1995, p. 453.
[7] L. Kaplow & S. Shavell, 'Property Rules versus Liability Rules: An Economic Analysis', (109) *Harvard Law Review* 1996, p. 766 ff.
[8] J.L. Coleman & J.S. Kraus, 'Rethinking the Theory of Legal Rights', (95) *Yale Law Journal* 1986, p. 1349 ff.

difference with the situation where a liability rule is the proper way of transfer. In that case, paying the damages leads to a legitimate transfer of the entitlement. By cumulatively combining a property and a liability rule, the only way to acquire an entitlement is in a voluntary transfer. Imposing an involuntary transfer upon someone else (so, infringing upon his subjective rights) only leads to the duty to pay damages, without acquiring the desired entitlement. The added liability rule therefore supports the property rule as the only way to transfer the entitlement.
The conclusion is that an infringement upon a subjective right has an independent economic rationale. It provides incentives to seek a voluntary transaction in situations of low transaction costs and in situations where the injurer wants to act in a way in which only the owner is allowed to act. Such voluntary transactions lead to a better outcome than the involuntary transactions that are possible if the entitlement is only protected by a liability rule.

2.2.2 Breach of Statutory Duty

If an injurer breaches a statutory duty and thereby causes losses to the victim, the latter can sue the former under tort law. In legal literature it is debated whether this breach of statutory duty is enough to conclude to unlawful behavior, or if only breaches that were negligent can lead to that result.[9] As was the case in the section on infringement upon a right, the question therefore is whether the breach of a statutory duty is an independent category of torts, or if ultimately the negligence rule is decisive. I will argue that from a Law and Economics perspective, breach of a statutory duty has in independent rationale, but that in some cases this breach cannot be decisive after all.
Starting point of the analysis is the idea that the legislator, in issuing the legislation, has weighed the interests involved and that this weighing resulted in the written rule that the injurer has violated. If the legislator has made a correct weighing of interests, it would be a waste of resources if the court would have to re-weigh these interests in assessing whether the injurer has acted negligently. Therefore, violation of a written rule that has correctly weighed the interests involved should be regarded as unlawful, without the courts evaluating whether the injurer has acted negligently.[10]
However, not in all cases can we argue that the legislator has made a correct weighing of interests:

- Public Choice theory provides arguments to be skeptical about the idea that the legislator has weighed all interests involved in a correct manner. Interest groups may try to influence the legislator in such a way that the statute advances this particular group over others. Some groups will be more successful than other groups, but in any case it cannot be taken for granted that the legislator will have weighed *all* interests involved.
- Sometimes the court is better able to make a correct weighing of interests than the legislator, e.g. because the court possesses superior information. In such cases, it is better that the court determines whether the behavior of the injurer, who breached a statutory duty, was undesirable. In the opposite case, where the legislator has better information, it is

[9] See e.g. S. Deakin, 'Evolution for our time: a theory of legal memetics', (55) *Current Legal Problems* 2003, p. 13 ff.

[10] Determining liability on the basis of a breach of statutory duty instead of letting the court decide whether the injurer was careful enough also avoids the problems caused by the *hindsight bias*. This bias might lead courts to assess the behavior of the injurer as being negligent, because the level of care taken by the injurer looks less reasonable after the losses have materialized, than at the moment that the injurer acted. See e.g. J.J. Rachlinski, 'A Positive Psychological Theory of Judging in Hindsight', (65) *University of Chicago Law Review* 1998, p. 572.

desirable that the legislator utilizes this information to create clear rules, so that actors know which type of care measures they should take. Any breach of such rules should be regarded as unlawful. Faure argues that information regarding possible professional risks is better collected by the government than by the parties involved.[11] This leads to a preference of regulation over liability, but within the context of tort law it leads to the conclusion that breach of a written rule is unlawful. The legislator provides detailed regulation and clear safety requirements. It is not up to the parties involved to decide to deviate from these rules.

- If, since the enactment of the legislation, relevant parameters have changed, the weighing of interest as performed by the legislator might be outdated. If e.g. new information sheds a different light on the weighing of interests by the legislator, the written rule should not be decisive just like that. The court should re-weigh the interests involved until the legislator has provided new rules.
- Finally, if parties have better information than the legislator, violation of a written rule should not be enough to conclude that the behavior was unlawful.

In conclusion: breach of a statutory duty has an independent economic rationale, but many exceptions exist which call for a re-weighing of interests by the court in applying the negligence rule.

2.2.3 Negligence

In the economic analysis of tort law, negligence is the most important form of unlawfulness. It is not necessary to explain the whole economic analysis of negligence in this paper, because there already is much literature on this topic.[12] I will just give a brief summary of the most relevant issues.

In applying the negligence rule, the court evaluates if an injurer has acted carefully enough. In economic terms, this assessment is made by weighing the costs of possible precautionary measures against the benefits of such measures in the sense of a reduction in expected accident losses. As long as the marginal costs of additional care are lower than the marginal benefits thereof, an injurer who did not take this precautionary measure is deemed negligent. This provides actors with the incentives to take optimal care, because it is always more expensive to be negligent and liable, than to take due care and not be liable. This line of reasoning is known as the *marginal Hand-formula*, named after judge Learned Hand who applied this argumentation in the case *United States v. Carroll Towing Co.*[13] Grady however argues that this is not the way in which courts operate.[14] Rather than first determining the optimal level of care by applying the marginal Hand formula and subsequently assessing whether the injurer took enough care, the court compares the actual care measures taken by the injurer with an alternative care measure suggested by the plaintiff. The court determines,

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[11] M.G. Faure, 'Rechtseconomische kanttekeningen bij de deregulering van de arbeidsomstandighedenwetgeving', (10) *Nederlands Tijdschrift voor Sociaal Recht* 1995, p. 140-149.

[12] I refer to the standard works such as R.A. Posner, 'A Theory of Negligence', (1) *Journal of Legal Studies* 1972, p. 29-96; J.P. Brown, 'Toward an Economic Theory of Liability', (2) *Journal of Legal Studies* 1979, p. 323-349; M.F. Grady, 'A New Positive Economic Theory of Negligence', (92) *Yale Law Journal* 1983, p. 799-829; Landes & Posner, 1987, op.cit. (note 5); S. Shavell, *Economic Analysis of Accident Law*, Cambridge, Massachusetts: Harvard University Press 1987; M.F. Grady, 'Untaken Precautions', (18) *Journal of Legal Studies* 1989, p. 139-156 and many, many more.

[13] 159F.2d 169 (2d Cir. 1947).

[14] See Grady 1989, op.cit. (note 12). Also see C. Ott & H.-B. Schäfer, 'Negligence as Untaken Precaution, Limited Information, and Efficient Standard Formation in the Civil Liability System', (17) *International Review of Law and Economics* 1997, p. 15-29.

by applying the marginal Hand formula, whether the total costs of accidents would have been lower if the injurer would have taken this so-called *untaken precaution*. In both approaches, so the standard approach of the marginal Hand formula and Grady's approach of the untaken precaution, the negligence rule can give parties incentives to take optimal care.
The costs and benefits of taking care differ per person.[15] For example, for someone who has only recently received his drivers' license, it is more difficult to drive correctly than for an experienced driver who already drives for many years. Therefore, the optimal care level differs per person. This implies that tort law, in order to be able to provide everyone with optimal care incentives, should apply an individualized negligence rule in every case. However, many difference between individuals are difficult to observe, so that it would be very costly to determine the optimal level of care in every individual case. Furthermore, people could decide to behave strategically, suggesting that their care costs are higher than they really are, in order for their individual standard of due care to be lowered. Therefore, it is better to neglect differences that are not easily observed, and to apply a general negligence rule to each member of a certain group. For example, *all* car drivers have to meet the same standard of care, irrespective of how long they already have their license. After all, it is not easily observable if someone is an experienced driver or not. Obviously, clear differences can be taken into account, e.g. by holding taxi drivers and police officers to a higher level of due care. Their vehicle makes them clearly distinguishable and they are assumed to have a better drivers' education and/or a higher level of experience.
Another possible result of applying a uniform negligence rule is that individuals with high costs of care might decide to withdraw from the activity, because they cannot meet the standard of due care and therefore always will be liable.

2.2.4 Conclusion

In the sections above, I have argued that infringement upon a subjective right and breach of a statutory duty both have an independent economic rationale, and that they both can lead to the conclusion that the injurer has acted unlawful. Hence, liability is not always determined by the negligence rule. In the cases where the negligence rule is decisive, it is not formulated for every person individually, but for an entire group, because this saves on system costs and can induce the 'high risks' to withdraw from the activity. The conclusion therefore is, that unlawfulness should be determined in an objective, abstract way, disregarding several specific characteristics of the case. This way, the legal (written or unwritten) norm can provide guidance for a larger group of people, instead of only determining whether *this* injurer in *this* case has acted unlawfully.
However, in some situations liability makes no sense from an economic point of view, even though the injurer has infringed upon a right or has acted contrary to a written or unwritten norm. The legal instruments of justifications and excuses make it possible to deny liability, even though under normal circumstances the injurer would be liable. In the following sections, I will analyze the different justifications and excuses and I will investigate how they fit in the framework that I have described above. Before I turn to the justifications and excuses, however, I will spend attention to the topic of imputability, i.e. the question whether the injurer who has acted unlawfully can be held accountable for this unlawful act.

[15] See e.g. Shavell 1987, op.cit. (note 12) p. 73 ff. and Landes & Posner 1987, op.cit. (note 5), p. 73 and 123 ff.

2.3 Imputability

In section 2.2 I argued that behavioral norms should be formulated on an abstract level. Such rules imply that injurers such as the actual injurer, under normal conditions, should have acted differently than the actual injurer did. For example, generally speaking one should not hurt others, because the negative consequences for the victim lower social welfare. Therefore, if an actor injures someone else by e.g. hitting him, normally speaking he should be liable for the losses, because he did not behave correctly.
Specific circumstances of the case can change this conclusion. For example, if our injurer was attacked and in his defense, he overreacts and severely hurts the assailant, he has committed a tort, because it is not allowed to hurt others. However, given the specific circumstances of the case, we might not want to hold him liable for the injuries of the assailant.
Therefore, the mere commitment of a tort is not enough to conclude to liability. For liability to be warranted, it is not only necessary that the injurer behaved in a way that *average* injurers under *normal* conditions should refrain from. It is also necessary that the *actual* injurer under the *specific* conditions should have acted differently. This result is reached by the requirement of imputability: the tort should be accountable to the injurer.
Hence, the combination of unlawfulness and imputability provides the correct incentives. The level of concreteness of the unlawfulness requirement determines the possible role of the imputability requirement. As mentioned above, it would have been possible to define torts on a concrete level, so that the specifics of both the injurer and the case are already incorporated in the norm. I already provided some arguments in favor of the abstract method at the level of unlawfulness: the abstract rules provide clearer behavioral guidelines for a larger group of people and actors that will have difficulties in meeting the general due care level might decide to withdraw from the activity.
At the level of imputability, some additional arguments exist. If the behavioral norms are formulated in a concrete way, the specific circumstances of the case have to be dealt with in every individual case. If the norms are formulated in an abstract way, and if imputability is assumed to be present when the tort is proven, the specific circumstances of the case only become relevant if the injurer invokes an excuse. This saves on administrative costs, because in the cases where no excuse is invoked, no attention has to be spent on the specifics of the actual case. Furthermore, given that under normal conditions someone who has committed a tort should have acted differently, it is desirable to place the burden of proof of the opposite (i.e. the existence of exceptional conditions that should bar liability) on the injurer.[16] It will provide better incentives, because if the victim always would have to prove that *this* injurer under *these* conditions also should have acted differently, problems of proof might frustrate his claim and therefore injurers might receive too little incentives.

2.4 Conclusion

[16] In the model of Hay and Spier, one of the reasons for a reversal of the burden of proof is the situation where the costs for the injurer to prove the absence of a certain factor (in this case, imputability), multiplied by the probability that the factor is absent, are lower than the costs of the victim to prove the presence of the factor, multiplied by the probability that the factor is indeed present. Because normally speaking an injurer who committed a tort should have acted differently, the probability that imputation is absent is much lower than the probability that it is present. It is therefore desirable to place the burden of proof on the injurer, who should invoke an excuse to dispute the presence of imputability. See B.L. Hay & K.E. Spier, 'Burdens of Proof in Civil Litigation: An Economic Perspective', (26) *Journal of Legal Studies* 1997, p. 413-431.

The conclusion from this section is clear: the combination of unlawfulness and imputability provides the care incentives. The more concrete unlawfulness is defined, the less room there is for a separate requirement of imputability. There are several arguments in favor of an abstract formulation of the unlawfulness requirement, which is then coupled with a requirement of imputability: (1) infringement upon a right and breach of a statutory duty (which are by definition general, abstract norms) have their own independent economic rationale; (2) the negligence rule should be formulated on a general level to save on administrative costs and to provide correct activity level incentives to people who cannot meet the general norm; (3) abstract norms give clearer behavioral guidelines to a larger group of people and (4) the fact that someone who has committed a tort under normal conditions should have acted differently justifies a reversal of the burden of proof regarding imputability.
Some specific circumstances can lead to the conclusion that the original behavioral norm is not correct, and that *any* injurer under such conditions was allowed to act contrary to the original norm. Such circumstances constitute justifications, which make the *behavior* lawful.[17] Other circumstances do not take away the undesirability of the behavior, but merely show that *this* particular injurer cannot be held accountable for his tort. Such circumstances constitute excuses, where the *behavior* is still unlawful, but the specific *injurer* should not be liable. I will treat the justifications and excuses in the subsequent sections.

3. Justifications

3.1 Introduction

In this section, I will analyze the justifications that are distinguished in different legal systems from an economic point of view. I will try to answer the question whether the various justifications can help in achieving the economic goal of maximizing social welfare.

3.2 Force majeure and necessity

3.2.1 Force majeure

Different views on force majeure are possible.[18] Some argue that a person who has committed a tort in a situation of force majeure did not act unlawful, so that it indeed constitutes a justification. Force majeure is then regarded as an external force, which one cannot and need not resist. Others regard force majeure as a situation in which an external factor (an act of a third party or a natural phenomenon) rather than the behavior of the injurer

[17] This line of reasoning is also clearly visible in the following quote: 'For example, a driver of a fire engine rushing to a fire is justified in exceeding the speed limit. Even with sirens wailing, the speeding engine may raise slightly the danger of a traffic accident, but the risks of harm are greater if time is lost getting to the fire. The driver's behavior is not wrongful, it is warranted. Members of society expect, indeed hope, that other persons placed in the same position will act similarly.' K. Greenawalt, 'The Perplexing Borders of Justification and Excuse', (84) *Columbia Law Review* 1984, p. 1899.

[18] I use the term 'force majeure' instead of 'act of God', because the latter term rules out all situations where behavior of a third party forms the basis of the justification. See e.g. D. Binder, 'Act of God? Or Act of Man?: A Reappraisal of the Act of God Defense in Tort Law', (15) *The Review of Litigation* 1996, p. 13.

was the cause of the losses.[19] Here the behavior of the injurer is still unlawful, but it is not the cause of the losses, so that liability is not possible in the first place.[20]
From a Law and Economics point of view, liability in a situation of force majeure makes no sense. If another factor was the cause of the losses (so the latter of the two above-described views), this is clear, because only if the injurer was the cause of the losses, he should receive the behavioral incentives which tort law can provide. Liability in cases where the tort was no cause of the losses does lead to a desirable change in behavior, but it would cause administrative costs.[21] Also when the other view is followed, so that force majeure justifies the tort, Law and Economics arguments support the conclusion of no liability. The costs of applying a care level that even could have avoided the losses in a situation of force majeure are excessively high. It is not desirable that actors base their care decisions on these exceptional situations.
The cause of the force majeure should not be accountable to the injurer, because otherwise he could have taken measures to avoid this situation. If an injurer does not take certain measures that he could have taken, and if this omission prevents him from being able to take due care at a later stage, this situation should not be regarded as force majeure. The due level of care should encompass taking optimal prior precautions. This way, the injurer receives incentives to take the optimal prior precautions and to take optimal care at the later stage.[22]

3.2.2 Necessity

Necessity is a species of force majeure and it concerns the situation where the injurer breaches a duty, but this breach is not regarded as unlawful, because it is cancelled out by another duty or an interest of a higher order. In the *Principles of European Tort Law*, the idea that the other duty or interest should be of an higher order, is expressed in the following way: 'Again, the defendant's behaviour must have been proportionate to the danger that he thereby responded to. (…) The interests involved on either side will have to be weighed (…) as well as the reasonableness of the defendant's perception of the facts immediately before his harmful behaviour.'[23] Accepting necessity as a justification enables the injurer to choose the alternative with the lowest costs.[24] After all, an obligation not to act in a certain way (e.g. not forcing the door of an empty shed) is cancelled by a possible higher interest (e.g. sheltering against a heavy storm). In itself, liability would probably not hinder the behavior, because the injurer finds it more important to take shelter than to be liable. However, liability would create administrative costs without leading to a behavioral change. Therefore, in my view it is economically desirable not to hold the injurer liable under situations of necessity. In the American *Model Penal Code*, the paradigmatic justification of necessity is indeed the choice for a lesser evil. Conduct that otherwise would constitute a crime now is justified if the actor

[19] See e.g. Binder 1996, op.cit. (note 18), p. 25 and 61.
[20] See e.g. Principles of European Tort Law 2005, op.cit. (note 1), p. 128 and 129, where act of God and third-party conduct are explicitly treated as two different types of external influencing factors. As I mentioned in footnote 18, the term force majeure encompasses both types.
[21] On the necessity of a causal relationship between the tort and the losses, see e.g. S. Shavell, *Foundations of Economic Analysis of Law*, Cambridge, Massachusetts: The Belknap Press of Harvard University Press 2004, p. 254.
[22] Shavell 1987, op.cit. (note 12) p. 77 ff. Also see Binder 1996, op.cit. (note 18), p. 14 ff. on the idea that it is no act of God if a natural phenomenon causes losses, which could have been avoided if people would have properly anticipated the phenomenon.
[23] Principles of European Tort Law 2005, op.cit. (note 1), p. 125.
[24] Also see D.M. Kahan & M.C. Nussbaum, 'Two Conceptions of Emotion in Criminal Law', (96) *Columbia Law Review* 1996, p. 319.

believes that this conduct is necessary to avoid a harm or evil greater than that sought to be prevented by the law defining the crime.[25]

It is interesting to note that Lewis Klar argues that the person who broke into the empty shed should compensate the losses of the shed owner, because intentional trespass in Canadian law is a rights-based tort instead of a wrong-based tort. The mere trespass is an invasion of rights and therefore enough for liability.[26] When this idea is confronted with the Calabresi and Melamed framework that I discussed above, the conclusion in my view should be different. In the situation as described, transaction costs are high (the owner of the shed is not present and the person breaking into the shed has an urgent need to enter the shed). Property rules are not suitable in such a situation, so that infringement upon a right is not the proper type of tort. The court therefore still has to decide whether the injurer acted differently than he should have done, and given the circumstances, this is not the case. The defense of necessity enables the court to decline liability.

Landes and Posner offer a possible economic reason why in some cases of necessity, the injurer still should compensate the victim for his losses. They illustrate their argument with the case *Vincent v. Lake Erie Transportation Co.*[27] The defendant's ship was moored to the plaintiff's pier when a storm arose. The defendant's crew lashed the ship more tightly to the pier. The ship was saved, but the pier damaged. Even though the fact that a greater harm was avoided, so that the defendant acted reasonably in securing his ship to the pier, according to Landes and Posner it might be better to hold the injurer strictly liable instead of applying a negligence rule. Without liability, fewer piers may be built in the future. In addition, liability might provide the injurer with better activity incentives. I agree with the authors that in some cases where the injurer acted under necessity, strict liability could have been a better rule than negligence. If it is up to the court to decide whether to apply a rule of strict liability or of negligence in a specific case, it is possible to choose the best solution in every individual case. In most (if not all) civil law countries, however, the courts do not have this competence. The legislator has determined which type of rule governs the specific type of accident. If negligence is the applicable rule, by not accepting the defense of necessity in a case like Vincent, courts can try to approach a similar result as under strict liability. The possible danger however is, that injurer will try to meet the (too high) standard of care, in order to avoid liability. This would lead to inefficient outcomes. I therefore think that under a rule of negligence, it is economically desirable to accept the defense of necessity in cases where the injurer has avoided the greater harm or loss. If it is possible to distinguish certain *types* of cases in which accepting this justification would lead to undesirable results, the legislator could apply a rule of strict liability. The injurer then would have to compensate the losses anyway, irrespective of possible unlawfulness of his behavior.[28]

Sugerman discusses some arguments provided by Guido Calabresi against strict liability in the *Vincent* case.[29] According to Calabresi, the owner of the pier was probably in the better position to evaluate and to act upon the expected accident losses (e.g. by building a pier that is less easily damaged in storms), and he also knows better how valuable his pier is. Furthermore, in the end the cargo-owners will pay for the losses anyway, because shipping

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[25] L. Alexander, 'Lesser Evils: A Closer Look at the Paradigmatic Justification', (24) *Law and Philosophy* 2005, p. 611.

[26] L.N. Klar, 'The Defence of Private Necessity in Canadian Tort Law', *Issues in Legal Scholarship* 2005, issue 7, article 3, (www.bepress.com/ils/iss7/art3), p. 20.

[27] 100 Minn. 456, 124 N.W. 221 (1910). See Landes & Posner, 1987, op.cit. (note 5), p. 178 ff.

[28] The Principles of European Tort Law 2005, op.cit. (note 1) on p. 125 note that, even though necessity is regarded as justification, the 'victim' might claim for compensation on other grounds such as restitution.

[29] S.D. Sugarman, The "Necessity" Defense And The Failure Of Tort Theory: The Case Against Strict Liability For Damages Caused While Exercising Self-Help In An Emergency', *Issues in Legal Scholarship* 2005, p. 72 ff.

prices will increase either due to higher insurance premiums (if the ship owner is liable for the losses) or increased dock fees. The latter is preferable, because the market operates at lower costs than the liability system. Hence, the ship owner should not be liable.

3.3 Self-defense

If a person is unlawfully attacked and he defends himself, he is not liable for the losses that his necessary self-defense might cause. In order for necessary self-defense to be possible, first there has to be an unlawful attack by attacker A. In his defense, victim V subsequently causes losses to A. In the tort suit A is the plaintiff, suing V for compensation of the losses that the latter caused by defending himself.
The defending act can consist of a crime, such as the use of deadly force or inflicting serious bodily harm. Normally speaking, crimes cause (large) negative externalities and are therefore socially undesirable.[30] This implies that under normal conditions, committing a crime is undesirable behavior. In the section regarding breach of a statutory duty, I already argued that in such cases, the fact that the injurer has acted contrary to a written rule is enough to conclude that he has committed a tort.
However, necessary self-defense is an exception to this rule. The response of the original victim, who is now the defendant in the tort case, is understandable and even desirable. For the defense to succeed, the response has to be both necessary and proportional.[31] If the necessary boundaries are crossed, the wrongful behavior might be excusable, but it is no longer justified. The economic rationale of accepting self-defense as a justification is threefold. First, the defense can avoid more losses than it causes, so that it actually might reduce the expected losses.[32] But even if the losses caused to the initial assailant exceed the losses that he could have caused to the victim, the defense is often accepted.[33] The second economic rationale can help explain this: the initial assailant might be deterred because he knows that he has to bear the losses that he might suffer as result of the necessary self-defense.[34] In many cases, the initial assailant is the cheapest cost avoider: by not attacking the victim in the first place, losses are avoided. Third, the attacked person found himself in an unusual situation in which he could not think over his possible reactions, and under normal circumstances he would not have caused any losses.[35] Liability therefore will not lead to a desirable change in behavior but it will cause tertiary costs.
In conclusion, liability would not provide any preventive incentive. It would only lead to a shifting of the losses, which would cause administrative costs. It is more desirable to deter the initial assailant from his attack, than the victim from his self-defense. Accepting self-defense as justification can contribute to this result.

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[30] See e.g. P.H. Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability', (23) *UCLA Law Review* 1975, p. 266. On p. 272 ff., Robinson explains that while a crime might cause societal harm under normal conditions, under specific circumstances this might be different. Such circumstances then constitute justifications.

[31] This is also recognized in the Principles of European Tort Law 2005, op.cit .(note 1), p. 122 ff.

[32] This line of reasoning is comparable to the 'lesser evil' idea which forms the basis of necessity as justification. Alexander critically discusses this idea of self-defense as lesser evil, see Alexander 2005, op.cit. (note 25), p. 629, 630.

[33] See e.g. R. Segev, 'Fairness, Responsibility and Self-defense', (45) *Santa Clara Law Review* 2005, p. 388, 389.

[34] See Landes & Posner 1987, op.cit. (note 5), p. 152 and 172 ff.

[35] Kahan & Nussbaum 1996, op.cit.. (note 24), p. 328 ff. stress the importance of the defendant's emotions in the justification of self-defense.

3.4 Legal duty or legal authority

If a tortfeasor acts under a legal duty or within the limits of his legal authority, an act that normally would constitute a tort is not unlawful. For example, a police officer that arrests a suspect invades the right to move around freely, the right to bodily integrity, *et cetera*.[36] Or a bailiff that confiscates the car of someone, invades this person's property right. However, these acts that ordinarily would constitute a tort, are now justified on the basis of a weighing of interests. The public interest that the police is allowed to arrest and detain suspects outweighs their private interest not to be hindered in their freedom. The public interest that bailiffs are allowed to confiscate property outweighs the private interests of those whose property is taken away. Hence, social welfare is increased by giving priority to more important interests. However, if the official exceeds the limits of his authority, or if at a later stage the duty or authority turns out to be invoked unfoundedly, one cannot argue that a greater interest justified the act. The conclusion would then be that the act constitutes a tort after all. For example, if a police officer has arrested someone and it turns out that this person should not have been regarded as a suspect due to e.g. a lack of probable cause, the police officer has committed a tort (in common law countries, these would be the torts of false arrest and false imprisonment. In civil law countries, the victim would have to argue that the police officer infringed upon his subjective rights or that he acted negligently).
Even though this justification enables a weighing of interest, giving priority to the larger public interest, insights from Public Choice theory warrant caution. There is no guarantee that the legal rules regarding duty and authority maximize social welfare by correctly weighing the different interests. However, this problem is partly offset by the circumstance that the act is considered a tort after all if the justification is not accepted. Given that a court is needed to evaluate an appeal on a justification, the judiciary can correct the possible Public Choice problems by not accepting the defense. Notwithstanding this relativization, the objections from Public Choice theory suggest that this justification should be used reservedly.

3.5 Authorized official order

If in injurer commits a tort to carry out an authorized official order given by the authorities, his behavior can be justified by this order. The economic rationale behind this justification is the consideration that it would be too costly for the actor to first investigate whether the order was the best way to reach the given goal or that better alternatives existed. If someone receives an official order, he should be allowed to expect that he has to carry out this order, even though it might cause losses. However, if obeying the order clearly will cause losses, and the actor knows a better alternative that is feasible in the given circumstances, following the order is not justified, because more optimal behavior was known and possible. In such cases, we cannot argue that the injurer has acted the way in which we want him to act.

3.6 Permission /consent

In the 'victim' permits the 'injurer' to commit the tort, e.g. to infringe upon his rights, apparently the 'victim' prefers the situation with the tort to the situation without it. The parties involved have made a weighing of interests that differs from the weighing made by

[36] This archetypical example is also used in the Principles of European Tort Law 2005, op.cit. (note 1), p. 126.

the legislator, or the weighing that resulted in the subjective right that was invaded. Under the assumption that parties know their own interests best, it is desirable to follow their decision and to accept permission as justification. This is an application of the Coase theorem:[37] if transaction costs are absent or at least low enough to enable parties to negotiate and to reach an agreement which allocates rights to the person valuing them the most, law should not deviate from those agreements.
Of course, this line of reasoning only holds if the permission was given in freedom, and not under duress. Hence, if a 'weaker' party gave permission to a 'stronger' party, it is necessary to make sure that the weaker party indeed voluntarily consented. Also, differences in information should be regarded, because if the 'victim' gave his permission under incomplete information, the act does not necessarily bring him in a better position. Furthermore, if the act of the 'injurer' is permitted by the 'victim', but it creates negative externalities, it might be desirable to not allow the act after all. But it is then up to the third parties who are negatively affected by the act so sue the injurer.

3.7 Assumption of risk

The defense of assumption of risk implies that a plaintiff who explicitly or implicitly consents to a hazardous activity, cannot sue the injurer for damages if the danger materializes and leads to losses. In the legal literature, it is debated whether assumption of risk is a separate justification.[38] After all, the line of reasoning that the victim should not receive compensation because he has assumed the risk of losses can also be a part of the defense of contributory or comparative negligence. It is then argued that the victim himself also contributed to the occurrence of the loss, and that he therefore should receive no (contributory negligence defense) or only partial (comparative negligence defense) compensation. Alternatively, assumption of risk can be regarded as a form of permission: if the victim knowingly accepts the risk that he is injured by the behavior of the tortfeasor, he should not be able to sue for damages if those losses indeed occur. He has, in a sense, permitted the injurer to act the way he did. A possible difference between permission and assumption of risk could be that permission regards situations in which the victim consented to an intentional violation of his rights or interests, while assumption of risk refers to the victim accepting the possibility that the injurer unintentionally and accidentally harms him.[39] Finally, the result of not granting compensation to the victim in situations of risk assumption can be reached by reducing the level of due care required from the injurer. The victim willingly brought himself in a situation of which he knew or should have known that under normal conditions he might get hurt. This leads to the result that dangers created by the injurer that normally speaking would have been unlawful, are now allowed. Hence the injurer did not act negligently toward the victim, so that the latter cannot successfully sue the former. This line of reasoning is often followed in sports situations.

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[37] R.H. Coase, 'The Problem of Social Cost', (3) *Journal of Law and Economics* 1960, p. 1-44.

[38] In the Principles of European Tort Law 2005, op.cit. (note 1), p. 126, assumption of risk is mentioned as a separate defense. See K.W. Simons, 'Reflections on Assumption of Risk', (50) *UCLA Law Review* 2002, p. 482 for references regarding the debate. According to Simons, assumption of risk is defendable if confined to two categories: (1) if the victim prefers the tortious behavior over the nontortious behavior (e.g a passenger who encourages a driver to speed) and (2) if the victim prefers the tortious risk over the situation where the defendant would decline any further relationship with him (e.g. a stranded motorist who requests a ride from a drunk driver). In my opinion, both these options would fall under the heading of 'permission', which forms a separate justification.

[39] See e.g. W. van Gerven, P. Larouche, J. Lever, *Cases, Materials and Text on National, Supranational and International Tort Law*, Oxford: Hart Publishing 2000, p. 729/1.

Landes and Posner examine the defense of assumption of risk in a setting of low transaction costs.[40] Just as with permission, the defense expresses a preference for market transactions over court decisions. If a court deems the injurer negligent, but the plaintiff's behavior shows that he regarded the risk as acceptable, due to the defense the parties' valuation in the end is decisive. The authors provide the example of *McLeod Store v. Vinson,*[41] in which the defendant department store organized a guinea race outside the store and offered a prize to the winner. The plaintiff entered the race and was injured when he fell chasing the guinea. The court held that the plaintiff voluntarily assumed the risks of the race, so that he could not recover his losses from the defendant. The authors argue that for the plaintiff to enter the race, the expected value of the prize must have exceeded his expected costs, and denying recovery in tort in essence enforces his contract with the defendant. In the Dutch *Circus donkey* case,[42] a visitor to the circus voluntarily accepted an invitation to ride an unsaddled donkey at the end of the show, and he fell off. The district court and appellate court argued that the visitor assumed the risks, which were of common knowledge. The Supreme Court, however, considered that voluntary exposure to commonly known risks does not necessarily bar liability of the defendant. Because the circus, which was as least as familiar with the specific risks of riding a donkey as the plaintiff, challenged the plaintiff, it has acted negligently. According to the Supreme Court, there can be at most a reduction of damages, if the court on the basis of the circumstances of the case decides that the losses can also be partially accounted to the plaintiff.[43] Note that given the circumstances of a specific case, this reduction can also lead to a full rejection of damages. Therefore, even though the Dutch Supreme Court applies a defense of comparative negligence instead of assumption of risk, the practical outcome can be the same: if the plaintiff has voluntarily assumed a risk (which is a factor that can be accounted to him), damages might be denied. The solution through comparative negligence, however, allows fine-tuning, whereas assumption of risk is an all-or-nothing defense.
Turning the question if assumption of risk constitutes a *separate* defense or that it is subsumed under either contributory/comparative negligence, permission or a lower due care level aside for the moment, it should be analyzed if it is economically desirable to dismiss liability in cases where the victim willingly accepted the risk of getting hurt. The answer in my view is 'yes'.

Landes and Posner offer several possible answers to the questions why liability might be denied in situations with low transaction costs where the injurer was negligent and why any reasonable person would voluntarily assume the risk of being injured by a negligent injurer when negligence economically speaking implies that both the injurer and victim would have been better of ex ante if the injurer had taken more care. The first answer is already mentioned above: the preference for market outcomes over judicial evaluations. If a court deems the injurer negligent, this might be caused by a wrong weighing of the interests involved. Given the fact that the victim assumed the risk and assuming that actors know their own preferences better than the court does, the mere fact of the risk assumption shows that the court's evaluation was wrong. In my view, incomplete information frustrates this line of reasoning, because if the victim cannot properly assess the risk he takes, he might be the one

[40] See Landes & Posner 1987, op.cit. (note 5), p. 139 ff.
[41] 213 Ky. 667, 281 S.W. 799 (1926).
[42] Supreme Court, October 21, 1988, *NJ* 1989, 729.
[43] In a case in which a soccer player committed an offense, the Supreme Court explicitly considers that there is no need for a separate defense of risk assumption, because the desired result is reached either by not deeming the act of the injurer as unlawful, or by finding the victim comparatively negligent. Supreme Court June 28, 1991, *NJ* 1992, 622.

who actually errs. The considerations of the Dutch Supreme Court in the circus donkey case illustrate this. The circus was better informed about the risks of riding an unsaddled donkey than the victim, and the victim might have felt that he would loose face if he declined the invitation. The mere fact that the victim accepted the invitation therefore does not necessarily imply that he found this activity valuable enough to outweigh the possible risk. This was different in the *Vinson*-case, where the guinea race was advertised (so that the victim there was not pressured to accept) and the winner would receive a prize (which might be high enough for a rational person to accept the risks). Therefore, this possible answer only can be persuasive in cases where the victim has adequate information to make a correct weighing of risks and benefits.

The second possible answer provided by Landes and Posner is the following. By accepting risk assumption as a defense, a risk-loving plaintiff can market his taste for risk. Even in situations where the expected value of the risky activity might be lower than the costs, risk-lovers also derive utility from the mere uncertainty. By accepting risk assumption as defense, other people are allowed to offer such risky ventures to those who would like to take the risk. An example that could illustrate this idea is a company that organizes risky activities such as rafting, bungee jumping, et cetera. The value of such activities to those who undertake them is the experience of the thrill that is associated with the risk taken. If the companies who organize these activities could be held liable in case losses indeed occur, probably these activities would not be commercially attractive anymore. Obviously, companies and risk-takers enter into a contract in which liability will be excluded, so that they do not constitute tort cases, but the example might help to illustrate the idea of Landes and Posner nonetheless. The authors however do not stress this second possible answer, because actors are normally assumed to be either risk-neural or risk-averse instead of risk loving.

The third answer is related to a topic that I already discussed above: the negligence rule is formulated at an abstract level and is based on the average costs and benefits of care. If for an individual person these costs and benefits significantly differ from the average, the negligence rule might not provide the correct incentives. Landes and Posner provide the example of a very skilled tractor driver, for whom some safety devices that are cost-justified for average drivers are more expensive than the expected losses they prevent. He prefers a cheaper tractor without those safety devices to a more expensive tractor with those devices. If he indeed buys such a cheaper tractor and an accident happens after all, he should not be able to sue the manufacturer on the basis of negligence, even if it would have been negligent to sell the cheap tractor to an average driver. Accepting the defense of assumption of risk therefore enables us to correct the excessive care incentives that the abstract negligence rule provides under certain conditions.

The fourth answer focuses on the activity level of the victim: by not engaging in the dangerous activity in the first place, the victim himself could have avoided the accident. If courts would incorporate the activity level of the victim in the defense of comparative or contributory negligence, the same result could be accomplished, but the activity level seldom enters this defense.

The four possible answers described above concern situations where transaction costs are relatively low. In situations of high transaction costs, which are the more relevant situations in tort law, Landes and Posner do not really see a substantial role for the defense of assumption of risk. Only if the costs to the victim of avoiding the accident by reducing his activity are clearly lower than the costs of the injurer to avoid it, liability should be denied. The authors provide the example of an injurer that negligently starts a fire, which spreads to the house of the victim, who runs into the burning house to retrieve an object of little value and gets hurt. Even if the victim took high care while in the house, he should not have entered it in the first place. If the defense of comparative or contributory negligence does not

encompass the activity level, the defense of assumption of risk can play a desirable role here by not allowing the victim to recover the losses that he suffered by entering the house. The Dutch case regarding the circus donkey suggests that in the Netherlands, the activity level of the victim is a relevant factor in determining whether he was comparatively negligent.

The conclusion in my view should be that assumption of risk from an economic perspective is no separate defense in tort law. The situations of low transaction costs are not representative for tort situations, but even there the desired result can be achieved by applying a defense of permission, of comparative or contributory negligence (which also makes it possible to grant partial compensation, whereas assumption of risk is an all-or-nothing approach), or alternatively by arguing that the injurer did not act unlawfully towards this plaintiff. And when transaction costs are high, the only economic rationale for the defense lies in correcting the activity level of the victim, which can be done by incorporating it into the defense of comparative or contributory negligence.

3.8 Acting in the general interest

If an activity is carried out in the general interest, the activity might be regarded as lawful where it otherwise would have constituted a tort. The reason behind this is that if such acts would be regarded as torts, plaintiffs could sue for an injunction, which would be an unacceptable consequence. However, the mere fact that the act is carried out in the general interest, does not necessarily imply that the injurer should not compensate the losses. In the Dutch legal literature, several approaches exist to reach this result. In one approach, the act itself is considered a tort, but the influence of the general interest is a 'justification in the making'. Payment, or at least the offer of compensation, completes the justification. In the alternative approach, the act is lawful, but not paying compensation is unlawful. The Dutch Civil Code uses yet another approach: according to article 168 of book 6 of the Civil Code (article 6:168 CC), the act remains a tort, but the plaintiff cannot sue for an injunction. If the injurer is convicted to pay compensation but he fails to do so, the plaintiff can sue for an injunction after all.
From an economic point of view, it is not clear what constitutes the 'general interest'. If it is defined as the sum of the utility levels of all individuals in society, then acts carried out in the general interest increase social welfare. However, if the general interest merely consists of the interests of the majority, acts in the 'general' interest can go at the expense of minority interests and do not necessarily increase total welfare.
In addition, Public Choice theory points out that politicians and government officials can have their own goals, which might diverge from the general interest. Furthermore, pressure groups try to influence public decision-making. Acts in the 'general' interest therefore might in reality be aimed at specific interests of politicians, civil servants and pressure groups.[44]
Even if an act is potentially welfare increasing, it is not necessarily welfare maximizing. It might have been possible to take additional care or to choose an alternative method, so that the primary accident costs decrease.[45] More importantly, the fact that it is often a government

[44] See e.g. J.R. Macey, 'Public Choice and the Law', in: P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, London: MacMillan Reference Limited 1998, p. 171-177.

[45] Calabresi has classified total accident costs into three categories: primary, secondary and tertiary costs. The primary accident costs are the losses in case an accident happens plus the costs of precautionary measures that are taken in order to try to avoid accidents. The secondary costs are the costs of having to bear the losses. These costs decrease if the losses are spread over a larger group, because every individual then bears a smaller loss. Due to the decreasing marginal utility of wealth, sharing a loss or transferring it to a less risk-averse actor increases total welfare. The tertiary accidents costs are the costs of the legal system, also known

that carries out acts in the general interest implies that the secondary accident costs can be decreased by holding the injurer liable. After all, if the government has to compensate the losses, they are spread over a larger group of people (the tax payers), which is preferable to the situation where the unfortunate victim has to bear the entire losses himself.
The conclusion of this section is clear: the argument that a damaging act was carried out in the general interest, should not be accepted as a justification. Even if the act itself is desirable so that the injurer should not be enjoined, liability for the losses caused in the general interest can lower primary and secondary accident costs. As always, one should keep in mind that the possible increase in tertiary costs due to the tort suit should not exceed the reduction in primary and secondary costs.

3.9 Conclusions regarding justifications

In the above sections I have discussed several justifications from an economic perspective. The common ground of those justifications is that they enable the legal system to correct possible misguided incentives that are caused by the use of abstract, general norms. In cases of *force majeure*, either the injurer cannot be regarded as the cause of the losses so that he need not receive incentives to change his behavior, or if he is regarded as the cause it cannot be said that he has acted differently than desirable under the given circumstances. Applying a level of care that could even have avoided the accident given the specific conditions would have been too expensive. The defense of *necessity* enables the injurer to choose the alternative with the lowest costs. If the circumstances of the case are such that economic theory would prefer a rule of strict liability over negligence, liability would still be warranted. In situations where an actor inflicts losses in *self-defense*, liability would not provide any preventive incentive. It would only cause administrative costs due to the shift of the losses. It is better to deter the initial assailant from his attack, than the victim from his self-defense. If an injurer acts under a *legal duty* or within the limits of his *legal authority*, his acts can be justified on the basis of the weighing of interests that resulted in the duty or authority. However, Public Choice insights warrant caution in applying this justification. Carrying out an *authorized official order* can be justified because it is too costly for the actor to investigate whether the order was the best way to reach the given goal or that better alternatives existed. If the victim has voluntarily given *permission* to the injurer to commit the tort, the act of the injurer should be justified. Apparently, the parties involved weigh their interests differently than is done in formulating the general norm. *Assumption of risk* from an economic perspective does not constitute a separate justification in tort law, because the desired results can already be reached through other defenses. Acting in the *general interest* should not justify the tort, because it is often still desirable that the injurer compensates the losses of the victim.
In the situations where the justifications make economic sense, the injurer did not act differently than he should have done, given the circumstances of the case. Anyone in the same class of injurers who would find himself in such circumstances would have been allowed to act that way. Taking measures to avoid the losses would have been too expensive (force majeure, necessity, official order), would have given wrong incentives to others (self-defense) or would have lead to an incorrect weighing of interests involved (legal duty or authority, permission). This characteristic of justifications (that they lead to the conclusion that the *behavior* was correct) is fundamentally different than the basic function of excuses, which I will discuss below. I will argue that with excuses the behavior is undesirable, but

as system costs or administrative costs. See G. Calabresi, *The Costs of Accidents. A Legal and Economic Analysis*, 5th printing, New Haven: Yale University Press 1977, p. 24 ff.

liability cannot influence the *injurer*. It would only cause administrative costs, so that it is better to reject liability.

4. Excuses

4.1 Introduction

If an injurer has committed a tort and he cannot successfully invoke a justification, in principle he is liable. The weighing of interests that took place in the written norm or in the negligence standard is not corrected on the basis of the specific circumstances of the cases (that would have constituted a justification). Generally speaking, injurers who have committed a tort could have acted differently, and so they should have. In legal terms the tort can be imputed to them, so that they were at fault. However, under certain conditions, the tort might not be imputable to the injurer after all. Even though the injurer has acted wrongfully, liability is not warranted. To give an example, if an injurer by mistake believes that a certain good is his and he destroys it, while in reality the good belongs to someone else, he has infringed upon the right of the victim. If this mistake was excusable, implying that the injurer was reasonably allowed to make the mistake, liability cannot influence the injurer's behavior in a desirable way: either there is no change in behavior because the injurer thinks that the good is his, or he spends too much resources in assessing whether a good is really his (after all, the mistake was excusable).
In the sections below, I will analyze the different excuses from an economic point of view, asking the question whether the excuses can contribute to the ultimate goal of minimization of the total costs of accidents.

4.2 Mental or physical disability or illness

If a person with a mental disability commits a tort, one could argue that the tortfeasor should not be liable, because he cannot assess the consequences of his behavior and liability will not influence his behavior. A physical disability or illness can also limit the possibilities to take care, so that one should not hold the disabled or ill injurer to the same standards as healthy people. This, however, would be a too superficial line of reasoning.
In section 2.2.3 I already explained that it is economically desirable to apply a general, objective negligence rule, even though people differ in their costs and benefits of taking care. Formulating separate levels of due care would be too expensive and would be vulnerable to strategic behavior. Only if the differences between people are easily observed, applying separate negligence rules is preferable, because the information costs are low and the possibilities for strategic behavior limited. Landes and Posner provide the example of a blind person, who clearly signals his disability by using a cane.[46] For him, another due care standard is applied.
Hence, for physical disabilities and illness, the relevant question is whether they are clearly and easily ascertainable. If so, the possible problems of strategic behavior and increased administrative costs are solved and a separate due care standard can be devised. Obviously, liability should still exist if the disabled or ill person engaged in an activity from which he should have refrained precisely because of his condition. For example, a person who very

[46] Landes & Posner 1987, op.cit. (note 5), p. 127.

regularly is struck by an epileptic seizure should not drive a car. He therefore should not be able to excuse himself on the basis of his condition if he causes a car accident after all.
Whether or not a mental disability should be an excuse depends on the circumstances, more specifically the gravity of the disability. If the disability is so severe that the actor cannot control his behavior, liability cannot provide adequate incentives and would only cause administrative costs. An excuse of mental disability could then make economic sense. However, liability could provide incentives to the guardian to better control the behavior of the actor, e.g. by not engaging in certain activities. This would plead against accepting an excuse of mental disability, unless the guardian could be held personally liable if the actor causes losses.
If the disability is less severe so that the actor has some influence over his behavior, but he cannot meet the required standard of care, liability can induce him to refrain from the activity. This will reduce the expected accident losses, so that mental disability should not be accepted as an excuse in such a case. If the actor is capable of meeting the required standard of care, even though this is relatively expensive for him, apart from the activity level argument, liability can provide the incentive to actually take due care. Obviously, this level of care is higher than optimal in his specific situation. Accepting mental disability as an excuse could prevent this excessive care, but at the cost of losing the activity level incentive. Furthermore, the need to distinguish between actors who can meet the standard of due care and those who cannot causes substantial administrative costs. In my view, this pleads against accepting the excuse in all cases where the disabled person has some influence over his behavior.
So, if the actor cannot control his behavior, the excuse makes economic sense, but if the actor has some influence, the excuse should not be accepted. Making this distinction, however, causes administrative costs. The more difficult it is to distinguish between the two types of cases, the more weight has to be attached to the administrative costs, and the more attractive it becomes to treat all cases alike: do no accept the excuse of mental disability. A corroborating argument is, that if it is difficult to distinguish between the two types, in order not to hinder ordinary life too much, people should be allowed to expect that others have to adhere to the normal standards of behavior.

4.3 Excusable error regarding the law or the facts

If the injurer errs regarding the law or certain facts, tort law might not be able to change his behavior. The injurer e.g. does not know that he violates a written norm, he does not know that this norm is applicable in his situation, he does not know that the victim had a subjective right which he infringes upon, or he thinks that the subjective right is his own. Often, an appeal on the excuse of error fails, because the court decides that the injurer is to blame for his fault, or at least the risk of making such an error should be borne by him. However, if an error is regarded as *excusable*, the injurer is not to blame for not knowing the law or the facts.
How can excusable and non-excusable errors be distinguished? In my view, the same approach can be followed as with the requirement of foreseeability: if the costs of acquiring more information outweigh the benefits thereof (consisting of the ability to adapt the behavior to the true facts or the applicable norms), not knowing these facts or norms is excusable. If the costs are lower than the benefits, in economic terms the injurer should have known the norm or facts and the error is not excusable.[47]

[47] For the economic analysis of foreseeability, see e.g. G. Calabresi & A.K. Klevorick, 'Four Tests for Liability in Torts', (14) *Journal of Legal Studies* 1985, p. 585-627; S. Shavell, 'Liability and the Incentive to Obtain Information About Risk', (21) *Journal of Legal Studies* 1992, p. 259-270; H.-B. Schäfer & C. Ott 2005,

If it is difficult to assess what a specific injurer should have known, so that it is difficult to distinguish excusable errors from non-excusable errors, the administrative costs of applying this defense might be substantial and strategic behavior might occur. Therefore, the defense should only be accepted in cases where it can be applied relatively easy. The possible use of the defense therefore is rather limited: only in cases where it is clear that it would have been too expensive for the injurer to discover the applicability of the norm or the true facts should it be applied.[48]

4.4 Self-defense with excessive force

As discussed in section 3.3, if someone causes losses in the necessary defense against an attack, his damaging acts are justified. The economic reason behind this was that we do not want this person to act differently. The defense might prevent more losses than it causes, and accepting the defense might deter the initial assailant from his attack in the first place.
If the actor exceeds the boundaries of the necessary defense and uses more force than was needed to ward off the attack, we can no longer say that he has acted in a desirable way. After all, it would have been preferable that he would not have used excessive force. Therefore, the tort is not justified. However, it remains to be seen if liability for the inflicted losses is warranted. After all, the argument still remains that it is desirable to deter the initial assailant from his attack and excusing the damaging behavior of the victim helps in this respect.[49]
Theoretically speaking, it would be possible to divide the losses between the initial assailant and his victim. The assailant then bears the losses that he would have suffered as a result of necessary self-defense, while the victim bears the losses that were caused by his excessive reaction. However, it is unlikely that such a distinction can easily be made. In addition, the victim did not have the opportunity to carefully think over his response to the attack. He found himself in an exceptional situation and under normal conditions he would not have caused the losses. Making him (partially) liable for the losses of his assailant will therefore not change his behavior and only causes administrative costs. It is better to let the assailant bear all his losses, even those that were caused by an excessive reaction. Obviously, this does not give the victim *carte blanche* to use unlimited force. In every case it is therefore necessary to assess whether the actual force used by the victim does not exceed the limits of excusable force, even though it might have exceeded the limits of necessary force.

4.5 Unauthorized official order

Lehrbuch der ökonomischen Analyse des Zivilrechts, 4., überarbeitete Auflage, Berlin: Springer 2005, p. 354 ff.

[48] R. Segev, 'Justification, Rationality and Mistake: Mistake of Law is no Excuse? It Might be a Justification!', (25) *Law and Philosophy* 2006, p. 41 ff. argues that mistake of law can be regarded as a justification if it would have been too costly for the actor to acquire more information, so that not knowing the rule is rational. In my view, the information costs are connected to the particular actor, so that one cannot argue that it is optimal for *every* person not to know the true rule. Of course, if a rule is so obscure that it is objectively preferable that people do not know this rule, the arguments in favor of breach of statutory duty as a separate tort do not hold, and liability should be determined by the negligence rule (see section 2.2.2 above). The conclusion could then be that the injurer did not act unlawful in the first place, not because his act is justified but because it was not negligent. On p. 44, Segev acknowledges this agent-relative characteristic of mistake of law, but argues that the crucial factor is the different circumstances rather than the identity of the agent.

[49] The two types of self-defense can be described as *justifiable self-defense* and *excusable self-defense*, see e.g. Robinson 1975, op. cit. (note 30), p. 276.

If an injurer follows an official order of which he was allowed to assume that it was authorized, liability makes no sense. After all, it is not desirable that the actor has to check every official order on its validity. However, if it should have been clear that the official who gave the order was not authorized, the actor should not have executed the order and he should not be able to excuse himself.

5. Conclusions

After having analyzed the different justifications and excuses in tort law from an economic point of view, what conclusions can be drawn from the analysis? A first result is that with many justifications and excuses, the final opinion regarding the desirability of the particular defense depends on a weighing of a likely rise in tertiary costs due to the increased complexity of the individual case on the one hand, and the possible decrease in primary and/or secondary costs that results on the other hand. It is not the goal of my paper to provide quantitative information on these costs and benefits, but rather to try to identify the possible effects of justifications and excuses on these primary, secondary and tertiary costs. This implies that the expressed opinions whether a justification or excuse makes economic sense are not based on empirical proof, but on how they fit in the theoretical framework of the economic analysis of tort law.

Second, the possible role of justifications and excuses is greatly determined by the level of concreteness of the behavioral norms that tort law provides. If liability depends on negligence of the injurer and if all circumstances that are specific for this case and this injurer are incorporated in formulating the due care level, there is no separate role for justifications and excuses. After all, the relevant circumstances would then be already incorporated in the negligence rule, leading to the conclusion that the injurer did not act negligently. If, on the other hand, the judgment regarding unlawfulness is based on general, abstract norms, the case- and injurer-specific circumstances that could argue against liability still have to be assessed. This can be done in the phase of justifications (case-specific circumstances) and excuses (injurer-specific circumstances). I have argued that this latter approach of applying general norms is preferable, because it saves on administrative costs, it can lead to a better allocation of resources (especially when an infringement upon a subjective right is concerned) and it might provide better care and activity incentives.

The third conclusion is that justifications are relevant in situations where under normal conditions the behavior of the injurer would have been undesirable, but in the given circumstances we would have wanted every injurer to act like this injurer did. The reasons why his behavior was desirable differ: it would have been too expensive to take a care level that could have avoided the losses (force majeure), the injurer chose the option that caused the smaller losses (necessity, some cases of self-defense), his behavior might deter others from causing losses (self-defense), he acts to serve a greater public interest (legal duty or authority), he was allowed to think that he should act like this (official order) or he actually prefers the tortious situation (permission). In accepting some of the justifications, caution is warranted. Permission should only be a justification if it was given in freedom and if the victim had enough information. Regarding official duty and authority, the objections from Public Choice theory suggest that this justification should be used reservedly.

Fourth, some justifications should be fully rejected from an economic point of view. Assumption of risk does not constitute a separate justification, because its possible goals can already be reached by applying other defenses, such as permission or comparative/contributory negligence. Acting in the general interest is problematic due to the

difficulties of defining what the 'general interest' is, and because liability would lead to a better spreading of losses and thereby to a reduction in secondary costs.
Fifth, after it is determined that the behavior of the injurer was unlawful and not justified, it remains to be seen if the behavior was imputable to the injurer. Generally speaking, this will be the case because if an average injurer should have acted differently, this particular injurer also should have acted differently. Any exceptional circumstances why he should not or could not have acted differently have to be proven by the injurer. This reversal of the burden of proof regarding imputability makes economic sense, mainly because the probability that such circumstances exist is much smaller than the probability that they do not exist. The main purpose of excuses is to deny liability in cases where it would not lead to a desirable change in behavior, even though the injurer did not act the way in which we wanted him to act. Excuses avoid the administrative costs of transferring money through the expensive tort system in cases where liability serves no purpose. On the other hand they cause administrative costs by complicating the legal procedure.
Most of the analyzed excuses are problematic. The excuse of mental disability only makes sense if the actor cannot control his behavior altogether. However, liability might provide incentives to his guardian to avoid the losses, which pleads against accepting this excuse. Furthermore, the administrative costs of trying to assess to what extent an actor can control his behavior might be substantial, so that it might be better not to accept this excuse at all. Clearly and easily ascertainable illnesses and physical disabilities could lead to a lower due care level for the injurer, so that the objective norm is already changed. The illness or disability could also form a reason why the injurer should not have engaged in a certain activity. In either case, it does not form an excuse. Excusable error regarding the law or the facts is difficult to distinguish from inexcusable error, so that this excuse creates substantial administrative costs. Only in cases where it is clear that it would have been too expensive for the injurer to discover the applicability of the norm or the true facts should it be applied. Accepting self-defense with excessive force as excuse makes economic sense, mainly because it might deter the initial assailant. However, it should not enable the victim to use unlimited force, so that it is necessary to determine in every case whether the force used was excusable. An unauthorized official order, finally, should excuse the defendant if he did not have to know that the order was unauthorized.