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Interactions between civil and criminal liability for cybercrimes under Swiss law

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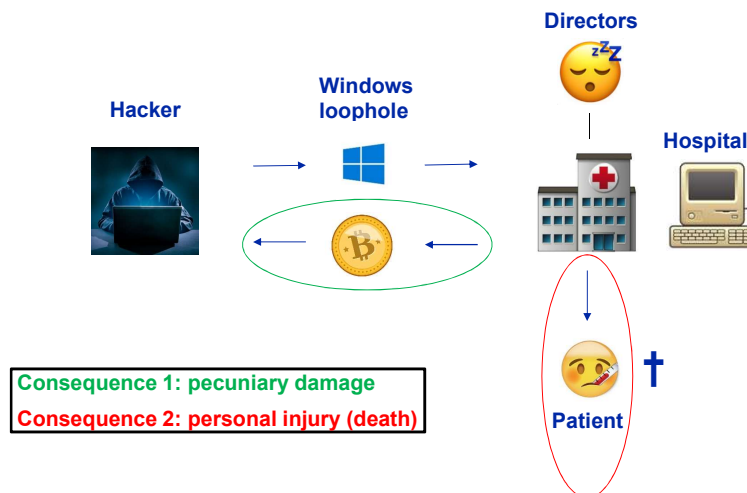
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Los Angeles hospital paid \$17,000 in bitcoin to ransomware hackers

Hollywood Presbyterian Medical Center had **lost access** to its computer systems since 5 February after hackers installed a virus that encrypted their files

<https://www.theguardian.com/technology/2016/feb/17/los-angeles-hospital-hacked-ransom-bitcoin-hollywood-presbyterian-medical-center>

A (not too) unlikely event...





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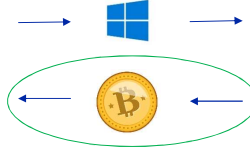
(1) Tort?
(2) Extortion?
(1) Tort?
(2) (Negligent) homicide?

Hacker



(1) Contractual | tort?
(2) /
(1) Tort?
(2) [i.c. no corporate criminal liability]

Windows



Directors



(1) Contractual | tort?
(2) Mismanagement?
(1) Tort?
(2) (Negligent) homicide by omission?

Hospital



(1) /
(2) /
(1) Contractual | tort?
(2) [i.c. no corporate criminal liability]



(1) Civil liability
(2) Criminal liability



Civil and criminal law interactions: the two extremes

– Cost- and time-efficiency
– No contradictory rulings

Procedural identity

Material identity



Procedural independence

Material independence

Taking into account the different
– purposes and interests
– rights and duties
– parties



Material interactions (1|2)

E.g. hospital directors' liability:

Mismanagement (art. 158 Swiss Penal Code):

- (i) management of assets
- (ii) breach of duty
- (iii) damage
- (iv) causal link
- (v) intent

Directors' liability (art. 754 Swiss Code of Obligations):

- (i) director
- (ii) breach of duty
- (iii) damage
- (iv) causal link
- (v) fault



Material interactions (2|2)

Criminal law dependent on civil law perspective

Interpretation of normative constituent elements of a crime explicitly or implicitly referring to civil law

- Limiting function of civil law:
«Any person who acts as required or permitted by the law acts lawfully even if the act carries a penalty under this Code or another Act» (art. 14 Swiss Penal Code)
- Civil law violation necessary, yet **not always sufficient**

Civil law dependent on criminal law perspective

Recourse to criminal law

- **Wrongfulness** in tort law (art. 41 Swiss Code of Obligations)
- In case of pecuniary damages, case law requires the breach of a specific **asset protection provision** often found in criminal law (e.g. computer fraud, money laundering)



Procedural interactions

Criminal proceedings

Civil proceedings

In general **independent proceedings**, each with its **own procedural rights, obligations and principles**

Nevertheless certain **interactions**:

- **Aggrieved person as a party to the criminal proceedings**
 - Access to files → May be used in parallel or subsequent civil proceedings
 - May assert claims for damages caused by the criminal offence → To be decided by the criminal judge as part of the criminal trial
- **Binding effect of a criminal conviction on parallel or subsequent civil proceedings?**
 - Often factually binding, though not a legal principle (cf. art. 53 Swiss Code of Obligations)

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Thank you for your attention.

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