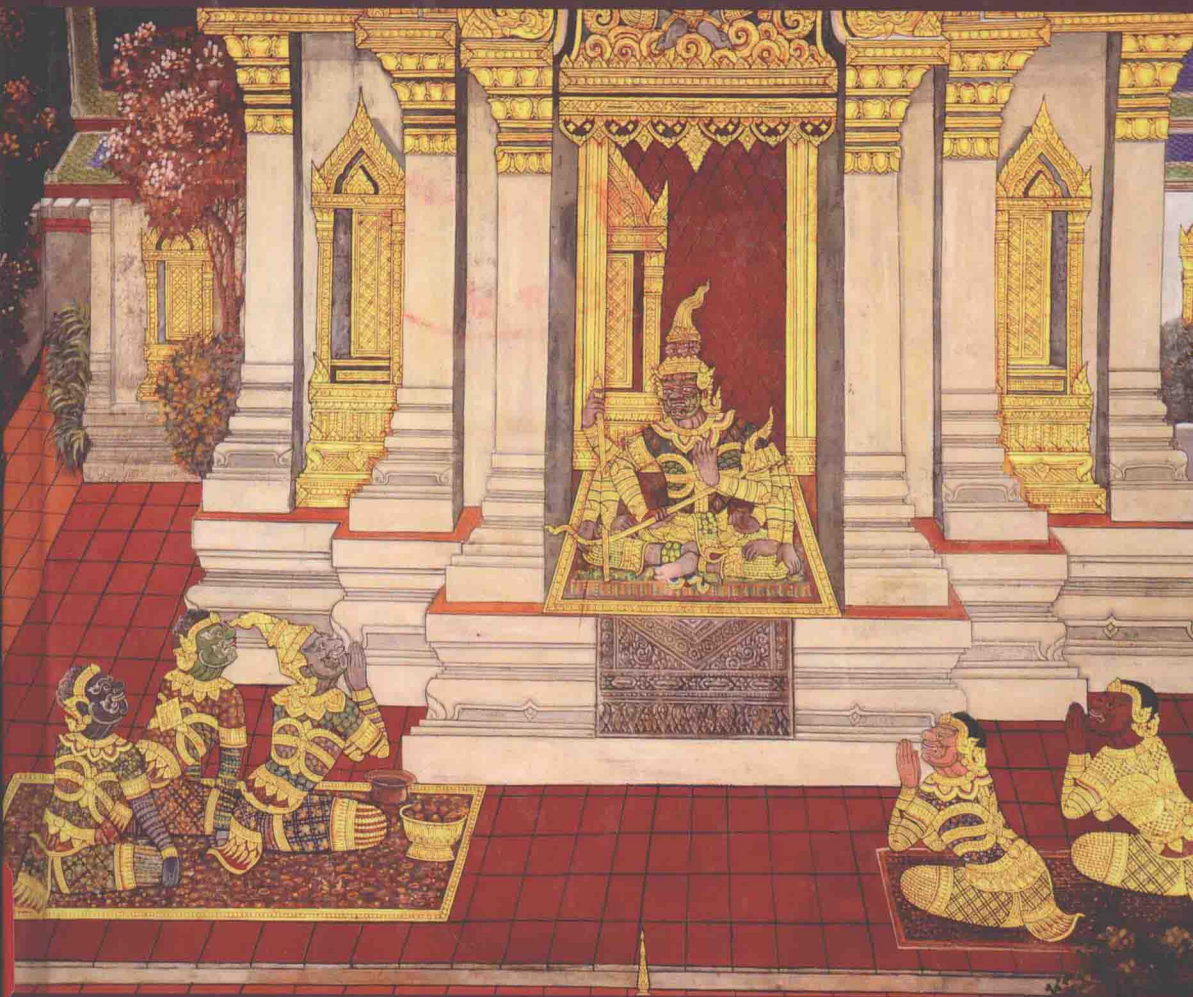


Comparative Tort Law

Global Perspectives

Edited by

Mauro Bussani • Anthony J. Sebok



RESEARCH HANDBOOKS IN COMPARATIVE LAW

Series Editors: **Francesco Parisi** and **Tom Ginsburg**

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1. Introduction to comparative tort law: Global perspectives

Mauro Bussani and Anthony J. Sebok

1. WHAT THE BOOK IS NOT

A book with the title ‘Comparative Tort Law: Global Perspectives’ must be carefully explained to its readers so as to avoid certain confusions. Let us start by making clear what the book is not.

Although the title might suggest otherwise, this book is not about international tort law or transnational tort law. This book has no reductive or globalizing ambitions. The purpose of the book is decidedly not to resemble a digest or an encyclopedia. A book about the tort law of the entire world would be an impossible task – the recently completed *Comparative Studies in the Development of the Law of Torts in Europe* published by Cambridge University Press is nine volumes and it presents only part of the tort law of one legal family, Europe. Finally, this book is not intended to summarize the vast body of scholarship that covers tort law around the globe, nor does it offer a normative tort theory rooted in the history of any one (or all) family/families of tort law.

2. WHAT THE BOOK IS ABOUT

This book, which is one volume and twenty essays (including this introduction), has one specific purpose, for which, we hope, its structure is well suited. The purpose is to provide a framework for reflection and analysis about the current state of tort law and its recent developments in what has been conventionally called ‘Western’ and ‘non-Western’ tort systems.

This book provides a map of many of the major landmarks of tort scholarship from the perspective of the beginning of the twenty-first century. Its structure and scope are dictated by this purpose. The fixed point that guided the selection of authors and the topics in the book is the idea that tort is still a concept that has a distinct meaning in all legal systems. This holds true even if in some systems there is no word that translates to or corresponds with the word ‘tort’, and even if in some legal systems the legal consequences of a cause of action in tort are not clearly differentiated from other private law or public law mechanisms. While legal systems may not share a terminology, they share a common set of questions: ‘what conduct by the defendant triggers liability, and for what grievances [may] the plaintiff recover?’ (see the chapter by James Gordley). As the book shows, these questions are those which any tort law system tries to answer.

2 *Comparative tort law*

The book is divided into three sections: 'General Issues', 'The Western Law of Torts' and 'Non-Western Perspectives'. There is no doubt that other structures may have served as well. While we are not overly concerned about the specific structure we have chosen – since one point of this book is to illustrate that there is no Archimedean standpoint outside of legal culture – we are conscious of the Western assumptions built into the chapters contained in the section entitled 'General Issues'. Some of the topics we asked authors to cover may be, as Daniel Jutras says of alternative compensation schemes, solutions to 'rich countries' problems'. The same might be said of the chapter on tort law and insurance by Ina Ebert – after all, the relationship between the law of non-contractual obligations and third parties whom by contract assume (or are owed) those obligations presumes a financial system that has developed episodically across the globe, and most fully in the West.

But it is precisely the self-consciousness produced by the task of drafting an organizing structure that we wish to harness and highlight. For example, the idea that there are 'general issues' in tort throughout the globe can be a product of both a descriptive (or scientific) attitude and an interpretive (or aspirational) attitude. In the former category, we place the subjects of conflict of laws and the economic analysis of torts; themes that, notwithstanding the problems of translation, may have application in any system of legal responsibility in the world. Of course, concrete answers will vary, depending on multiple variables, but as Symeon C. Symeonides, who writes on the conflicts of law, and Giuseppe Dari-Mattiacci and Francesco Parisi, who write on the economic analysis of torts, demonstrate, the abstract questions of whose law to apply and whether a given practice is efficient are practical questions that are at play, whether explicitly or implicitly, in every tort system, regardless of the scope or grounds of liability in that system.

3. THE WORLD AND THE WEST

In other areas, the body of questions handled under 'General Issues' indeed reflects our admittedly partial perspective. We think that, whether or not all tort systems do consider the issue, all tort systems could regard human rights, crime, insurance and alternative compensation schemes in the context of their existing tort system. We recognize that in each of these cases, a normative or interpretive argument could be made for refusing any connection between a torts system and the topic at hand. This point has already been made above with regard to insurance. Arguably, the relationship of insurance to tort is purely theoretical for legal systems in those parts of the world where most wealth is tied up in real or chattel property, and there is very little financial liquidity, which is necessary for an insurance market to thrive. But even this concession needs to be carefully examined. Perhaps insurance today is not a major issue in Sub-Saharan Africa, but given globalization and the introduction of capital into the nations covered in the chapter by Dominic N. Dagbanja, insurance concerns touch at least some activities in those nations and could become more important as globalization continues.

As for the decision to include human rights and crime in the section on 'General Issues', it might be argued that this reflects our own Western political and cultural

assumptions. In response, we would direct the reader to Chapter 2 in this book. As one of us (Mauro Bussani) and Marta Infantino assert, ‘tort law should be counted amidst the institutional devices whose aim is to settle societal conflicts in case of disruptions of social harmony’. Beyond this common foundation, Bussani and Infantino note, the whole framework of tort is based on contingent elements that from one time or another and from one perspective or another are contestable. For example, certain categories internal to Western tort law, such as causation, are revealed upon close analysis to be highly contingent depending on various political and cultural factors. Further, the very idea of injury and agency – which one might have thought was prior to any tort system – is also contingent and plastic, at least between cultures.

Faced with this reality of global contingency, our solution is not to throw up our hands and to give up trying to provide points of comparison, but rather to engage in a form of interpretation. Interpretation, at least as we understand it, does not assert its authority based on the interpreter’s presumption of objectivity. Interpretation’s authority is based on the interpreter’s ability to add chapters to a narrative which extend understanding in ways that are practical and useful to the audience to whom it is directed. We believe – although this short introduction is not the place to set out the whole argument for this belief – that in the areas of human rights and crime, all tort systems should at some point have at least to confront the question of whether tort law should be used to protect human rights (a question investigated by Eric A. Engle in his chapter on tort law and human rights) or to respond to wrongs deemed crimes by the state (as highlighted by Matthew Dyson in his discussion about the boundaries between tort law and criminal law). How each system chooses to answer such questions – in both the West and outside the West – is a descriptive matter which this book is not designed to comprehensively address, for reasons already stated above. But we hope we have set the table, so to speak, for other studies to come.

4. WESTERN TECHNICALITIES

The chapters on ‘The Western Law of Torts’ provide the reader with an overview of the main areas of conflict and development among modern North American and European tort systems. To set the stage, James Gordley offers a historical account of the common law and civilian systems organized along two sets of questions. One set of questions has to do with the fault (or lack thereof) of the defendant. The second set of questions has to do with the type of grievance recognized by tort law. Gordley surveys the development of the common law as well as the succession of phases in the civilian system: its Roman roots; medieval and early modern jurists; medieval Canon lawyers; the late Scholastics; the northern ‘natural law’ jurists; and the modern French and Germans architects of the *Code civil* and the *Bürgerliches Gesetzbuch* (BGB). Gordley’s account makes clear that there is no necessary logic to the development of tort law in the West among the concepts of responsibility conventionally known as strict liability, negligence and intentional wrongdoing. The common law moved fitfully from a situation where liability was based either on intent or was strict, to the development of a form of negligence that allowed for pockets of liability without fault. In contrast, civilian law moved from Roman law, which cared deeply about culpability

(*culpa*) to a system that embraced a concept of negligence that today allows pockets of strict liability. What this development conceals, Gordley suggests, is the threadbare quality of the shared conviction over how modern abstract categories such as negligence and strict liability 'should be analyzed or why they should be trusted'. What has been lost as a result 'are the ways that jurists once gave content to the concepts that we still use and the reasons that they had for trusting these concepts'.

As Gordley explains, as a historical matter, elements of intentional tort, negligence and strict liability can be found in common law and civilian systems. Yet the question of the choice between negligence and strict liability has taken on special importance in Western tort systems. This is, as Franz Werro and Erdem Büyüksagis show in their chapter, a result of numerous causes. The most significant is the explosive growth of industrial activities and technological developments that moved civil society away from 'artisanal' risks that could be ameliorated with conscious investment of care to a world of statistical risk. The other development is the self-conscious activism of the legislator to use legal codes as a tool for the maximization of social welfare and the minimization of accident costs (a political development that may have been prompted by the growth of the financial responsibilities assumed by the welfare state). Whatever the cause(s), the choice between strict liability and negligence has been raised and debated both in the interpretation of existing law and in the proposal of legal reforms. Werro and Büyüksagis review the various policy arguments offered in the choice between strict liability and negligence and focus on two mainstream approaches to strict liability in Europe today: the 'hazardous thing' standard and the 'hazardous activity' standard. The former is, arguably, associated with the French idea that a person is responsible for that which is in her custody, while the latter, arguably, is associated with the German doctrine of imposing a higher duty of care (or a reversal of the burden of proof of causation) on someone who chooses to engage in certain especially risky activities. Werro and Büyüksagis assess these two approaches and note certain advantages to the hazardous activity standard from a doctrinal perspective which, in the authors' view, may help explain why future development of strict liability in Europe might follow that direction.

The chapters on professional liability and products liability illustrate one way in which convergence at the level of doctrine has occurred in Europe. Ewoud Hondius provides a survey of professional liability in European jurisdictions by focusing primarily on the development of medical malpractice liability. Hondius notes divergence among European nations as to their formal approaches to medical malpractice. There is, for example, the dichotomy between those jurisdictions, such as England, that treat medical malpractice as a matter of tort law, and those other jurisdictions, such as France and Germany, which allow the very same malpractice to be handled as a contract claim. These differences have been ameliorated by the progressive convergence, under the 'façade' of these structures, of the regimes applicable to tort law- and contract law-based professional claims. Thanks to this convergence, differences in various concrete judicial doctrines concerning the definition of the standard of care and the burden of proof of the causation of injury have been narrowed over recent years. The chapter concludes with a discussion of the possibility of harmonization at the European level, either functionally or through some more organized mechanism.

The theme of harmonization looms even larger in Mathias Reimann's chapter on product liability. In this area of law, diverse strands of contract and tort law were pulled together to form a new hybrid body of law under the EEC's 1985 Products Liability Directive. Reimann observes that the Directive can be viewed from many comparative perspectives, including the degree to which it successfully integrated the legal regimes of its member states and the ongoing dialogue both before and after 1985 between European and United States courts over the development and rationale of products liability as a semi-autonomous body of private law.

The chapters on causation, pure economic loss and emotional distress in Western tort systems describe a more complex interplay between façade and substance in doctrine. In all three of these areas, as Marta Infantino, Vernon Valentine Palmer and Stephen D. Sugarman respectively observe, the theoretical problem posed by each of these doctrinal topics is the so-called 'floodgates' problem: the problem that rules which allow any plaintiff to seek relief under the relevant condition (causation, pure economic loss or pure emotional distress) cannot be limited, and could expose defendants and judicial systems to limitless and socially costly liability judgments. In each of these areas, different Western systems have grappled with this problem by asserting the existence of limiting principles. Infantino describes how Western tort law deals with the need for limiting principles by setting out highly abstract rules concerning cause-in-fact and legal cause, and then goes on to describe the multiple social, cultural and economic factors that drive the shape of these rules. Palmer is concerned with a similar dynamic, where each tort system attempts to explain and rationalize its departure from an exclusionary rule that is too harsh for any system to fully embrace. Sugarman's account of non-economic losses in Western tort systems looks at the floodgates problem from a slightly different perspective. Although here, too, there is a constant struggle over the boundaries of recovery for pure emotional distress in tort, Sugarman focuses on the mechanisms that Western tort systems have employed for calculating the quantum of damages, given that the translation of emotional and physical suffering is fraught with risks of error in every direction: the 'floodgates' of too much absolute liability is a risk, but so is the risk of some plaintiffs receiving a 'flood' of compensation and another a trickle for the very same valid legal claim.

5. NON-WESTERN PERSPECTIVES

The chapters on non-Western tort law illuminate the importance of history and culture in the development of national tort systems. For example, Emi Matsumoto offers a careful chronology of the development of Japan's 'mixed' tort system. In the case of Japan there is no question that a process of legal transplantation played a major role in the development of its modern tort law. To be sure, the German and French codes were both influences on the drafters of the Japanese code at the end of the nineteenth century. But in Matsumoto's telling, other factors, such as the tendency to translate foreign legal terms in a highly literal manner, and the underlying Japanese understanding of society and social relations, played a significant role in the development of the law, too. Besides the ever present role played by fault, the importation of the element of 'unlawfulness' drawn from the German concept of *Rechtswidrigkeit* has over time been

filled with the requirement of the infringement of a legally protected interest, so that, as Matsumoto illustrates, modern Japanese law of negligence allows liability on parallel, rather than serial, tracks.

The case of China is no less illuminating about the long-term resistance of deeply entrenched legal practices. As is well known, the enactment in 2009 of a brand-new Chinese law on tort is but the last chapter of a long series of legal transplants from the West (traditionally from Germany but more recently also from the U.S.). Yet, as Hao Jiang repeatedly emphasizes, Chinese official law offers a very poor guide for understanding what legal remedies are available to tort victims in China. In a country that has been run by its own set of social norms for thousands of years, foreign-inspired rules cannot be superimposed overnight – nor in a few years. By contrast, the foreign-inspired transplants have created a dynamic and pluralistic framework, where customary understandings of what can be complained of coexist with a growing awareness of the potentialities opened up by the official system. In the fast-changing Chinese social and economic scenarios, people live in and between many legal layers, leaving judges to try to strike a compromise between tradition and reform, Confucianism and black-letter law.

Dominic N. Dagbanja's chapter on tort law in Sub-Saharan Africa takes on the massive task of both describing multiple layers of law (the official and the customary) and many national laws, some of which have very different political and colonial histories. Dagbanja notes at the outset that the official common law in former British colonies in Sub-Saharan Africa does not look very different from Western tort systems when observed from the perspective of doctrinal description. He says, 'among the interests protected by common law tort are intentional or negligent invasion of personal (privacy and reputation) and proprietary interests; interests in economic relations, business and trading interests; interests in intellectual property; and negligent interference with personal, proprietary and economic interests'. This list is paralleled later in the chapter by the list of interests protected in customary tort law in Sub-Saharan Africa. The individual is not the primary bearer of the protected interest; family or kin possess the interest to be protected. This affects not only the range of subjects who may react to or respond for wrongdoing (what we might call standing); but it also affects the interests and remedies which are given priority in the concrete application of customary tort law rules, as is shown, for example, by the attention paid to torts where family or other group interests are at stake, such as verbal insult, adultery and seduction.

Abdul Basir bin Mohamad's chapter on Islamic tort law parallels Gordley's analysis of European tort law by offering an analysis organized around two sets of questions: the fault (or lack thereof) of the defendant and the types of interests protected by tort law. Basir bin Mohamad describes grounds of liability based on questions of both mental state (intention as opposed to negligence) and the directness or indirectness of the defendant's act. The interests protected are typical of those seen in other legal traditions: reputation, property, physical integrity, and so on. Distinctive to the systems described by Basir bin Mohamad is the source of the law. The source is explicitly religious; it is the Qur'an (Koran). The interpretation of the verses of the text and the authoritative sermons about those verses present a fascinating illustration of legal interpretation, which shares points of comparison and contrast with the methods of interpretation of official and customary law discussed elsewhere in the book.

Marco de Morpurgo's chapter on tort law in Latin America provides yet another perspective on the way that local political and social conditions can shape the tort law in one specific legal family. De Morpurgo reminds us that, given the specific history of Latin American colonization, the history of legal transplantation favored the codes of France and Spain. Only later would the tort law of the United States develop into a major influence. De Morpurgo's interest is the specific dynamics that were placed into motion once Latin American nations grew independent, given the deep entrenchment of the tort systems of France and Spain in those nations. He observes that the colonial influence was both assimilated and resisted in different ways. There emerged, he observes, a gap between what he calls the official and unofficial sectors of the law. De Morpurgo further observes that the development of the official sectors of the law depended to some extent on the ability of the courts to secure political independence from the legislator and the varying authority jurists could exercise over the interpretation of the codes before the courts.

6. IDEAS AND WISHES

Ideally, there are two types of books: those that provide a 'definitive' statement in a widely researched area and those that open new areas and raise more questions than they provide answers. This volume is intended to be much more of the second than of the first type, showing how legal comparativism can be used to study in depth the evolutions and current contents of tort law across jurisdictions and cultures.

As sometimes happens in collective enterprises such as this, not each and every contributor has fully abided by the guidelines that we established at the outset of the project. But divergence and diversity in execution is perhaps emblematic of this book's overall subject. There is broad enough compliance to produce the advantages we had wished for, even as each contributor expressed him or herself as they felt necessary. We are very pleased with the result, and we hope the reader will agree.

PART I

GENERAL ISSUES

