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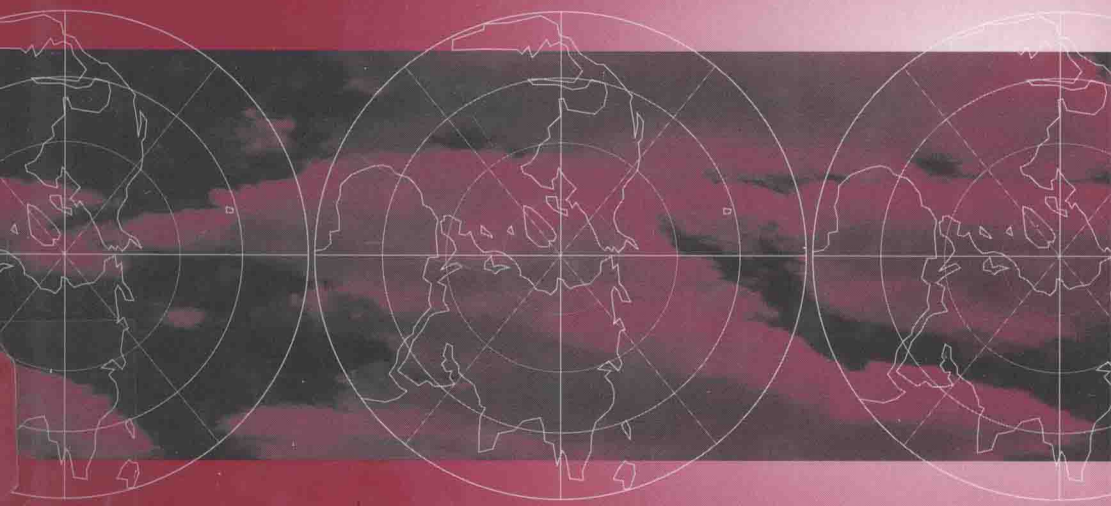
Compensation for Personal Injury in English, German and Italian Law

A Comparative Outline



BASIL MARKESINIS, MICHAEL COESTER,
GUIDO ALPA AND AUGUSTUS ULLSTEIN

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Compensation for Personal Injury in English, German and Italian Law

Cross-border claims for personal injuries are becoming more common. Furthermore, European nationals increasingly join class actions in the USA. These tendencies have created a need to know more about the law of damages in Europe and America.

Despite the growing importance of this subject, there is a dearth of material available to practitioners to assist them in advising their clients as to the heads of damage recoverable in other countries. This book aims to fill that gap by looking at the law in England, Germany and Italy. It sets out the raw data in the wider context of tort law, then provides a closer synthesis, largely concerned with methodological issues, and draws some comparative conclusions.

BASIL MARKESINIS QC, FBA is Professor of Common and Civil Law at University College London and Jamail Regents Chair in Law at the University of Texas at Austin. He is the author or co-author of twenty-five books and over a hundred articles published in major European and US legal journals. He has received high decorations from the Presidents of France, Germany, Greece and Italy for his work on European law and European integration and is Corresponding Member of the Academies of Athens, Belgium, France and the Netherlands.

MICHAEL COESTER has been an Ordinarius Professor of Law at the University of Göttingen (1983–1994) and Munich since 1994. He was Dean of the faculty in Göttingen and has served on the Senate of the University of Munich. He has been Visiting Professor at the University of Michigan, University College London, and University of Nanjing. He has authored four books and over 130 articles published in journals of several countries, and is the co-author of two leading German commentaries on private and private international law.

GUIDO ALPA FBA is Professor of Civil Law at the University of Rome 'La Sapienza' and Professor of Anglo-American Law at the University of Genoa. He has been Vice President of the Italian Bar Council since 2001 and President of the Italian Bar Council since 2004. Professor Alpa has published books on civil law, financial markets contracts and regulation, consumer protection, tort liability and comparative law.

AUGUSTUS ULLSTEIN LL B. Q.C. is a barrister practising in London. He specialises in Personal Injuries and Product Liability cases arising from accidents occurring in England, Europe and the USA. He has given expert evidence in the USA on the English Law of damages in Personal Injury cases.

With a Foreword by the Rt Hon. the Lord Steyn.

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal subdisciplines, developments since 1946 confirm their interrelation.

Comparative law is increasingly used as a tool in the making of law at national, regional, and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonisation of law under international auspices. Mixed international arbitrations, especially those involving state economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to "foreign affairs," and to the implementation of international norms, are a focus of attention.

The Board welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

(list continues at the end of the book)

Foreword

In 1871, when reviewing Addison's recently published *The Law of Torts*, Oliver Wendell Holmes expressed the view that 'Torts is not a proper subject for a law book' ((1871) 5 Am.LR 340). In 1881 Holmes gave the lie to this idea in his famous book *The Common Law* which contained a magisterial chapter on the theory of the law of torts. Today, tort law has a strong claim to have generated more case law and more literature than any other branch of the law.

In an age in which comparative law has come of age the development of our tort law has benefited greatly from comparative methods. It has enabled us to test our law against feasible solutions adopted in foreign legal systems. Due perhaps in large measure to the relative inaccessibility of sources in foreign languages, the comparative exercise has unfortunately in English legal practice largely concentrated on decisions in common law jurisdictions, such as Australia, Canada, New Zealand and South Africa. That our courts need not be so inhibited has been underlined, for example, by three major works, i.e. Prof. Christian von Bar, *The Common European Law of Torts*, vols. 1 and 2 (2000); Prof. Walter van Gerven (van Gerven, Lever and Larouche), *Cases, Materials and Text on National, Supranational and International Tort Law* (2000); Prof. Basil Markesinis and Prof. Hannes Unberath, *The German Law of Torts* (4th edn, 2002). All three are, of course, essential reading for practitioners. The decision of the House of Lords in *Fairchild v. Glenhaven Funeral Services* [2003] 1 AC 32, which concerned the age old tort problem of uncertainty about which employment caused a disease, has demonstrated what can be done, if the complex foreign material is 'packaged' in an attractive manner. The opinion of Lord Bingham of Cornhill (at 58 to 63 and 66) relied strongly on the rich sources of modern civilian practice and doctrine: see also the opinion of Lord Rodger of Earlsferry

(at 117 to 118). Practitioners need to take account of the important lesson of *Fairchild* that Continental jurisprudence really matters.

Now there is another great step forward with the publication of this book. The subject of compensation for personal injury is of great practical importance in all civil justice systems. The book compares the solutions adopted in English, German and Italian law. The aim is essentially practical, namely to make available to judges, practitioners and academic lawyers a detailed account of the decisions of foreign courts, packaged to meet the needs of practitioners, in order to enable the comparative point of view to play a dynamic role in the development of our law.

The book has been written by distinguished lawyers who share a profound knowledge of tort law and comparative methodology. Not surprisingly, they have produced a first class book which is a notable contribution to tort law and comparative law studies. It contains much material which those in practice cannot afford to ignore. I commend it unreservedly to judges, practitioners and academic lawyers.

JOHAN STEYN
House of Lords, June 2004

Preface

Biblical texts warn us that no one can serve two gods. Lawyers, no doubt, have occasionally done so; and comparative lawyers must, surely, have a dispensation to do so regularly. For the *raison d'être* of the latter is to describe and compare different systems without fear or favour, largely for the sake of the advantages and the insights that flow from any comparative exercise. We have thus tried to present in a comparative juxtaposition three major legal systems of the world and have addressed our text to two readerships which are often described as being very different – practitioners (including judges) and academics. We have done this for two reasons.

Many have written about the respective tasks of these two kinds of lawyers; and in England those who have done so have stressed how different they are. There is, of course, some truth in these assertions; but in our view these differences have also been exaggerated – at any rate whenever one is trying to make the one group work closely with the other, as we feel they must. For in such circumstances academics must try to present their theories in any way that makes them palatable to practitioners; if they do not, their dish (for which read ideas) will not be savoured.

To the extent that the book describes in *modest* detail what can be claimed in the event of personal (not fatal) injuries in the three systems compared, it tries to serve the first constituency. Two of us – Basil Markesinis and Augustus Ullstein – have encountered this need in our professional careers; and one more – Guido Alpa – also practises as an *avvocato* in Rome and Genoa and knows the needs of the profession.

If the first of our targeted groups needs 'usable' *data*, the second needs *thoughts and ideas* that can promote further reflection. Here the effort had to go into the 'packaging' of the information we assembled for this book in a way that made it look more than just a list of similar and different solutions. Here, two of us – Basil Markesinis and Michael Coester – took

more time to achieve this overall result by going over the entire text several times and minimising, whenever possible, the effects of a presentation that was too slanted towards national habits and methods. A few words need to be said about the difficulties the authors encountered in carrying out this enterprise.

Since this book was written in English and primarily addresses an Anglophone readership, inevitably it had to take as its starting point the classification structure known to the common law. If, as we hope, the reader thinks that, overall, the presentation of the English, German and Italian law makes good reading, it means that we have succeeded in our 'packaging' efforts of the other two legal systems. But this was by no means an easy task, as the specialist reader of any of these systems can attest. For the truth of the matter is that the structures, divisions, concepts and notions used in this book, being of common law origin, did not always fit in easily with what exists in Germany and Italy, which is often very different to the English. Even the writing style of lawyers who come from different countries is different and here, again, we have tried to produce a work which will sit well in the library of a common lawyer. But 'different' does not mean less valid, less interesting or less attractive. This, too, is made clear in several parts of the narrative; and tribute is here paid to the two non-common lawyers who co-authored this book and so generously agreed to comply with the demands of English language and practice.

'Packaging', thus *had* to take place for, otherwise, the Continental systems discussed in this book, which have served as models for many countries, would continue to be a mystery to anyone but their own nationals and devotees. In our view, the increasingly transnational nature of personal injuries litigation cannot tolerate such parochialism. Thus, the contribution to the art of 'packaging' forms the first part of the intellectual contribution this book tries to make to the art of comparison; the synthesising conclusions form the other. Broadly speaking, the whole enterprise follows the approach advocated by one of us on many occasions, most recently in his monograph entitled *Comparative Law in the Courtroom and the Classroom: The Story of the Last Thirty Five Years* (Hart Publishing, 2003) (this will soon appear in French, German and Italian translations, an indication perhaps of the interest this method is attracting in these countries) and has tried to avoid the format of a questionnaire which jurists from different systems dutifully fill in. Such works may be useful in one sense; but from a scholarly angle they seem less appealing.

One last word is needed on 'packaging'.

A number of contemporary comparatists have objected to such efforts at 'packaging' foreign law. They say it does not work. They also argue that it 'betrays' the essential features of the foreign system, which must be seen in its wider environment. We see no betrayal whatsoever in an effort which tries to make national wisdom and experience internationally known and appreciated. And we affected no cover-up of the essential features of a particular system, as our readers will see when reading *carefully* what one could loosely describe as the components of the book which contain the information about national law. For from them one can glean additional information about history, the sources of law, the identity of the major protagonists, the abstract or concrete mould of mind of each system compared in this book, the style of judgments, as well as find out how they compensate different headings of damage. Dare we thus say it? This book, like most books which contain personal experiences of many years and not just information, should therefore be read on two levels: the obvious and the concealed.

That despite our efforts, disagreements may still persist about the method is as possible as it is likely that the information provided on each particular issue will not always be found to be as extensive in all three systems under comparison. This, for instance, becomes obvious in chapter 3 as a result of the unwillingness of Italian law to devise different rules for calculating past and future economic losses. Here, then, no amount of 'packaging' could (or should) conceal existing difference. The reader must be left free to decide if the differences are 'apparent' rather than 'real', as well as the more difficult question whether the approach of Italian law could be improved. Once again, the accusation of 'betraying' a foreign system by making it accessible to lawyers of another is, to us, ludicrous.

For us, however, making value judgments of this kind was a matter of lesser import. For, this, essentially, is an essay in comparative methodology which all of us, in our similar and different ways of 'making a living out of the law', are trying to develop in order to practise our profession. If the attempt to innovate has carried with it problems, we were willing to confront them and even risk falling into error since we know that all human action entails the risk of error. For, as the great Goethe (in *Faust*, Part I (1790; Insel edn, 1965), p. 16) put it, *Es irrt der Mensch, solang er strebt*. The alternative – inaction – was not an option.

Basil Markesinis QC, FBA (London and Texas); Guido Alpa, FBA (Rome and Genoa); Michael Coester (Munich); Augustus Ullstein QC (Temple)
London, Genoa, Munich, 24 December 2003

Table of cases

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