EUROPEAN LEGAL DEVELOPMENT

The Case of Tort

JOHN BELL AND
DAVID IBBETSON

CAMBRIDGE

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Volume 9

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EUROPEAN LEGAL DEVELOPMENT

What shapes the development of a legal system? The economy? Legal ideas? Social and political movements? Drawing on the other eight volumes in the series, *European Legal Development: The Case of Tort* aims to challenge conventional comparative law explanations of the factors that shape the law. It goes further into ideas that law could be conceived as either driven by external factors or is primarily the product of deliberations among lawyers. Choosing the examples of product and medical liabilities, the book considers the convergence of developments across legal systems. By contrast, examining road accidents and relations between neighbours, it notes areas in which the development of tort law has diverged. Tort law emerges as only part of the legal response and its place depends on the activity of the legislator, as much as on judicial and scholarly ideas about the place of fault liability within the schemes of compensation.

JOHN BELL is Professor of Law at the University of Cambridge.

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EUROPEAN LEGAL DEVELOPMENT

THE CASE OF TORT

This volume brings together many of the themes in the series, *Comparative Developments in the Law of Torts in Europe*. It presents a way of looking at legal development that goes beyond that found in the existing literature. It looks in greater depth at ideas such as legal transplants, the path dependence of particular legal traditions, the connection between law and particular social cultures. It argues that legal development can be studied fruitfully by examining changes in the law in the books and the legal outcomes which the law generates within its social, political and economic environment. Path dependence is a crucial feature in explaining why similar societies do not operate with the same legal rules and may not even produce the same outcomes. These ideas are examined in relation to liability for fault. Having reviewed the law around 1850, two broad themes are pursued in relation to the period 1850 to 2000. The first is the homogeneity of legal outcomes in relation to liability for products and the liability of doctors and hospitals. The second is the divergence of legal outcomes in relation to liability for road accidents and industrial nuisances. The book concludes with an analysis of the factors shaping legal development in Europe.

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COMPARATIVE STUDIES IN THE DEVELOPMENT OF THE LAW OF TORTS IN EUROPE

Series editors
John Bell and David Ibbetson

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PREFACE

The European Legal Development series arose from a project funded by the AHRC from January 2005 until February 2008.

The aim of the project as a whole was to examine the nature of legal development in Western Europe since 1850, focusing sharply on liability for fault. Behind this there is a more abstract purpose, to attempt to cast some light on the factors which have influenced the way in which the law has changed over this period. Legal historians have looked at the general question, usually focusing on the rather facile distinction between the English common law and continental European legal systems. Though rooted in the sources, these works have been marred by a somewhat unsophisticated methodology and an inevitably selective use of evidence. Comparative lawyers have developed far more sophisticated methodologies, but their theoretical perspectives have too often borne little relation to empirical data. Over the last 25 years, tort lawyers have looked at the same types of question; but their analysis has invariably been at a high level of generality and has rarely looked at the historical component. By bringing together experts with different disciplinary backgrounds – comparative lawyers and legal historians, all with an understanding of modern tort law in their own systems – and getting them to work collaboratively, we have aimed to produce a more nuanced comparative legal history, and one which is theoretically better informed.

The topic of legal development is broad and, to make it manageable, with colleagues we undertook a programme of work built up from a number of case studies. The first six books in the series, covered Product Liability, Relations between Neighbours, Medical Liability, Technological Change, Traffic and Railways, and Legal Doctrine. They examined the development of tort law in relation to those topics in a number of Western European countries. The next two books examined the influences on legal development, the Impact of Ideas and the Impact of Legal Institutions and Professions. To make the study manageable, these works concentrated on the liability for fault between 1850 and 2000 as our major area of study.

Around 1850, there were many similarities in approaches to liability for fault across the legal systems of Western Europe. But since then, there has been significant divergence. Our method has been first to chart the changes and then to seek the explanations for what happened.

This volume aims to bring together many of the themes in the series, and to develop and apply a method of analysis appropriate to comparative legal history. It therefore aims to present a way of looking at legal development that goes beyond that found in the existing literature. It looks in greater depth at ideas such as borrowings between systems, the path dependence of particular legal traditions and the connection between law and particular social cultures. It argues that legal development can be studied fruitfully by examining changes in the law in the books and the legal outcomes which the law generates within its social, political and economic environment. The methodology of the book is set out in Chapter 1, but briefly, it involves looking at the law in the books, legal outcomes and the legal environment through both general surveys and detailed case studies. Although we have based ourselves very significantly on the research undertaken by our colleagues in the project, we have also undertaken our own detailed research on specific areas of the law. We have also developed a theoretical framework for studying legal development which was not contained in the other books in the series. That theoretical framework is set out in both Chapter 1 and in the concluding Chapter 5. Chapter 2 seeks to set the scene for the development of tort law between 1850 and 2000 by setting out the background to liability for fault as conceived in Western Europe around 1850. Chapter 3 examines examples of the homogeneity of legal outcomes with a focus on liability for products and the liability of doctors and hospitals. Chapter 4 offers a contrast by examining examples of the divergence of legal outcomes in relation to liability for road accidents and industrial nuisances. Through these examples, studied with both surveys and detailed case studies, we demonstrate the way a more sophisticated understanding of legal development can be justified, built around the importance of path dependence in explaining the distinctive features of the legal development of the different jurisdictions in Europe, despite the similarity of the modern social problems which they faced and, very often, the similarity of their values.

The research for the European Legal Development project as a whole involved scholars from a range of countries, in particular, England and Scotland, Spain, the Netherlands, Germany, France, Sweden, Austria and Italy. Each working group drew on the expertise of both senior and more junior scholars familiar with different European legal systems, and

contained a mixture of comparative lawyers and legal historians. We are grateful for their energy and enthusiasm, as well as for the many insights they have brought to the project. As well, in producing this volume we have taken advantage of the kindness of many other friends and colleagues in helping us to understand aspects of their legal systems which were otherwise opaque to us. We thank them, and hope that we have not unwittingly misrepresented them. In particular, we are grateful to Matthew Dyson and Colm McGrath, who began as PhD students on this AHRC project, and who made a significant contribution to the formulation, discussion and execution of its many strands.

John Bell
David Ibbetson

ABBREVIATIONS

ABGB	Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code) 1811
AC	Law Reports, Appeal Cases
AJDA	Actualité Juridique – Droit Administratif
All ER	All England Law Reports
ALR	Allgemeines Landrecht (Prussian Civil Code 1794)
BGB	Bürgerliches Gesetzbuch (German Civil Code 1900)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
Burr.	Burrow's King's Bench Reports *tempore* Mansfield
BW	Burgerlijk Wetboek (Dutch Civil Code 1838)
C.	Codex of Justinian
CA	Court of Appeal
Cass. ch. réunies	Cour de cassation, chambres réunies
Cass. civ.	Cour de cassation, chambre civile
CE	Conseil d'Etat
CE Ass.	Conseil d'Etat, Assemblée Plénière
CE Sect.	Conseil d'Etat, Section du Contentieux
chr.	Chronique
CJ	Chief Justice
col.	column
Comparative Studies	Department of Transportation, *Comparative Studies in Automobile Accident Compensation* (Washington: Dept of Transportation, 1970)
concl.	Conclusions
Crim.	Cour de cassation, chambre criminelle
D.	Receuil Dalloz; Digest of Justinian
DC	Receuil Dalloz, Dalloz Receuil Dalloz, Hébdomadaire
Doctrine	N. Jansen, *The Development and Making of Legal Doctrine* (Cambridge University Press, 2010)
DP	Receuil Dalloz, Périodique
ER	English Reports
Exch.	Exchequer Reports

F. & F.	Foster and Finlayson's Nisi Prius Reports
G.	Gaius, Institutes
Gaz. Pal.	Gazette du Palais
gl	Glossa
	Hansard, House of Commons Debates
HL	House of Lords
HLC	House of Lords Cases Reports
HR	Hoge Raad
Ideas	M. Lobban and J. Moses, *The Impact of Ideas* (Cambridge University Press, 2012)
Inst.	Institutes of Justinian
JCP	Semaine Juridique – Juris-Classeur Périodique
KB	King's Bench
KFG	German Road Traffic Law of 3 May 1909
Lebon	Recueil Lebon (Conseil d'Etat)
LJ	Law Journal; Lord Justice
MDU	Medical Defence Union
Medical	E. Hondius (ed.), *The Development of Medical Liability* (Cambridge University Press, 2010)
MR	Master of the Rolls
Neighbours	J. Gordley (ed.), *The Development of Liability between Neighbours* (Cambridge University Press, 2010)
NJ	Nederlandse Jurisprudentie
obs.	Observations
OJ	Official Journal of the European Union/European Communities
P.	Partida
Products	S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press, 2010)
Professions	P. Mitchell (ed.), *The Impact of Institutions and Professions* (Cambridge University Press, 2012)
Req.	Cour de cassation, chambre des requêtes
RG	Reichsgericht
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RJ	Repertorio de Jurisprudencia
RTR	Road Traffic Reports
S.	Recueil Sirey
SC	Session Cases
STS	Sentencias del Tribunal Supremo
StVG	Straßenverkehrsgesetz (Road Traffic Act) 1952
S-VC	Recueil Sirey
TC	Tribunal des Conflits

Technology	M. Martín-Casals, *The Development of Liability in Relation to Technological Change* (Cambridge University Press, 2010)
TR	Durnford and East's Term Reports
Traffic	W. Ernst, *The Development of Traffic Liability* (Cambridge University Press, 2010)
Wils.	Wilson's Kings Bench and Common Pleas Reports
WLR	Weekly Law Reports

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1

Introduction

This book analyses the nature and causes of the development of fault liability in tort in the period 1850–2000. The concept of 'legal development' is used frequently in historical and comparative law literature, but it requires further elucidation because of the central place that it plays in this work. To begin with, it is necessary to explain the understanding of 'law' that is appropriate in this context, and then to proceed to explain the idea of development. While it is important to understand law as a set of normative standards that govern conduct, law needs to be understood in a number of other ways as well.

I The distinctiveness of law

Law should be seen as a problem-solving enterprise. The problems are seen as (first order) resolving disputes, maintaining order and achieving fairness; (second order) ensuring confidence in the institutions of justice, ensuring effectiveness of the system and ensuring solutions can be replicated; and (third order) reinforcing social values through words and symbols.

The distinctive contribution of law is solving problems through rules and through institutions. Law is thus a distinctive way of dealing with social problems. It reduces complexity by offering an ordered system of rules, principles and procedures within which problems can be resolved. Lawyers value not only doing the right thing, but doing it repeatedly. So the key to a legal solution is to develop routines and rules that will deliver the right solution repeatedly. Such routines are embedded in agreed procedures and institutions. At the same time, there needs to be flexibility to adjust to the unforeseen and unfair.

Any solution to a new problem has two institutional settings. The first is the organisational institution: the bodies that make rules, the people who have to administer the rules, and the procedures they have to follow. The second is the conceptual institution of the law: its framework of

concepts through which it routinely delivers justice to particular cases, not only in this new problem, but in the myriad other contexts within which it operates. Lawyers are concerned about the consequences of individual decisions in order to ensure that the solution to a new problem does not disrupt the ability of established institutions and concepts to deliver routine justice. An account of legal development, therefore, has to involve not just the changes in rules, but also changes in the institutional setting of the law and its environment.

To understand the capacity of the law as a set of rules to be open to development, it is necessary to appreciate that rules are inherently incomplete, in need of interpretation, and therefore contestable. Rodolfo Sacco usefully developed the concept of 'legal formants' to describe the conception of this legal system with which lawyers work:

> even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there is only one rule in force, recognizes implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges – elements that he keeps separate in his own thinking. In this essay, we will call them, borrowing from phonetics, the 'legal formants'. The jurist concerned with the law within a single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one rule. He does so by a process of interpretation. Yet this process does not guarantee that there is, in his system, only a single rule.[1]

It would be clearer to say that national legal scholars writing books and articles and judges making decisions on the basis of the law operate with the regulative ideal that the law should be coherent and consistent, even if it may not be fully so in actual reality. In other words, they seek to interpret the law *as if* it were completely coherent and consistent, even though they know that, as a matter of fact, it is not. This produces the notion that there is a single formulation of the law valid at a particular moment of decision. As Sacco says, this regulative ideal is implemented by an act of interpretation which has authority because of the position occupied by the scholar or judge. So it would not be typically right to say that the legal community has a single view of what the law is.

[1] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law* 1, 22. See also S. Mancuso, 'Legal Transplants and Economic Development: Civil Law vs. Common Law?' in J.C. Oliveira and P. Cardinal (eds.), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution* (Heidelberg: Springer, 2009), 75.

It is better to characterise the law as a conversation within the legal community in which certain participants carry particular authority. The idea of 'formants' suggests that there are competing, always incomplete, versions of what the law is on a particular matter. These are contributed by different participants in the legal discussion – legislators, judges, scholars and advocates. They may agree on the basic sources and principles of the system, but come to different formulations of the rules. There are debates about what the law requires and certain discussants in many legal systems have strong authority, such as higher courts or legislators or some leading scholars. Others will contribute their ideas without particular authority, e.g. lower courts and many other legal scholars. Looking back in time we have at best a partial reconstruction of the elements of that conversation between members of the legal community. The state of the law at any one time comes from a snapshot of the conversation and where it has reached, focusing on the contribution of certain authoritative participants, but also cognisant of the way those authoritative statements are being received. These snapshots are published as doctrinal articles, textbooks, lawyers' opinions and advice, or as judicial decisions on particular cases.

The combination of the ideas of formants and the legal conversation produces a sense that statements of what the law is are provisional and incomplete. Although the regulative ideal may lead any one discussant to make claims that a particular view is the 'right' statement of the law, the picture which an observer of the legal system acquires is of a diversity of opinions.[2] For our purposes, it is sufficient to identify 'dominant opinion(s)' within the legal conversation and the different views that are sufficiently respectable to be available as potential grounds for decision. So it is necessary to reflect the diversity of currents of opinion, as well as areas of agreement. It is this messy picture that enables the law to be revised or developed over time, often without a formal change in the wording of a rule.

II The concept of 'legal development'

If there are always diverging and incomplete statements of the law in the 'formants' of legal argumentation, then how do we define 'development'? Development is a change either in the way in which the law is understood by the legal community as a standard of conduct or in the way it is applied in practice.[3] The law operates as a normative standard of conduct.

[2] Sacco, 'Legal Formants', pp. 25–26.

[3] It follows that there is no significant difference between the concept of legal 'development' and the notion of legal 'change'. The former term is intended to convey a more organic

It provides individuals with distinctive reasons for action from the legal point of view. Legal actors and legal subjects understand the normative requirements of the law starting from its verbal formulation and its conceptual structure. Legal development will be most obvious when the verbal formulation of a legal text alters.

In addition, within this normative meaning, we need to distinguish between what is required by the law and the strength of that requirement (its *force*). A legal provision may be clearly formulated, but its authority may be weak, e.g. because the formulation of the rule only emerges from the case-law of lower courts and is contested in scholarly literature. For the most part, the normative meaning is controlled by the legal community. By contrast the application, especially the practical application, is governed by factors not fully under the control of lawyers.

So when we talk of 'development' we are essentially looking at the differences in formulation and meaning of statements about what the law is, as well as how it is applied. In particular, there are the following areas of difference which affect the meaning of a rule:

1. Formulation
2. Interpretation
3. Context and relevance
4. Operation.

A Formulation

If we adopt Sacco's analysis that there is no formulation of a legal rule that is both canonical and comprehensive, then we are faced with constantly varying statements of what the law is: from legislators, judges, advocates, parties and textbook writers. As codifiers like Portalis recognised long ago, it is impossible to be comprehensive, however detailed the legislative text.[4]

But even though there may be a canonical formulation of a rule, it will typically be at a very general level, such as article 1382 of the French Civil Code: 'Any human act whatever which causes damage to another obliges him by whose fault it occurred to make reparation.' Typically, it will need

difference from one period to another, rather than minor differences in content. It is not intended to suggest that there is always a movement towards something that is 'better' in any sense.

[4] J.-E.-M. Portalis, 'Discours préliminaire sur le projet de Code civil' in F. Ewald (ed.), *Naissance du Code civil* (Paris: Flammarion, 1989), 39–42.