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Tortious liability for unintentional harm in the Common law and the Civil law

I

F.H.Lawson and B.S.Markesinis

TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW

Volume I: Text

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GENERAL EDITOR'S FOREWORD TO THE NEW SERIES

A series of *Cambridge Studies in International and Comparative law*, under the general editorship of H.C. Gutteridge, H. Lauterpacht and Sir A.D. McNair, was launched in 1946 with the first edition of Professor Gutteridge's important monograph on *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*. In a general introduction to the series the editors explained that it was designed to fill certain gaps in that part of English legal literature which is concerned with international relations: and that it would involve public international law, private international law and comparative law. In fact all the subsequent volumes of the distinguished series save the last, contributed by Dr B.S. Markesinis and dealing with the controversial issue of Dissolution of Parliament, were to do with public and international law.

There was a gap during the 1970s, when the Press Syndicate felt that legal publishers were best able to publish books on law. Happily, counsels more apt to the Press of Maitland's university have now prevailed, and the series is being revived. The intention is to publish monographs mainly on public international law; but it is a happy coincidence that this first work of the revived series is again about the comparative method of legal study and research.

The general editors of the original series said, in April 1946, that 'at present the literature of Comparative Law is scattered, fragmentary and often difficult of access'. The aim of the present volumes is precisely to make an important part of that material readily available to scholars and students, and to provide an authoritative commentary and guide to understanding it.

We are most fortunate that the new Cambridge series thus begins with work by that most distinguished Oxford scholar and teacher, Professor F.H. Lawson, in partnership with a Cambridge scholar and teacher, Dr Basil Markesinis.

Cambridge
April 1981

R.Y.J.

FOREWORD

It is a privilege to have been invited by the great old master of comparative law and his bright younger colleague to contribute a foreword to this important book. The authors are so well known as to need no introduction to the British and, indeed, the international reader. The work itself, however, calls for some comment.

This book gives a renewed life to a monograph which was written some thirty years ago by Professor Lawson and which rightly received world-wide acclaim, not least for its penetrating insights into the Civil law and, indirectly, the Common law. One might, therefore, be content to express admiration at the way Dr Basil Markesinis has expanded and reshaped this book so as to lay the main emphasis on the modern Common law and Civil law. It is, indeed, a rare feast to be able to read such a masterly treatment of a particularly complex subject. The great legal systems are throughout this book considered in a tightly interwoven fabric, enriched by valuable glances at other systems of law. The developments are always stated in an accurate and instructive manner. As regards the legal system I know best – the French system – one is amazed at the extent to which Dr Markesinis has been able to understand and expound with great lucidity the most complex aspects of the matter. I would not say that the French law of *responsabilité civile* is, as Dean Prosser once said of proximate cause, 'a tangle and a jungle, a place of mirrors and maze', since its main lines are reasonably clear and satisfactory. Nevertheless, I do subscribe to Jean Carbonnier's severe pronouncement: 'Un immense gaspillage d'intelligence et de temps, c'est peut-être le bilan que l'on dressera un jour de notre célèbre jurisprudence.' For, though the main lines are reasonably clear, they are encumbered by numerous pointless subtleties. And though their results are reasonably satisfactory, they can lead to at least 25 per cent of the victims of road accidents being left – unjustifiably in my view – without any compensation.

The question may be raised why French law is so imperfect in this matter. Probably, the reason is that it is no longer governed by the

Code (which has been and remains an excellent working tool) but is left to the courts which are less experienced than their English counterparts in handling case-law. The first part of this explanation needs justification.

It is true that the Civil Code devotes five sections to the law of torts ('Des délits et des quasi-délits'). But, with the emergence of accidents as a result of the nineteenth-century industrial revolution, the greatest part of the subject was left unregulated by the Code. It looked as if the 1898 Act on Industrial Accidents had remedied the situation. The remedy, however, was a temporary one. Traffic accidents, which in France at present account for 40 deaths and some 1,000 injuries a day, are not governed by statutory rules, except to the extent that automobile liability insurance has become compulsory since 1958. Faced with such inaction on the part of Parliament, the courts decided to step in and created a law for the protection of victims of personal injuries and, especially, for the protection of traffic victims. But they could not achieve this *kind* of major adjustment of the provisions of a code, even though the drafters had been content to leave to them the task of adapting the texts to the needs of contemporary life. The situation was so new that they had to create the law out of nothing – the reference to article 1384 CC being a mere excuse. They did quite well in 1930. The decision in the *jand'heur* case was excellent and courageous. Unfortunately, however, the courts were not able to find a satisfactory solution to the secondary problems raised by its implementation. Nor were they able to reconsider it in the light of new factors, such as the compulsory automobile liability insurance. They have experience in formulating *jurisprudence* on the basis of statutory provisions, but not in developing and shaping case-law. The Cour de cassation does not lack able and innovative judges; what it lacks is proper techniques. Suffice to confess that it hands down some 15,000 judgments every year (800 in the field of civil liability; is this not, to quote Prosser again, adding smoke to fog?) and only recently has it taken steps to introduce a screening system for cases.

The reading of this book raises another question. It shows admirably that the various systems of law considered in its pages have given comparable responses to the identical needs of society. Still, they have to effect this by means of technical constructions which differ from one system to another but are no less complex and irrational than the French law which I have just criticised. Is there any good reason for this particularism? It is difficult not to have the feeling

that until quite recently – and Lawson's *Negligence in the Civil Law* was one of the pioneer works – English, French and German law developed quite apart, in basic ignorance of each other, and have suffered from this narrowness of approach. Each has been a prisoner of its own traditions. Instead of considering the problems from a wider, comparative perspective, they have made them more refined and complex. They have been more anxious to refine than to recast – hence the results I have alluded to. Of course, a unification of the laws on the basis of rational rules which will be equally acceptable in the three systems under comparison will not be achieved overnight. However, one feels that this book will help open the minds of jurists, at any rate in the three countries it embraces. And it should also convince its readers, as its authors hope it will, that 'cross-fertilisation of ideas is both possible and desirable' and this, in the long run, will produce better laws to serve the people better.

André Tunc

Université de Paris I

PREFACE

This book has its origins in F.H. Lawson's *Negligence in the Civil Law* which first appeared in 1950 and was reprinted with minor corrections several times since. Indeed, much of its Roman law material has with few, mainly bibliographical, additions or alterations, found its way into the first chapter of this book. The restricted nature of the revision, however, should in no way be seen as belittling the more recent contributions that British scholars like Honoré, Nicholas, Watson, McCormack, to mention but few, have made to the study of the *lex Aquilia*, but rather as an indication of the belief that much of this ground remains, and by the nature of things is likely to remain, open to discussion and speculation. With this in mind, and given the uncertainty that shrouds much of the Roman law, it was thought fit to retain as much of the orginal material as possible since, despite differences in details, or interpretation, it remains a model of conciseness and readability.

Like all progenies, however, this book claims a character and personality of its own, in many respects fundamentally different from that of its progenitor's. For one thing, it has grown considerably in size, largely in order to accommodate the explosion in academic writing that has taken place during the last thirty years or so in the area of delictual liability. One side effect of this is that the book is now printed in two volumes: volume I containing the exposition of general principles and our conclusions on certain aspects of delictual liability for unintentional harm, and volume II reprinting a wide selection of extracts from texts, statutes and cases relevant to our subject. But, though volume II is, in a sense, a 'companion volume', it has been designed to have an independent existence and can thus be used by students and teachers as a kind of casebook on the Civil law of torts. A second consequence of this increase in size is that the old balance between 'introductory material' and 'texts' has been radically altered. For while in the first edition of *Negligence* the main focus was on the texts and the seventy-nine pages of 'Introduction' were merely

'intended to furnish the student with an intelligible order in which to read the texts', the emphasis in this book is, if anything, reversed. Thus, though both volumes are approximately the same size, the second is meant to support and authenticate the text found in the first.

A second and no less important change can be found in the switch of emphasis from the Roman law to the modern Civil law. This reflects the changing emphasis in University teaching and the growing importance of courses in foreign and comparative law. With the U.K. now firmly (?) anchored in the Common Market, this growing interest in the modern Civil law can only be welcomed as an opportunity to influence and be influenced by others. For it seems true to assert that English law, both private and public, appears to be prepared to look abroad for guidance and inspiration in a manner which has hitherto been totally unknown. But this change of emphasis did not in our opinion warrant the complete abandonment of Roman law. For not only does Roman law remain an admirable creation of brilliant and systematic minds and as such worthy of serious academic pursuit; it also provides an excellent way of introducing the Common lawyer to the modern Civil law since it forms the first stage in a long and fairly continuous historical development. The first chapter of this book is therefore entirely devoted to the *lex Aquilia* and subsequent developments, and acts as a bridge between the old and the modern Civil law.

From what has already been said it will be obvious that the great bulk of the book is new, and its purpose is to introduce the student to a general familiarity with some of the basic conceptions of most continental systems, such as an educated English lawyer ought to possess, *and* to develop through the exposition of particular rules a number of themes which seem to us particularly relevant and noteworthy. Our conclusions are briefly stated at the end of the book and it is hoped that they will provoke our readers to use the material we have supplied in the second volume to question or elaborate them. But the one thing we certainly hope that they will do is to encourage a more 'positive' approach to the Civil law and vice versa; an approach which, while conscious of the differences which exist between the systems, will, for a change, choose to explore their equally intriguing similarities. If we achieve this, we feel we shall have achieved one of the most important aims we set out to achieve.

A number of practical considerations have influenced the size of the book and this meant that a selection had to be made of what topics

would be discussed. The title gives some idea of what we have excluded. We have omitted liability for intentionally inflicted harm and further restricted our discussion to certain aspects of what we in England would call the tort of Negligence (though we have opted for the less misleading title of unintentional harm). More importantly, we have omitted any extensive discussion of non-delictual rules of compensation such as insurance and social security. No doubt this will disappoint some of our readers, but something had to go, and what stayed was to some extent determined by the scope and title of the progenitor of this book and, of course, our own, personal, interests. Besides, the Pearson Committee has now reported and has not, to the distress of some and the delight of others, sounded the death-knell of the traditional law of tort. So, while the subject remains alive, there is room for its comparative discussion.

As already stated, the main part of the book is devoted to the modern law: Common law and Civil law. This last should be understood as referring mainly to modern French and German law which (rightly in our opinion) still attract the greatest attention in this country. But this does not mean that we have attempted to discuss *every* topic from the point of view of the Common law, French law and German law, since we do not regard comparative law as a long list of similarities and differences. Thus the emphasis alternates between French law and German law, depending upon which of the two presents greater originality or interest on a particular point. And, more often than not, we have also given references to other codes, notably the Austrian, Swiss, Belgian, Italian and Dutch, whenever we thought that this might be of interest to our readers. One must remember, however, that our exposition of the 'foreign law' is really an account by a Common lawyer looking at the Civil law and, hence, the possibility of our French or German colleagues viewing their own law in a different way cannot be ruled out. Still, this may not be a bad thing, especially if it prompts Civil lawyers to rethink their own law in the light of observations made by outsiders. A few more comments about the materials included in the second volume may not be out of place.

The materials reprinted in the second volume are meant to supply help to interested students, not researchers, and are broadly divided into three sections: the first includes extracts from Roman texts; the second, extracts from mostly modern Western European Codes dealing with delictual liability; the third, reproducing a selection of German and

(mainly) French cases on the subject. All students of law by the comparative method must, at a very early stage, become familiar with these sources of modern law and there is no better place to start than the law of civil responsibility. Moreover, the problems that French and German lawyers have had to solve are substantially the same as those which have appeared in England in the present century and a special effort has been made to include cases (in both volumes) which bear a marked, factual, resemblance to well-known English cases. The task of comparison is thus greatly facilitated.

The preponderance of French materials found in this part of our work has not been dictated entirely by considerations of space. One important factor for this imbalance in favour of French law was the knowledge that most English students can read French better than German and, in fact, the French texts have been left untranslated on the assumption that one cannot hope to study modern law comparatively without *some* knowledge of French. At the same time, however, we have tried to ease the path of the student by explaining in appropriate places difficult terms and phrases. Passages from all other languages are reproduced in a translated form and in these translations the emphasis has not been on elegance and easy flowing style, because in a book of this kind the translation should be nothing more nor less than a 'crib'. But there is a further, important reason why we chose to give such pre-eminence to French law and this is because of its admirable ability to blend the theoretical and the practical while striving for elegance and symmetry. It thus avoids some of the theoretical excesses which can be found in the otherwise quite admirable German legal literature without reaching the opposite extreme (often found in English law) of ignoring logic, symmetry and elegance for the sake of 'practical solutions'. This, no doubt, is an important reason why French law has received and will continue to receive such pre-eminence in the syllabi of many Common Law Faculties and it has also led us to shift the balance in its favour.

One final point should be made. Keeping up to date with developments in one system is difficult enough; trying to achieve this with two, three, or more is a real nightmare. Happily we believe that the comparative approach can be and perhaps should be attempted in broad strokes, where form and shape matter more than detail, and acquiring the general feeling of a foreign system may be more important than trying to master its minutiae. Though every effort has been made to take into account the most recent materials, the above

mentioned philosophy may explain and, perhaps, justify omissions which the more learned of our readers will be quick to discover.

F.H. Lawson B.S. Markesinis

Cambridge, 10 July 1980

ACKNOWLEDGEMENTS

'*Αμαθία μὲν θράσος, λογισμός δὲ ὄκνον φέρει.*' This, at any rate, was the view taken by Pericles in his famous Funeral Oration. For my part I am now convinced that it is this temerity which usually flows from ignorance of the difficulties that lie ahead, plus my ambition to work with Harry Lawson, that first led me to volunteer to update his pioneering work. This proved an awesome task, given the great complexity of the subject and the fact that in all the systems under comparison, a great deal has happened since Harry Lawson's books first appeared in the early 1950s. In the event, however, I was fortunate to have the help of many colleagues who, in various ways, came to my rescue. My debt to their written work has, I hope, been adequately acknowledged in the notes to this work. But it gives me great pleasure to record a less specific, but none the less great, sense of indebtedness to my 'Tort' colleagues and friends in Trinity, Jack Hamson, Tony Jolowicz and Tony Weir, as well as to my friend Micky Dias, to all of whom I owe my interest in the subject and whose ideas I am sure I have consciously and unconsciously used and elaborated in more than one place in this book.

More specific and just as sincere is my debt to Peter Stein, who kindly read the first chapter in draft form and made many a valuable suggestion; to Kurt Lipstein, eminently suited and always willing to help with some difficult German texts; to my former pupil and now colleague and friend Professor Christian Von Bar for his meticulous checking of statements and references to German law; to Dr Kurt Clausius for his untiring and valuable assistance with the German bibliography and case-law; and to Mademoiselle Marie Josef-Experton for her help with a number of points concerning French law. Thanks are also due to the Trustees of the Leverhulme Trust Fund for providing much of the financial assistance usually necessary for research work of this kind; to Messrs Carl Heymanns Verlag KG, and C.H. Beck'sche Verlagsbuchhandlung, publishers of the Entscheidungen des Bundesgerichtshofes in Zivilsachen and the Neue

Juristiche Wochenschrift respectively; and to the editors of the *Recueil Dalloz-Sirey*, *La Semaine Juridique* and the *Gazette du Palais* for their generous permission to reproduce here some of the decisions published in their learned editions. Grateful thanks are also due to the staff of the Squire Law Library and, in particular, to Mr G.G. Hughes and Mr A.C. Rawlings for their help; and, finally, to my secretaries, Mrs Mary Pomery and Mrs Rebecca Vasko, who cheerfully typed and re-typed an impeccable typescript from an illegible manuscript.

But my greatest good fortune was in securing the help of André Tunc, who proved a patient teacher as well as a great friend. For he read my manuscript with great care and by giving me the benefit of his immense knowledge saved me from many errors and omissions. And as if all this were not enough, he has kindly contributed a foreword to the book in his usual generous manner.

Last but not least I wish to record my thanks to Harry Lawson for giving me a free hand in the preparation of this book. His generosity, patience and erudition, so well known to generations of colleagues and students alike, were, for me, a source of strength and inspiration during the dark moments when the magnitude of the task made me wish I had read Thucydides more often. If this book proves a worthy successor to his own work on comparative law it will be largely due to his influence and the assistance of all the above; if it is not, then I, alone, am to blame.

B.S. Markesinis

Although this book, for which we both take full responsibility, is the product of a joint effort, by far the greater part of the work, including the selection and modification of the materials contained in my earlier work, has been done by Basil Markesinis, to whom I am most grateful.

F.H. Lawson

ABBREVIATIONS

ABGB	Austrian General Civil Code.
A.C.	Law Reports, Appeal Cases (Decisions of the House of Lords and the Privy Council from 1891).
AcP	*Archiv für die civilistische Praxis.*
A.E.F.	Cour d'appel de l'Afrique Equatoriale française.
A.J.Comp.L.	*American Journal of Comparative Law.*
A.L.J.R.	Australian Law Journal Reports.
All E.R.	All England Law Reports.
Amos and Walton	Sir M.S. Amos and F.P. Walton, *Introduction to French Law*, 3rd edn (1967) by F.H. Lawson, A.E. Anton and L. Neville Brown.
Am. Rep.	American Reports.
App. Cass.	Law Reports, Appeal Cases (1875–1890).
ATF	*Recueil officiel d'arrêts du Tribunal fédéral suisse* (can also be referred to as *BGE – Entscheidungen des schweizerischen Bundesgerichts*).
Atiyah	P.S. Atiyah, *Accidents, Compensation and the Law*, 2nd edn (1975).
B.	*Basilica.*
BB	*Betriebsberater.*
Beseler	G. Beseler, *Beiträge zur Kritik der Römischen Rechtsquellen*, I (1910); II (1911); III (1913); IV (1920); V (1931).
Bet.	*Der Betrieb.*
BGB	Bürgerliches Gesetzbuch (German Civil Code).
BGBl.	*Bundesgesetzblatt.*
BGE	*Entscheidungen des schweizerischen Bundesgerichtes* (can also be referred to as *ATF – Recueil officiel d'arrêts du Tribunal fédéral suisse*).
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Decisions of the West German Supreme Court in civil matters).

Buckland, *Slavery*	W.W. Buckland, *The Roman Law of Slavery* (1908, 1970).
Buckland, *Text-book*	W.W. Buckland, *A Text-book of Roman Law from Augustus to Justinian*, 3rd edn revised by P. Stein (1963).
Buckland and McNair	W.W. Buckland and A.D. McNair, *Roman Law and Common Law*, 2nd edn revised by F.H. Lawson (1952, reprinted 1965, 1974).
Bull.civ.	*Bulletin des arrêts de la Cour de cassation, chambres civiles* (official reports).
Bull.crim.	*Bulletin des arrêts de la Cour de cassation, chambre criminelle* (official reports).
C.	*Codex Iustinianus.*
C.A.	Decision of the English Courts of Appeal.
Cal.L.Rev.	*California Law Review.*
Cal. Reptr. 2d.	California Reporter, 2nd series (American law reports).
Cal. Reptr. 3d.	California Reporter, 3rd series (American law reports).
Cass.	Cour de cassation.
CC	Civil Code.
C.E.	Conseil d'Etat.
Ch.	Law Reports, Chancery Division (from 1891).
Ch. Civ.	Cour de cassation, Chambre Civile.
Ch. Civ. 2^{e}	Cour de cassation, second Chambre Civile.
Ch. Comm.	Cour de cassation, Chambre Commercielle.
Ch. Crim.	Cour de cassation, Chambre criminelle.
Ch.D.	Law Reports,Chancery Division (1875–1890).
Ch. Mixte	Cour de cassation, Chambre Mixte.
Ch. Req.	Cour de cassation, Chambre des Requêtes.
Ch. Réun.	Cour de cassation, Chambres Réunies.
C.L.J.	*Cambridge Law Journal.*
C.L.R.	Commonwealth Law Reports.
Coll.	*Mosaicarum et Romanarum Collatio*, ed. Hyamson, 1913.
D.	Recueil Dalloz (1945–1964).
D	*Iustiniani Digesta.*
D.C.	Dalloz, recueil critique de jurisprudence et de législation (1941–1944).
Deutsch, *Haftungsrecht*	E. Deutsch, *Haftungsrecht*, I, 5th edn (1976).
de Visscher	F. de Visscher, *Le Régime romain de la noxalité* (1947).
D.H.	Dalloz Hebdomadaire (1924–1940).

D.L.R.	Dominion Law Reports.
D.P.	Dalloz périodique (1825–1940).
D.S.	Recueil Dalloz et Sirey (1965–).
D. StR.	Deutsches Steurrecht.
EG. BGB	Einführungsgesetz zum BGB (Introductory law to the BGB).
Encyclopedia	*International Encyclopedia of Comparative Law*, XI, chief ed. A. Tunc (1975).
Esser-Schmidt, *Schuldrecht*	J. Esser and E. Schmidt, *Schuldrecht*, 5th edn, I, *Allgemeiner Teil* (1975), II, *Besonderer Teil* (1976).
Ex. D.	Law Reports, Exchequer Division (1875–1880).
Fleming	John G. Fleming, *The Law of Torts*, 5th edn (1977).
F. Supp.	Federal Supplement (American Law reports).
F. 2d.	Federal Reporter, 2nd series (American Law Reports).
G.	*Gai Institutiones*.
GG	Grundgesetz (the Constitution of Western Germany).
Giffard	A.E. Giffard and R. Villers, *Droit romain et ancien droit français* (*obligations*), 4th edn (1976).
G.P.	*Gazette du Palais*.
Grueber	E. Grueber, *The Lex Aquilia* (1886).
H. & C.	Hurlston and Coltman (private reports 1862–1866).
Hart and Honoré	H.L.A. Hart and A.M. Honoré, *Causation in the Law* (1959).
Heimbach	C.G.E. Heimbach, *Basilicorum Libri LX*, vol. v (1850).
Holdsworth	Sir W.S. Holdsworth, *History of English Law*, 12 vols.
Honoré, *Encyclopedia*	*International Encyclopedia of Comparative Law* XI (chief ed. A. Tunc), ch. 7, 'Causation and Remoteness of Damage' by A.M. Honoré.
I.C.L.Q.	*International and Comparative Law Quarterly*.
J.	*Iustiniani Institutiones*.
J.C.L.	*Journal of Comparative Legislation and International Law*, 3rd series.
J.C.P.	*Juris-Classeur Périodique* (also referred to as *S.J.* (*La Semaine Juridique*)).
Jolowicz, *De Furtis*	H.F. Jolowicz, *Digest XLVII. 2, De Furtis* (1940).