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

II

F.H.Lawson and
B.S.Markesinis

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

Volume II: Materials

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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.

In the 1970s there was a gap during a time when the Syndics were persuaded that books on law should be left to commercial publishers. 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.

PREFACE

This is the second volume of a work which we have entitled *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* and one must seek in the preface of the first volume and the pages that follow it the history of its genesis and its detailed aims. But both the authors and the publisher felt that it might be useful to make the second volume available on its own and so, for the sake of the reader who has not purchased or consulted the first volume, a few introductory remarks about what follows may not be out of place.

In one sense, this book is a 'companion volume' to the first, in which we have attempted to give some of the general principles related to our subject and make some observations which, in varying degrees, apply to all the systems under comparison. The aim of this second volume was therefore to provide the interested reader with some basic texts and extracts from decisions which would enable him to pursue his study more deeply and, at the same time, question or develop some of our assumptions and conclusions. For this reason, the material in this volume follows closely the pattern and contents of the first and it would be futile to pretend that the reader will not get greater benefit if he uses the two volumes side by side.

But the material of this volume also aspires to independent status and could easily have been entitled *Cases and Materials on Comparative Torts*. To strengthen this element of self-sufficiency we have added some material of our own which either sketches for the reader the judicial background in France and Germany or provides a brief commentary on the law found in the case extracts.

The greater part of this second volume is devoted to the *modern* Civil law. But in the first volume we included a fairly long historical chapter giving an account of the *lex Aquilia* and tracing in briefest outline the development of the law from Roman times to the modern codes. In view of this and because we feel that Roman law has a strong pedagogic value we have included in this volume some of those classic texts. Reasons of space dictated that this be done in translation form

only. While the omission of the Latin originals should not cause undue hardship to the serious Roman lawyer (who can easily trace them elsewhere), it did make room for more of the modern law. Given today's emphasis on the modern Civil law, this, we hope, will counter the disadvantage of omitting the original texts.

The texts that follow aim at giving the reader some familiarity with some of the basic civil codes such as an educated Common lawyer ought, in our opinion, to possess. These are followed by extracts from decisions from German and French Courts and once again we wish to thank Messrs Carl Heymanns Verlag KG, C.H. Beck'sche Verlagsbuchhandlung and the editors of Recueil Dalloz-Sirey, *La Semaine Juridique* and the *Gazette du Palais* for permission to translate or reproduce here their original texts.

The topics discussed in this volume are *roughly* those considered in the first. In neither volume, however, have we wished or tried to discuss *every* topic from the point of view of *every* system. The emphasis has thus alternated depending on a variety of factors, the importance of a particular decision being only one of them. Our main effort was to select not only the *leading* case but also the case which was factually equivalent to one which our Common law student would have met while studying his own system, so that he will be able to compare the two with greater profit. We hope that within the strict confines of a short book we have succeeded in showing that French and German lawyers have been called upon to solve problems almost identical to ours; that their solutions have been remarkably similar; and that their reasoning has often been as tortuous if not as unsatisfactory as ours. Above all, however, we hope to have shown how useful it can be for a lawyer studying his own system to study how *foreign* colleagues have handled similar problems. This, in our opinion, is the first and arguably the greatest benefit one can derive from the use of the comparative method.

One final word should be added as an explanation rather than as an apology. The preponderance of French material in this volume is justified partly by the knowledge that French law is the most commonly taught 'foreign system' in this country, and partly because we find that in its study one encounters an admirable ability to blend the theoretical and the practical while it always strives for elegance and symmetry. Thus, though the French system appears (to our eyes at least) less rigorous and less 'worked on' than the German, it has managed to avoid some of the theoretical excesses which can be found

Preface

in the otherwise admirable Germanic legal literature. At the same time, however, it has avoided the opposite extreme found in the Common law which, in the words of the great Holmes, 'decides the case first and determines the principle afterwards'.

F.H. Lawson

B.S. Markesinis

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	<i>Archiv für die civilistische Praxis.</i>
A.E.F.	Cour d'appel de l'Afrique Equatoriale française.
<i>A.J.Comp.L.</i>	<i>American Journal of Comparative Law.</i>
A.L.J.R.	Australian Law Journal Reports.
All E.R.	All England Law Reports.
AMG	Arzneimittelgesetz.
Amos and Walton	Sir M.S. Amos and F.P. Walton, <i>Introduction to French Law</i> , 3rd edn (1967) by F.H. Lawson, A.E. Anton and L. Neville Brown.
Am. Rep.	American Reports.
App. Cass.	Law Reports, Appeal Cases (1875-90).
ATF	<i>Recueil officiel d'arrêts du Tribunal fédéral suisse</i> (can also be referred to as <i>BGE - Entscheidungen des schweizerischen Bundesgerichts</i>).
Atiyah	P.S. Atiyah, <i>Accidents, Compensation and the Law</i> , 2nd edn (1975).
B.	<i>Basilica.</i>
BB	<i>Betriebsberater.</i>
Beseler	G. Beseler, <i>Beiträge zur Kritik der Römischen Rechtsquellen</i> , I (1910); II (1911); III (1913); IV (1920); V (1931).
Bet.	<i>Der Betrieb.</i>
BGB	Bürgerliches Gesetzbuch (German Civil Code).
BGBI.	<i>Bundesgesetzblatt.</i>
BGE	<i>Entscheidungen des schweizerischen Bundesgerichtes</i> (can also be referred to as <i>ATF - Recueil officiel d'arrêts du Tribunal fédéral suisse</i>).
BGHZ	<i>Entscheidungen des Bundesgerichtshofes in Zivilsachen</i> (Decisions of the West German Supreme Court in civil matters).

Abbreviations

Buckland, <i>Slavery</i>	W.W. Buckland, <i>The Roman Law of Slavery</i> (1908, 1970).
Buckland, <i>Text-book</i>	W.W. Buckland, <i>A Text-book of Roman Law from Augustus to Justinian</i> , 3rd edn revised by P. Stein (1963).
Buckland and McNair	W.W. Buckland and A.D. McNair, <i>Roman Law and Common Law</i> , 2nd edn revised by F.H. Lawson (1952 reprinted 1965, 1974).
<i>Bull.civ.</i>	<i>Bulletin des arrêts de la Cour de cassation, chambres civiles</i> (official reports).
<i>Bull.crim.</i>	<i>Bulletin des arrêts de la Cour de cassation, chambre criminelle</i> (official reports).
C.	<i>Codex Iustinianus</i> .
C.A.	Decision of the English Court of Appeal.
<i>Cal.L.Rev.</i>	<i>California Law Review</i> .
<i>Cal. Reprtr. 2d.</i>	California Reporter, 2nd series (American law reports).
<i>Cal. Reprtr. 3d.</i>	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 Commerciale.
Ch. Crim.	Cour de cassation, Chambre Criminelle.
Ch. D.	Law Reports, Chancery Division (1875-90).
Ch. Mixte	Cour de cassation, Chambre Mixte.
Ch. Req.	Cour de cassation, Chambre des Requêtes.
Ch. Réun.	Cour de cassation, Chambres Réunies.
<i>C.L.J.</i>	<i>Cambridge Law Journal</i> .
<i>C.L.R.</i>	Commonwealth Law Reports.
<i>Coll.</i>	<i>Mosaicarum et Romanarum Collatio</i> , ed. Hyamson, 1913.
D.	Recueil Dalloz (1945-64).
<i>D</i>	<i>Iustiniani Digesta</i> .
D.C.	Dalloz, recueil critique de jurisprudence et de législation (1941-4).
D. Chron.	Dalloz chronique.

Abbreviations

Deutsch, <i>Haftungsrecht</i>	E. Deutsch, <i>Haftungsrecht</i> , 1, 5th edn (1976).
de Visscher	F. de Visscher, <i>Le Régime romain de la noxalité</i> (1947).
D.H.	Dalloz Hebdomadaire (1924-40).
D.L.R.	Dominion Law Reports.
D.P.	Dalloz périodique (1825-1940).
D.S.	Recueil Dalloz et Sirey (1965-).
D. StR.	Deutsches Steuerrecht.
EG. BGB.	Einführungsgesetz zum BGB (Introductory law to the BGB).
<i>Encyclopedia</i>	<i>International Encyclopedia of Comparative Law</i> , gen. ed. A. Tunc (1975).
Esser-Schmidt, <i>Schuldrecht</i>	J. Esser and E. Schmidt, <i>Schuldrecht</i> , 5th edn, I, <i>Allgemeiner Teil</i> , (1975), II, <i>Besonderer Teil</i> (1976).
Ex. D.	Law Reports, Exchequer Division (1875-80).
Fleming	John G. Fleming, <i>The Law of Torts</i> , 5th edn (1977).
F. Supp.	Federal Supplement (American law reports).
F. 2d.	Federal Reporter, 2nd series (American law reports).
G.	<i>Gai Institutiones</i> .
GG	Grundgesetz (the Constitution of Western Germany).
Giffard	A.E. Giffard and R. Villers, <i>Droit romain et ancien droit français (obligations)</i> , 4th edn (1976).
G.P.	<i>Gazette du Palais</i> .
Grueber	E. Grueber, <i>The Lex Aquilia</i> (1866).
GVG	Gerichtsverfassungsgesetz.
H. & C.	Hurlstone and Coltman (private reports 1862-6).
Hart and Honoré	H.L.A. Hart and A.M. Honoré, <i>Causation in the Law</i> (1959).
Heimbach	C.G.E. Heimbach, <i>Basilicorum Libri LX</i> , vol. v (1850).
HGB	Handelsgesetzbuch (West German Commercial Code).
Holdsworth	Sir W.S. Holdsworth, <i>History of English Law</i> , 12 vols.
Honoré, <i>Encyclopedia</i>	<i>International Encyclopedia of Comparative Law</i> (chief ed. A. Tunc), XI, ch. 7, 'Causation and Remoteness of Damage' by A.M. Honoré.

Abbreviations

I.C.L.Q.	<i>International and Comparative Law Quarterly.</i>
J.	<i>Iustiniani Institutiones.</i>
J.C.L.	<i>Journal of Comparative Legislation and International Law</i> , 3rd series.
J.C.P.	<i>Juris-Classeur Périodique</i> (also referred to as S.J. (<i>La Semaine Juridique</i>)).
Jolowicz, <i>De Furtis</i>	H.F. Jolowicz, <i>Digest XLVII. 2, De Furtis</i> (1940).
Jolowicz and Nicholas	H.F. Jolowicz and B. Nicholas, <i>Historical Introduction to the Study of Roman Law</i> , 3rd edn (1972).
Josserand	L. Josserand, <i>Cours de droit civil positif français</i> , 2nd edn (1933).
J.S.P.T.L.	<i>Journal of the Society of Public Teachers of Law.</i>
JuS	<i>Juristische Schulung.</i>
JW	<i>Juristische Wochenschrift.</i>
JZ	<i>Juristenzeitung.</i>
Kaser, R. PR.	Max Kaser, <i>Das römische Privatrecht</i> , 1, 2nd edn (1971).
K.B.	<i>Law Reports, King's Bench</i> (1901-52).
Larenz, <i>Schuldrecht</i>	K. Larenz, <i>Lehrbuch des Schuldrechts</i> , 11th edn, 1, <i>Allgemeiner Teil</i> (1976), 11, <i>Besonderer Teil</i> (1977).
LebMG	<i>Lebensmittelgesetz</i>
Lenel, <i>Ed.</i>	O. Lenel, <i>Das Edictum Perpetuum</i> , 3rd edn (1927).
LK	<i>Leipziger Kommentar.</i>
LM	Lindenmaier, Möhring <i>et al.</i> (Commentary on decisions of BGH).
L.Q.R.	<i>Law Quarterly Review.</i>
L.R. Ch. App.	<i>Law Reports, Chancery Appeal Cases</i> (1865-75).
L.R.C.P.	<i>Law Reports, Common Pleas Cases</i> (1868-75).
L.R. Ex.	<i>Law Reports, Exchequer Cases</i> (1865-75).
L.R.H.L.	<i>Law Reports, English and Irish Appeals</i> (1866-75).
L.R.Q.B.	<i>Law Reports, Queen's Bench</i> (1865-75).
L.T.	<i>Law Times Reports</i> (1859-1947).
Macq.	Macqueen (Sc.) H.L. (private reports 1851-65).
M. & W.	Meeson and Welsby Ex. (private reports 1836-47).

Abbreviations

Mazeaud and Mazeaud	Henri, Léon et Jean Mazeaud, <i>Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle</i> , II, 6th edn (1970).
Mazeaud and Mazeaud, <i>Leçons</i>	Henri, Léon et Jean Mazeaud, <i>Leçons de droit civil</i> , II, part 1, 6th edn (1978) by F. Chabas.
Mazeaud and Tunc	Henri et Léon Mazeaud et A. Tunc. <i>Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle</i> , I, 6th edn (1965).
McKerron	R.G. McKerron, <i>The Law of Delict</i> , 7th edn (1971).
M.D.R.	<i>Monatschrift für Deutsches Recht</i> .
Medicus	Dieter Medicus, <i>Bürgerliches Recht</i> , 9th edn (1979).
M.L.R.	<i>Modern Law Review</i> .
Monier	R. Monier, <i>Manuel élémentaire de droit romain</i> .
Monro	C.H. Monro, <i>Digest IX. 2, Lex Aquilia</i> (1898).
N.E.	North Eastern Reporter (American law reports).
N.I.L.Q.	<i>Northern Ireland Legal Quarterly</i> .
NJW	<i>Neue Juristische Wochenschrift</i> .
N.W.	North Western Reporter (American law reports).
OGH	Oberster Gerichtshof (Austrian Supreme Court).
OLG	Oberlandesgericht a German Court of Appeal).
OR	Swiss Code of Obligations.
P.	Law Reports, Probate Division (1891-).
Pas.	<i>Pasicrisie Belge</i> (Belgian law reports).
Pernice	A. Pernice, <i>Die Lehre der Sachbeschädigungen</i> (1867).
Planiol et Ripert	M. Planiol et G. Ripert, <i>Traité pratique de droit civil</i> , 14 vols., tome VI par P. Esmein (1952).
Prosser	W.L. Prosser, <i>Law of Torts</i> , 4th edn (1971).
P. 2d.	Pacific Reporter, 2nd series (American law reports).
Q.B.	Law Reports, Queen's Bench (1891-1900; 1952-).
Q.B.D.	Law Reports, Queen's Bench Division (1875-90).

Abbreviations

<i>Rabels Z.</i>	<i>Rabels Zeitschrift für ausländisches und internationales Recht.</i>
<i>Rev. crit. jur. Belge</i>	<i>Revue critique de jurisprudence Belge.</i>
<i>Rev. crit. lég. et jur.</i>	<i>Revue critique de législation et de jurisprudence.</i>
<i>Rev. gén. ass. terr.</i>	<i>Revue générale des assurances terrestres.</i>
<i>Rev. hist. dr. fr. et é.</i>	<i>Revue historique de droit français et étranger.</i>
<i>Rev. int. dr. ant.</i>	<i>Revue internationale des droits de l'antiquité (3rd series, 1954-).</i>
<i>Rev. int. dr. comp.</i>	<i>Revue internationale de droit comparé.</i>
<i>Rev. trim. dr. civ.</i>	<i>Revue trimestrielle de droit civil.</i>
<i>RGBl.</i>	<i>Reichsgesetzblatt.</i>
<i>RGSt.</i>	<i>Amtliche Sammlung der Entscheidungen des Reichsgerichts in Strafsachen.</i>
<i>RGZ</i>	<i>Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the German Imperial Court in civil matters).</i>
<i>Rotondi, Scr. Giur.</i>	<i>G. Rotondi, Scritti Giuridici (1922).</i>
<i>RVO</i>	<i>Reichsversicherungsordnung (German Imperial Insurance Ordinance).</i>
<i>S.</i>	<i>Recueil Sirey.</i>
<i>S.A.L.J.</i>	<i>South African Law Journal.</i>
<i>Savatier</i>	<i>R. Savatier, Traité de la responsabilité civile en droit français, 2nd edn (1951).</i>
<i>S.C.</i>	<i>Session Cases (Scottish law reports).</i>
<i>S.D.H.I.</i>	<i>Studia et Documenta Historiae et Iuris.</i>
<i>Seuff Arch</i>	<i>Seuffert's Archiv.</i>
<i>S.J.</i>	<i>La Semaine Juridique (also referred to as J.C.P. (Juris-Classeur périodique)).</i>
<i>S.L.T.</i>	<i>Scots Law Times.</i>
<i>So.</i>	<i>Southern Reporter (American law reports).</i>
<i>Somm.</i>	<i>Sommaire (summary of French decisions in D.).</i>
<i>So. 2d.</i>	<i>Southern Reporter, 2nd series (American law reports).</i>
<i>StGB</i>	<i>Strafgesetzbuch (German Criminal Code).</i>
<i>StVG</i>	<i>Strassenverkehrsgesetz (German Road Traffic Act).</i>
<i>Starck</i>	<i>Boris Starck, Droit civil, obligations (1972).</i>
<i>S.W.</i>	<i>South Western Reporter (American law reports).</i>
<i>Trib. Civ.</i>	<i>Tribunal Civil.</i>
<i>xii T.</i>	<i>The Twelve Tables.</i>
<i>U. of P.L. Rev.</i>	<i>University of Pennsylvania Law Review.</i>
<i>Va.L.Rev.</i>	<i>Virginia Law Review.</i>

Abbreviations

<i>Vand.L.Rev.</i>	<i>Vanderbilt Law Review.</i>
<i>VersR.</i>	<i>Versicherungsrecht.</i>
Weill and Terré	<i>Droit civil.</i> 2nd edn (1975).
Weir, <i>Encyclopedia</i>	<i>International Encyclopedia of Comparative Law</i> (gen. ed. A. Tunc), xi, ch. 12, 'Complex Liabilities' by Tony Weir.
Winfield and Jolowicz	Winfield and Jolowicz on Tort, 11th edn by W.V.H. Rogers (1979).
W.L.R.	Weekly Law Reports.
<i>WM</i>	<i>Wertpapier-Mitteilungen.</i>
ZPO	<i>Zivilprozessordnung</i> (Code of Civil Procedure).
Z.S.S.	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.</i>
Zweigert and Kötz	K. Zweigert and H. Kötz, <i>An Introduction to Comparative Law</i> , II, <i>The Institutions of Private Law</i> (translated by Tony Weir, 1977).

CONTENTS

<i>General editor's foreword to the new series</i>	IX
<i>Preface</i>	XI
<i>Abbreviations</i>	XV
PART IA Digest 9,2: on the <i>lex Aquilia</i>	I
PART IB Extracts from other Roman texts	25
Institutes of Gaius 3, 202,210-19,223; 4, 9,11,37,76	25
Sentences of Paul 1, 19.1-2	28
<i>Collatio</i> of the Mosaic and Roman laws 2, 4.1,5.5; 7, 3.1-4; 12,7.1-10	28
Institutes of Justinian 3, 27.7; 4, 1.11,3.pr.-16,4.7,6.19,8.4	31
Digest	35
2.14 Of pacts, 7.13	35
4.3 Of <i>dolus malus</i> , 7.7,35	35
6.1 Of the vindication of a thing, 38	36
7.1 Of usufruct and how it is exercised, 13.2	36
9.1 Of the alleged commission of <i>pauperies</i> by a four-footed animal, 3	37
9.4 Of noxal actions, 2,6	37
11.5 Of gamblers, 2.1	38
19.2 Of the actions of letting and hiring, 11,13.4,25.7,30.2	38
19.5 Of actions <i>praescriptis verbis</i> and <i>in factum</i> , 11,14. pr.-3,23	39
39.3 Of water and the action for keeping off rainwater, 1.12	40
41.1 Of the acquisition of ownership, 55	40
43.24 Of the interdict <i>quod vi aut clam</i> , 7.4	41
47.2 Of thefts, 27.2-3,31,32.1,50.4,51	41
47.8 Of robbery and riot, 2.20	42
47.9 Of pillage, 3.7,9	42
47.10 Of outrages and defamatory writings, 7.1,13.1,17.7	43
48.8 Of the <i>lex Cornelia</i> concerning assassins and poisoners, 9	44
50.16 Of the meaning of words, 102	44
50.17 Of divers rules of the old law, 36.55,151,155,169,203	44
Basilica: scholion on <i>D</i> 9,2 ii pr.	45

PART II Extracts from foreign codes	47
Prussian Code, tit. 6, 5-7, 10-16, 18-23, 41-4, 79	47
French Civil Code, arts. 1149-51, 1382-6	49
Loi du 31 mai 1924, relative à la navigation aérienne, art. 141.2	50
Austrian Civil Code, §§ 1304, 1306a, 1308-10	50
Belgian Civil Code, § 1386 bis	51
Quebec Civil Code, §§ 1053-6b	52
German Civil Code, §§ 226-31, 249-55, 276-8, 328-31, 676, 823-40, 842-7, 851, 903-4	54
Swiss Code of Obligations, arts. 41-61	62
Civil Code for the Mexican District and Territories, arts. 1910-33	66
Italian Civil Code, arts. 1223-7, 2043-59	68
The (New) Netherlands Civil Code Book 6, Ch. 3 (not yet in force)	71
PART III Extracts from German cases	76
A bird's eye view of the organisation of the German courts in civil matters	76
Notes to the German cases	81
1 Decision of the 6th Civil Senate of 26 November 1968 (BGH)	84
2 Decision of the 6th Civil Senate of 8 June 1976 (BGH)	100
3 Decision of the 1st Civil Senate of 25 May 1954 (BGH)	105
4 Decision of the 1st Civil Senate of 14 February 1958 (BGH)	111
5 Decision of the 6th Civil Senate of 19 September 1961 (BGH)	118
6 Decision of the 6th Civil Senate of 22 June 1931 (RG)	123
7 Decision of the 3rd Civil Senate of 25 September 1952 (BGH)	124
8 Decision of the Court of Appeal of Stuttgart of 24 November 1964	131
9 Decision of the 6th Civil Senate of 22 April 1958 (BGH)	135
10 Decision of the 6th Civil Senate of 16 February 1972 (BGH)	139
11 Decision of the 6th Civil Senate of 7 December 1911 (RG)	144
12 Decision of the 8th Civil Senate of 28 January 1976 (BGH)	146
13 Decision of the 7th Civil Senate of 7 November 1960 (BGH)	151
14 Decision of the 6th Civil Senate of 10 February 1930 (RG)	154
15 Decision of the Great Senate of 4 March 1957 (BGH)	159
16 Decision of the 3rd Civil Senate of 27 May 1963 (BGH)	166
17 Decision of the 7th Civil Senate of 30 May 1963 (BGH)	168
18 Extracts from BGH Decision of 12 February 1979 (BGH)	170
PART IV Extracts from French cases	177
Introductory comments	177
The notion of <i>faute</i>	185
1 <i>Baier c. Serafinowski</i> , Cass. Civ., 1 déc. 1965, J.C.P. 1966, 2.14567	187
2 <i>Dauphas c. Parti Communiste Français</i> , Paris, 11 juil. 1973, J.C.P. 1974, 2.17600	188
3 <i>Soc. Presse-Office c. Sachs</i> , Cass. Civ., 6 janv. 1971, D. 1971, 263	192

Contents

4	<i>Branly c. Turpain</i> , Cass. Civ., 27 fév. 1951, D. 1951,329	193
5	<i>Coquerel c. Clément-Bayard</i> , Cass. Req., 3 août 1915, D.P. 1917,1.79	205
6	<i>Epoux Vullion c. Sté immob. Vernet St-Christophe, and Brun c. Sté civ. immob.</i> , Cass Civ., 4 fév. 1971, J.C.P. 1971,2.16781	207
7	<i>Nourrigat c. Pech</i> , Cass. Civ., 28 fév. 1910, S. 1911,1.329	208
Damage		215
8	<i>Lejars c. Consorts Templier</i> , Cass. Civ., 13 fév. 1923, D.P. 1923,1.52	216
9	<i>Metenier c. Epoux Luce</i> , Cass. Civ., 27 juil. 1937, D.P. 1938,1.5	217
10	<i>Veuve Gaudras c. Dangereux</i> , Cass. Civ., 27 fév. 1970, D. 1970,201	219
11	<i>Football Club de Metz c. Wiroth</i> , Colmar, 20 avril 1955, D. 1956,723	221
Causation		227
12	<i>Léo c. Etablissements Milliat frères</i> , Cass. Soc., 7 mai 1943, S. 1943,1.106	228
13	<i>The Lamoricière</i> , Cass. Civ., 19 juin 1951 (2 arrêts), D. 1951,717	229
14	<i>Gueffier c. Ponthieu</i> , Cass. Civ., 2 juil. 1969, G.P. 1969,2.311	233
15	<i>Dame Bruneau et autres c. Epoux Bruneau et autres</i> , Cass. Civ., 29 sept. 1941, G.P. 1941,437	234
16	<i>Litzinger et autres c. Kintzler</i> , Cass. Civ., 5 juin 1957, D. 1957,493	235
17	<i>Drouin et Gillet c. Mangala</i> , Cour d'appel de l'Afrique Equatoriale Francaise, 5 avril 1957, J.C.P. 1957,2.10308	236
18	<i>Cie d'assurances 'Le Continent' c. Clavel, Garnier et Paul</i> , Grenoble, 16 mai 1962, D. 1963,137	239
19	<i>Fonds de Garantie automobile c. Hazevis et autres</i> , Rennes, 14 janv. 1971, J.C.P. 1971,2.16733	242
20	<i>Cripia et Deverchin c. Veuve Desbordes</i> , Paris, 8 janv. 1964, D. 1964, comm. 70	245
21	<i>Dame Olejniczak c. Savin</i> , Paris, 5 mai 1962, G.P. 1962.2.172	247
Liability without fault: Article 1384 al. 1 ^{er} CC		251
22	<i>Jand'heur c. Les Galeries belfortaises</i> , Cass. Ch. Réun., 13 fév. 1930, D.P. 1930,1.57 (and Rapport de M. le conseiller Le Marc'hadour)	252
23	<i>Dame Veuve Delcayre c. Messal</i> , Cass. Civ., 20 mars 1933, D.P. 1933.1.57	283
24	<i>Epoux Cadé c. Ville de Colmar</i> , Cass. Civ., 19 fév. 1941, D.C. 1941, J. 85	285
25	<i>Pialet c. Veuve Guise</i> , Cass. Civ., 24 fév. 1941, D.C. 1941.J.85	286
26	<i>Cons. Connot c. Franck</i> , Cass. Ch. Réun., 2 déc. 1941, D.C. 1942.J.25 (and Rapport de M. le président Lagarde)	288
27	<i>Parris c. Frenzel et autres</i> , Cass. Civ., 22 déc. 1941, S. 1942,1.49	296