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978-1-107-47563-2 - The Development of Liability Between Neighbours: Volume 2

Edited by James Gordley

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THE DEVELOPMENT OF LIABILITY BETWEEN NEIGHBOURS

Cases arising from disputes between neighbours (what English law would describe in terms of the law of nuisance) fall towards the edge of the law of tort, on its boundary with the law of property. They, therefore, provide a good example of how the categorisation of a case can affect the liability rule: tort law is typically concerned with fault, property law with strict liability. The aim of this book is to examine the importance of these category shifts, as well as the extent to which statutory interventions, planning control and the like have had an impact on the analysis of tortious liability.

JAMES GORDLEY is Shannon Cecil Turner Professor of Jurisprudence at the University of California, Berkeley.

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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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Volume 2

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JAMES GORDLEY

*Comparative Studies in the Development of
the Law of Torts in Europe*



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SERIES EDITORS' PREFACE

The European Legal Development series has arisen 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 twenty 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, we have undertaken a programme of work which has built up from a number of case studies and has moved towards a more general analysis and conclusions. Although we have been concerned with the development of the law, and although many of those involved in the project have been lawyers, we have also been concerned to include and benefit from the insights of historians and scholars in other disciplines.

Liability for fault between 1850 and 2000 has been 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

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has been significant divergence. Our method has been first to chart the changes and then to seek the explanations for what happened. Although there have been many changes in tort and delict laws over the period, the idea of liability for fault remains central to private law approaches to the compensation of victims of harms caused by the actions of others.

As a first stage, the project worked on six case studies which illustrate the general theme of liability for fault and its development within the period:

- legal doctrine
- medical liability
- product liability
- relations between neighbours
- technological change
- traffic and railways

This research 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.

A second stage has involved further groups examining a number of salient factors in legal development. The topics covered at this stage are:

- institutions and professions
- social and political ideas
- the economy (including the impact of insurance)

A final strand to the work is an overview book.

This book, edited by James Gordley, provides us with a good example of the benefits of this approach. We gain a clear insight into the way in which a well-established area of tort liability was adapted to changes in society and in the economy. The topic also reveals the extent to which legal change occurred not in tort law, but through an increase in state regulatory law and through private regulation. The factors for legal development identified in this book are ones which will be developed in later volumes.

John Bell
David Ibbetson

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ABBREVIATIONS

AC	Appeal Cases
AC Aud.	Archivo civil Audiencias
Am. J. Comp. L.	American Journal of Comparative Law
App Cas	Law Reports Appeal Cases
APS	Acts of Parliament of Scotland
ARB	Administratieve en rechterlijke beslissingen betreffende het openbaar bestuur in Nederland
Ar civil	Archivo civil
Art.	Article
B (Scots)	Bell
B & S	Best & Smith's Queen's Bench Reports
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Bundesgerichtshof in Zivilsachen
BImSchG	Bundesimmissionsschutzgesetz
BVerwG	Bundesverwaltungsgericht
BVerwGE	Entscheidungen des Bundesverwaltungsgericht
BW	Burgerlijk Wetboek
CA	Court of Appeal
Cass. civ.	Cour de Cassation, Chambre civile (France)
Cass., ch. réun	Cour de cassation, combined chambers (until 1967)
CC	Civil Code
CLJ	Cambridge Law Journal
Conv	Conveyancer and Property Lawyer
CP	Common Pleas (Law Reports)
CR	Conveyancing Review
D	Dunlop, Bell & Murray's Reports, Second Series Session Cases
D	Digest (of Justinian)
D or DC	Recueil Dalloz
DLR	Dominion Law Reports
D.P.	Dalloz Périodique
DS	Recueil Dalloz-Sirey

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LIST OF ABBREVIATIONS

DVB	Deutsche Verwaltungsblatt
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
ER	English Reports
EUP	Edinburgh University Press
EWCA	England and Wales Court of Appeal
FR	Fuero Real
GenTG	Gentechnikgesetz (gene technology law)
GewO	Gewerbe Ordnung (Germany)
GG	Grundgesetz
GP	Gazette du Palais
H & C	Hurlston & Coltman's Exchequer Reports
HL	Judicial Committee of the House of Lords
HLC	House of Lords Cases
HR	Hoge Raad
ICLQ	International and Comparative Law Quarterly
IR	Informations rapides
JC	Jurisprudenzia civil
JCP	Juris-Classeur Périodique, la Semaine Juridique
JLS	Journal of Legal Studies
JR	Judicial Review
JW	Juristische Wochenschrift
KB	King's Bench
LGR	Local Government Reports
LQR	Law Quarterly Review
LR	Law Reports
LS	Legal Studies
LT	Law Times
LuftVG	Luftverkehrsgesetz
M	Macpherson's Reports (Scotland)
MLR	Modern Law Review
MR	Master of the Rolls
Murr	Murray's Jury Court Cases
NBW	Nieuw Burgerlijk Wetboek
NJ	Nederlandse jurisprudentie
NJW	Neue juristische Wochenschrift
NJW-RR	NJW-Rechtsprechungsreport Zivilrecht
NoR	Novísima Recopilación
NSWR	New South Wales Law Reports
NVwZ	Neue Zeitschrift für Verwaltungsrecht
OAG	Oberamtsgericht
OG	Obergericht

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OJLS	Oxford Journal of Legal Studies
OLG	Oberlandsgericht
OUP	Oxford University Press
OVG	Oberverwaltungsgericht
OVGE	Entscheidungen der Oberverwaltungsgerichte
P & CR	Property, Planning & Compensation Reports
Pat App	Paton's Scotch Appeals House of Lords
PC	Judicial Committee of the Privy Council
PrOVGE	Prussian Oberverwaltungsgerichtsentscheidungen
QB	Queen's Bench
R	Rettie's Session Cases
RD	Revista de Derecho e Jurisprudencia y Ciencias Sociales
RG	Reichsgericht
RGD	Revista General de Derecho
RGZ	Reichsgericht, Zivilsachen (Ger)
RVR	Rating & Valuation Reporter
SAP	Sentencias Audiencia Provincial
SAT	Sentencias Audiencia Territorial
SC	Session Cases
Sh Ct Rep	Sheriff Court Reports
SLR	Scottish Law Review
SLT	Scottish Law Times
STS	Sentencias del Tribunal Supremo de Justicia en Materia Civil
TCPA	Town & Country Planning Act
TMA	Tijdschrift voor Milieuschade en Aansprakelijkheidsrecht
UmweltHG	Umwelthaftungsgesetz
WLR	Weekly Law Reports
YR	Year Book
<i>ZEuP</i>	Zeitschrift für europäisches Privatrecht
ZRG RA	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Rechtsarchiv