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978-1-107-47579-3 - The Development and Making of Legal Doctrine: Volume 6

Nils Jansen

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THE DEVELOPMENT AND MAKING OF LEGAL DOCTRINE

This detailed description and comparative analysis of the development of tort law in Europe over the last 150 years is based on national reports that are structured by a basic questionnaire. The national reports are complemented by a comparative analysis of the parallel, though often diverging, developments in the different legal systems. It can clearly be seen that different groups in the legal systems, such as judges and scholars, often had diverging views on tort law that were translated into more specific doctrinal and evaluative statements. Accompanied by a general expansion of liability due to changing perceptions of the risks of accidents, the former Roman law of delict and the medieval law of torts have been transformed into modern rules of extra-contractual liability that are deeply entrenched in the social security and insurance systems.

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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 6

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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 the years 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 has been significant divergence. Our method has first been to chart the changes and then to seek 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:

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

This research involved scholars from a range of countries, particularly 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 in this stage are:

institutions and professions,
social and political ideas and
the economy (including the impact of insurance).
A final strand to the work is an overview book.

This book, edited by Nils Jansen, constitutes the essential backbone to the project. Although the primary assumption on which the project is based is that legal change cannot be properly understood simply by examining doctrinal developments in a vacuum, it is a reasonable supposition that legal ideas, whether evidenced by scholarly writing or by judicial decisions, do have a part to play in the orchestration of the wider changes which are being examined. The book builds on previous work on the subject, some of it by contributors to this volume, but is shaped by the initial questionnaire produced by the editor so as sharply to point up the abstractions underlying the doctrinal changes. However, although addressing the topics in the questionnaire, contributors were given latitude to do so in the ways which seemed to them more appropriate to their own legal systems.

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The editors are grateful for the contribution of Matthew Dyson and Colm McGrath, PhD students on the AHRC project, who made many contributions to the discussion and execution of the project.

John Bell
David Ibbetson

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P R E F A C E

Writing a preface to a book is often a difficult task because usually many people helped, none of whom must be forgotten. In this case, however, the task is rather easy. I wish to express my gratitude first of all to David Ibbetson. Together with John Bell, he initiated the overall Legal Development Project; he was also a formidable host for all the splendid conferences at the University of Cambridge that led to this volume. There, the contributors to this volume were given the opportunity to discuss the comparative approach, the list of questions and important matters of substance in a very constructive and stimulating way. These were great occasions, where we all learned a great deal.

Moreover, together with his assistants, David Ibbetson assumed most of the editorial work. Thus, all the contributions have been language-checked in Cambridge. In Münster, Lea Faissner, Lukas Kämper, Lukas Rademacher, Kristin Vorbeck and Sarah Woyciechowski provided invaluable assistance. I am extremely grateful for all their support and help.

Nils Jansen

ABBREVIATIONS

ABGB	Allgemeines Bürgerliches Gesetzbuch
AC	Law Reports, Appeal Cases
<i>AcP</i>	<i>Archiv für die civilistische Praxis</i>
Ad & El	Adolphus & Ellis' Reports
ADC	<i>Anuario de Derecho Civil</i>
ALR	Allgemeines Landrecht für die Preußischen Staaten
App Cas	Appeal Cases
B & S	Best & Smith's Reports
<i>BayVBl</i>	<i>Bayerische Verwaltungsblätter</i>
BGB	Bürgerliches Gesetzbuch
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
Bing (NC)	Bingham's New Cases, Common Pleas
BJA	<i>Boletín Jurídico-Administrativo, Apéndice al Diccionario de la Administración Español</i>
BOE	<i>Boletín del Estado</i>
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
C & P	Carrington & Payne's Reports
<i>cap.</i>	<i>caput</i>
Cass.(civ.)	Cour de cassation (chambre civile); Corte di cassazione (sezione civile)
Cass.ass.plén.	Cour de cassation, assemblée plénière
Cass.crim.	Cour de cassation, chambre criminelle
Cass.ch.réun.	Cour de cassation, chambres réunites
Cass.ch.mixte	Cour de cassation, chambre mixte
Cass.Pen.	Corte di Cassazione Penale
Cass.Sez.Un.	Corte di Cassazione, Sezioni Unite
CBNS	Common Bench Reports, New Series
CC	Code civil; Codice civile; Código Civil
CLR	Commonwealth Law Reports
Col. Leg.	Colección Legislativa de España, Jurisprudencia Civil
Corte Cost.	Corte Costituzionale
CP	Law Reports, Common Pleas
CPD	Law Reports, Common Pleas Division

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LIST OF ABBREVIATIONS

<i>D</i>	<i>Receuil Dalloz</i>
D.	Digesta
Dalloz, <i>Répertoire</i>	D. Dalloz, <i>Répertoire méthodique et alphabétique de législation, de doctrine et de jurisprudence</i> (Paris: Bureau de la Jurisprudence générale du royaume, 1858)
<i>disp.</i>	<i>disputatio</i>
Dods	Dodson's Admiralty Reports
DOGC	<i>Diari Oficial de la Generalitat de Catalunya</i>
DP	<i>Receuil Dalloz Périodique</i>
<i>dub.</i>	<i>dubitatio</i>
East	East's Term Reports, King's Bench
El & Bl	Ellis & Blackburn's Queen's Bench Reports
ER	The English Reports
<i>Enc. Dir.</i>	<i>Enciclopedia del Diritto</i>
Ex	Law Reports Exchequer
Ex D	Exchequer Division
<i>exerc.</i>	<i>exercitatio</i>
F & F	Foster & Finlayson's Reports
García Goyena	F. García Goyena, <i>Concordancias, Motivos y Comentarios del Código Civil Español</i> (Madrid: Imprenta de la Sociedad Tipográfico-Editorial, 1852), quoted from the edition directed by J.L. Lacruz Berdejo (Zaragoza: Universidad de Zaragoza, Cátedra de Derecho Civil, 1974).
GrünhZ	<i>Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart</i>
H & C	Hurlstone & Coltman's Exchequer Reports
H & N	Hurlstone & Norman's Exchequer Reports
HKK	<i>Historisch-Kritischer Kommentar zum BGB</i> (Tübingen: Mohr Siebeck, 2003/07)
HL	House of Lords
HLC	Clarke's House of Lords Cases
Hob	Hobart's Common Pleas Reports
HR	Hoge Raad
Inst.	Institutiones Iustiniani
<i>Int. R. Law & Ec.</i>	<i>International Review of Law and Economics</i>
Jansen, <i>Haftungsrecht</i>	N. Jansen, <i>Die Struktur des Haftungsrechts</i> (Tübingen: Mohr Siebeck, 2003)
JBl	<i>Juristische Blätter</i>
JhJb	<i>Jahrbücher für die Dogmatik des Heutigen Römischen und Deutschen Rechts (Jhering-Jahrbuch)</i>

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<i>JZ</i>	<i>Juristenzeitung</i>
KB	Law Reports, King's Bench
Larenz/Canaris	K. Larenz and C.-W. Canaris, <i>Lehrbuch des Schuldrechts</i> , 13th ed. (Munich: Beck, 1994)
LG	Landesgericht
<i>lib.</i>	<i>liber</i>
<i>liv.</i>	<i>livre</i>
<i>LQR</i>	<i>Law Quarterly Review</i>
LR	Law Reports
K & J	Kay & Johnson's Vice Chancellor's Reports
M & W	Meeson & Welsby's Exchequer Reports
Macq	Macqueen's Scotch Appeal Cases
<i>MDR</i>	<i>Monatsschrift für deutsches Recht</i>
<i>MüKo</i>	<i>Münchener Kommentar zum BGB</i> , 3rd ed. (Munich: Beck, 1993 ff.); 4th ed. (Munich: Beck, 2001 ff.)
n.	number; margin number; note
N & M	Nott & M'Cord's Reports
<i>NJ</i>	<i>Nederlandse Jurisprudentie</i>
<i>NJB</i>	<i>Nederlands Juristenblad</i>
<i>NJW</i>	<i>Neue Juristische Wochenschrift</i>
OLG	Oberlandesgericht
<i>OJLS</i>	<i>Oxford Journal of Legal Studies</i>
P.	Las Siete Partidas
PD	Probate Division
QB	Law Reports, Queen's Bench
QBD	Queen's Bench Division
R	Rettie's Session Cases
<i>RabelsZ</i>	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
<i>RDM</i>	<i>Revista de Derecho Mercantil</i>
<i>RDP</i>	<i>Revista de Derecho Privado</i>
Req.	Cour de cassation, chambre des requêtes
<i>RGD</i>	<i>Revista General de Derecho</i>
<i>RGLJ</i>	<i>Revista General de Legislación y Jurisprudencia</i>
<i>RGRK</i>	<i>Reichsgerichtsräte-Kommentar BGB</i> , 12th ed. (Berlin: De Gruyter, 1976 ff.)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RJ	Repertorio de Jurisprudencia Aranzadi
<i>RM</i>	<i>Rechtsgeleerd Magazijn</i>
S.	<i>Recueil Sirey</i>
SC	Session Cases

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<i>sect.</i>	<i>sectio</i>
<i>SeuffA</i>	<i>M. J. A. Seuffert's Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten</i>
SFS	<i>Svensk Författningssamling</i>
SSTS	Sentencias del Tribunal Supremo
STS	Sentencia del Tribunal Supremo
<i>tit.</i>	<i>titulus</i>
TR	Dunford & East's Term Reports, King's Bench
<i>tract.</i>	<i>tractatus</i>
US	United States Reports
<i>VersR</i>	<i>Versicherungsrecht</i>
<i>W</i>	<i>Weekblad van het Recht</i>
WLR	Weekly Law Reports
WPNR	<i>Weekblad voor Privatrecht, Notariaat en Registratie</i>
Zimmermann, <i>Obligations</i>	R. Zimmermann, <i>The Law of Obligations: Roman Foundations of the Civilian Tradition</i> (Cape Town: Juta, 1990)
ZSS (<i>germ.</i>)	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (germanistische Abteilung)</i>
ZSS (<i>rom.</i>)	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)</i>
ZVersWiss	<i>Zeitschrift für die Gesamte Versicherungswissenschaft</i>