

Cambridge University Press

978-1-107-47582-3 - The Development Of Medical Liability: Volume 3

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## THE DEVELOPMENT OF MEDICAL LIABILITY

The way the law responds to death or personal injury resulting from medical treatment has changed over time. Expectations of success in medical interventions have risen. Hospitals have become more complex and use more advanced technology. This has had an impact on the liability of medical practitioners, both in generating new problems and in raising standards of expected care. While the focus is civil liability, typically either through contract or tort, this volume of essays also examines compensation systems outside private law. This topic has grown in significance since 1945. The problems encountered by the law are similar across the different jurisdictions, even if the health service arrangements are different. The legal changes are also set against changes in the institutional background, such as the role of the state, the availability of insurance and the professionalisation of medical practitioners.

EWUOD HONDIUS is Professor of Law at the University of Utrecht, the Netherlands.

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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 3

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EWOUT HONDIUS



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**CAMBRIDGE**  
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107475823](http://www.cambridge.org/9781107475823)

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First published 2010

*A catalogue record for this publication is available from the British Library*

ISBN 978-0-521-11143-0 Hardback

ISBN 978-1-107-47582-3 Paperback

Hardback only available as:

ISBN 978-0-521-19953-7 6-volume set

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## PREFACE BY SERIES EDITORS

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 to 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 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:

Product Liability  
 Legal Doctrine  
 Medical 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 in 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 Ewoud Hondius, provides us with a good example of the benefits of this approach. We gain a clear insight into the way in which a relatively new area of tort liability arose, and the interactions between legal systems in a period of greater professionalisation in medicine and increase in technical sophistication as well as the complexity of the bodies delivering medical care. The factors for legal development identified in this book are ones which will be developed in later volumes.

Particularly in relation to this book, the editors are grateful to the contribution of Colm McGrath, PhD student on the AHRC project, who made a significant contribution to the formulation, discussion and execution of this part of the project. His own work on this topic in relation to German law will be published separately and will complement significantly the understanding of this area presented in this book.

*John Bell  
 David Ibbetson*



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## ABBREVIATIONS

ABGB	<i>Allgemeines Bürgerliches Gesetzbuch</i>
ADEPA	<i>Asociación El Defensor del Paciente</i>
ADR	Alternative Dispute Resolution
AJDA	<i>Actualité Juridique – Droit Administratif</i>
ANAES	<i>Agence nationale d'accréditation et d'évaluation en santé</i>
AnwBl	<i>Anwaltsblatt</i>
ÄrzteG	<i>Ärztegesetz</i>
Asp	Act of the Scottish Parliament
AVMA	Action for Victims of Medical Accidents
BGBI	<i>Bundesgesetzblatt</i>
BGH	Bundesgerichtshof
BMA	British Medical Association
BMJ	<i>British Medical Journal</i>
BOE	<i>Boletín Oficial del Estado</i>
Bull. civ.	<i>Bulletin de la Cour de cassation, civil</i>
BW	<i>Burgerlijk Wetboek</i>
CAA	<i>Cour administrative d'appel</i>
Cass. Ass. Plén.	<i>Cour de cassation, Assemblée plénière</i>
Cass. civ.	<i>Cour de cassation, chambre civile</i>
Cass. crim.	<i>Cour de cassation, chambre criminelle</i>
Cass. req.	<i>Cour de cassation, chambre des requêtes</i>
CC	<i>Código Civil</i>
CE	<i>Conseil d'Etat</i>
CE Ass.	<i>Conseil d'Etat Assemblée</i>
chr.	<i>Chronique</i>
CLJ	<i>Cambridge Law Journal</i>
CLO	Central Legal Office
Cmnd.	Command Paper
concl.	Conclusions
Cr. App. R.	<i>Criminal Appeal Reports</i>
CSOH	Court of Session, Outer House Reports
D	<i>Digest of Justinian</i>
D	<i>Recueil Dalloz</i>

DH	<i>Recueil Dalloz Hébdomadaire</i>
DP	<i>Recueil Dalloz Périodique</i>
ECHR	European Convention on Human Rights
Edin. LR	<i>Edinburgh Law Review</i>
ER	<i>English Reports</i>
EvBl	<i>Evidenzblatt</i>
F	<i>Findlay Reports</i>
GAMM	<i>Le groupe des assurances mutuelles médicales</i>
Gaz. Pal.	<i>Gazette du Palais</i>
GIUNF	J.A. Glaser and J. Unger <i>et al.</i> (eds.), <i>Sammlung von zivilrechtlichen Entscheidungen des k.k. Obersten Gerichtshofes, Neue Folge</i> (Vienna: Manz, 1900–1919)
GMC	General Medical Council
GWD	<i>Green's Weekly Digest</i>
IR	<i>Informations rapides</i>
JBl	<i>Juristische Blätter</i>
JCP	<i>Juris-Classeur Périodique, la Semaine Juridique</i>
JO	<i>Journal Officiel</i>
JR	<i>Juridical Review</i>
KAG	<i>Krankenanstaltengesetz</i>
KAKuG	<i>Bundesgesetz über Krankenanstalten und Kuranstalten</i>
Leb.	<i>Recueil Lebon</i>
LGDJ	<i>Librairie Générale de Droit et de la Jurisprudence</i>
Lloyd's Rep. Med.	Lloyd's Reports Medical Cases
LRJAP	<i>Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común</i>
LS	<i>Legal Studies</i>
Maurès	A. Maurès, <i>Etude sur la responsabilité professionnelle et légale du médecin</i> (Paris: 1900, doctoral thesis)
MDDUS	Medical and Dental Defence Union of Scotland
MDU	Medical Defence Union
Med. LR	<i>Medico-Legal Reports</i>
Med. Law Rev.	<i>Medical Law Review</i>
MLR	<i>Modern Law Review</i>
NHS	National Health Service
NHS(S)A	National Health Service (Scotland) Act
NHSiS	National Health Service in Scotland
NHSNSS	NHS National Services Scotland
NICE	National Institute for Clinical Excellence
NILQ	<i>Northern Ireland Law Quarterly</i>
NJW	<i>Neue Juristische Wochenschrift</i>
NLJ	<i>New Law Journal</i>

## LIST OF ABBREVIATIONS

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obs.	Observations
OGH	<i>Oberster Gerichtshof</i>
OH	Outer House
OJLS	<i>Oxford Journal of Legal Studies</i>
ONIAM	<i>Office National d'indemnisation des accidents médicaux, des affections iatrogènes et des infections nosocomiaux</i>
ÖRZ	<i>Österreichische Richterzeitung</i>
PALS	Patient Advocacy Liaison Services
Penneau doctoral thesis	J. Penneau, <i>Faute et erreur en responsabilité médicale</i> (Paris: 1972, doctoral thesis)
Penneau, <i>Faute et erreur</i>	J. Penneau, <i>Faute et erreur en matière de responsabilité médicale</i> (Paris: LGDJ, 1973)
PIQR	<i>Personal Injuries Quarterly Review</i>
PL	<i>Public Law</i>
PN	<i>Professional Negligence</i>
PUF	<i>Presses Universitaires de France</i>
QIS	Quality Improvement Scotland
<i>RebelsZ</i>	<i>Rebels Zeitschrift für Ausländisches und Internationales Privatrecht</i>
rapp.	Rapport
RD	<i>Real Decreto</i>
RdM	<i>Recht der Medizin</i>
RDSS	<i>Revue de droit sanitaire et social</i>
RdW	<i>Rechtspraak van de Week</i>
Resp. civile et assur.	<i>Responsabilité civile et assurance</i>
RJ	<i>Repertorio de Jurisprudencia</i>
RRJ	<i>Revue de la recherche juridique</i>
S.	<i>Recueil Sirey</i>
SC	Session Cases
SEHD	Scottish Executive Health Department
SLPQ	<i>Scottish Law &amp; Practice Quarterly</i>
SLT	<i>Scottish Law Times</i>
somm.	<i>Sommaires</i>
StGB	<i>Strafgesetzbuch</i>
STS	<i>Tribunal Supremo</i>
SZ	<i>Entscheidungen des Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen</i>
TC	<i>Tribunal des Conflits</i>
VersR	<i>Versicherungsrecht</i>
VersVG	<i>Versicherungsvertragsgesetz</i>
ZBl	<i>Zentralblatt für die juristische Praxis</i>