

## ***Book Review* – Basil Markesinis and Hannes Unberath, The German Law of Torts: A Comparative Treatise**

Basil Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (4<sup>th</sup> Edition 2002), Oxford and Portland, Oregon, Hart Publishing. 1050 Pages. ISBN 1-84113-297-7, \$ 75.00.

*By Bernhard Grossfeld*

Within sixteen years this treatise has reached its fourth edition and has therefore rightly attained the stature of a classic of comparative tort law. For us it is especially fortunate that this effort has concentrated on German tort law and thus contributed to bringing English law within the gravitational force of Europe. The references to German law remain and are up-to-date, thanks no doubt to the fact that Hannes Unberath joined the project as author.

The book presents the English/American reader with German law in context. For this reason, it begins with a description of the organization of the German judicial system, beginning with the *Reichskammergericht* (Imperial Chamber of Justice - est. 1495) and moving on to the *Reichsgericht* (RG – Supreme Court of the German Reich) and its successor the *Bundesgerichtshof* (BGH – Federal Court of Justice). The hierarchy of courts and stages of appeal are also presented. From there the book moves on to consider the style and method of reasoning in decisions of the Federal Court of Justice. The authors note that the method of reasoning is brought forward in an “abstract manner,” leaving very little room for fantasy. But, the constant stock taking in legal policy arguments should take out some of the courts’ text’s occasional dryness.

Only after these introductory efforts does tort law enter on the scene: the essential rules are provided in English translation. Still, the reader is not confronted with the details. First, consideration is given to the *Bürgerliches Gesetzbuch* (BGB – German Civil Code) in general; its roots in the system of the *Pandects*<sup>1</sup> and the influence of

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<sup>1</sup> The Roman *Kaiser* (emperor) Justinian (527-565) collected and codified the existing roman law in a four part treatise, the second part being entitled *Digesten* (also called “*Pandekten*”), the other three being *Institutionen* (I.), *Codex* (III.) and *Novellen* (IV.). The *Digesten* (*Pandekten*) grew out of the compilation work of case material and interpretation from some 40 Roman jurists between the time of 100 a.d. and 250 p.d.. See, St. Meder, *Rechtsgeschichte* 73-4 (2001). [*The Editors*]

French law. The foreign reader receives much more exposure to German legal history than does a German law student. Comparative law without legal history is really not possible. Thereafter, the authors inform the reader specifically of the impact of constitutional law on civil law. The constitutional provisions concerned with fundamental rights are also provided in English translation. A discussion of the place of the ordinary law in the framework of the constitution concludes the introductory section.

The presentation of tort law revolves around Sections 823, 826 and 831 of the BGB and *Gefährdungshaftung* (strict liability) in general. The construction of the book is uniform. It begins with a comprehensive introduction followed by decisions, most frequently from the case law of the Federal Court of Justice, but also from the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) and occasionally other courts. The decisions are often enhanced with commentary. It is here, in these comments, that the reader finds the comparative law observations, demonstrating how the authors have filled the subject matter out with details. The reader will find 151 decisions in English translation, making up more than half of the book. Germans are likely to learn much that is unexpected about themselves from the perspective of the foreign observer. It is understandable that the former president of the Federal Court of Justice, *Walter Odersky*, wrote such an appreciative, even grateful, foreword to the book: where else does German law find a platform with such a far-reaching, international impact? Contributing to this effect is the elegant language used by the authors, the lightness and vividness of which Germans should strive for as a model.

The book offers still another surprise: at the beginning of the last third of the book the authors have published a legal and judicial map of Germany from the period preceding the development of the BGB and a map of the Federal Republic of Germany. Following the maps are brief introductions to a number of German jurists, including some who are still alive. The authors explain that focusing only on the past “would imply that the present offers unworthy successors.” Relatively detailed treatment is given to Carl von Savigny and Rudolf von Ihering. Shorter treatment is given to Otto von Gierke, Hans Carl Nipperdey, Werner Flume, Ernst von Caemmerer, Robert Fischer, Bruno Heusinger, Fritz Hauss and Walther Stimpel.

Let me conclude with a somewhat closer examination of the portion of the book (nearly half) concerned with Section 823 Para. 1 of the BGB. In keeping with the format described above, it begins with a “Commentary” of some 70 pages. There the authors explain such concepts as “life,” “body and health,” “property,” “other rights,” “unlawfulness,” and “fault.” The concepts “duties of care” and “causation” receive wide-ranging consideration thereafter. Contracts creating a duty of care

towards third parties and third party liability are mentioned at various points. Ninety-four decisions follow. Among them is the "Nervous Shock" Case, which is placed in a broad context alongside English and American cases. The "Prenatal Injuries" Case leads to the discussion of the concepts "wrongful life" and "wrongful death." The authors understand what issues and concepts to stress. There are decisions dealing with, among other issues, "economic loss" and "established operating business." The authors examine the "constitutionalization of private law", or the 'horizontal effect of fundamental rights' (*Drittwirkung der Grundrechte*) and discuss "personality and privacy rights." Unlawfulness and fault, the duties of care, product liability and damage to the product, causation: all are treated with concern for comparative law. The authors understand their subject and they elegantly present it.

A marvelous book, an ambassador for German legal culture! We should be very, very grateful for it.

*Translated by Russell Miller.*