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INTRODUCTION

101 EUROPE, EUROPEAN TORT LAW, AND INTERNATIONAL TORT LAW

101-1 EUROPE

The contemporary political concept of a united Europe was born from the ruins of the Second World War, a war that had divided Europe and caused damage on an unimaginable scale. Visionary European leaders aimed to reconcile the former enemies, to prevent new conflicts, and to achieve strong unity as protection against the Soviet Union and the East European Communist countries.

The initial result was the Council of Europe, established in 1949 and home of the European Convention on Human Rights, which was signed in 1950 (see Section 202). This was followed by the establishment of the European Coal and Steel Community (ECSC), with the ECSC Treaty entering into force in 1952 and creating a common market for coal and steel. Coal and steel were vital resources needed to wage war; so pooling these resources between former enemies was more than just a symbolic move: it sealed the peace. The ECSC was formed by the then West Germany, France, Italy, the Netherlands, Belgium, and Luxembourg and can be considered as the beginning of a long process which resulted in today's European Union (Section 203).

The six original members of the ECSC had wanted the United Kingdom to be a founding member but the then Prime Minister Clement Attlee is reported to have dismissed the project as 'six nations, four of whom we had to rescue from the other two'. This aptly illustrates the lukewarm approach of the British, whose country had not been invaded, to the EU, which it considers to be mainly concerned with markets and businesses not about creating institutions to prevent war.

From these beginnings, visions of 'Europe' have varied over the years from economic cooperation to achieve a common (internal) market to the idea of a federal Europe run by a European government and a European president. It is unsurprising, therefore, that the current political situation in Europe is somewhere between these two extremes and that it is not entirely clear in which direction developments will occur.[1]

[1] See for the legal, historical, and political aspects of the European Union: Walter van Gerven, *The European Union. A Polity of States and Peoples* (Oxford: Hart, 2005).

Initially, the unity of the Member States was endorsed by the existence of a common enemy in Eastern Europe; however, this changed with the end of the Cold War and, at the same time, the Union was substantially extended eastwards. Whereas the European project began with six countries in 1952, this number had doubled to 12 by 1986, and in 2005 had reached 25. With the accession of Bulgaria and Romania in 2007, the number of Member States has risen to 27 and in July 2013 Croatia is expected to become the 28th EU Member State.

This growth raised concerns about how the EU could take the necessary and effective measures to achieve its goals, if only for the obvious reason that it was easier to compromise with six parties than with 27. The Treaty establishing a Constitution for Europe aimed to provide the necessary tools to make the EU more 'manageable' but its rejection in referenda in France and the Netherlands in 2005 jeopardized that reform. The rejection was also considered a sign of unease and discontent with the steadily growing ambitions of the EU and revealed that further European integration was no longer self-evident.

The response to the failed Constitution for Europe came in the form of the Lisbon Treaty which entered into force on 1 December 2009. The differences with the Constitution for Europe were, however, mainly cosmetic. A less superficial issue was that the Charter of Fundamental Rights, which had been included in the Constitution for Europe, was only referenced in the Lisbon Treaty, with the consequence that the United Kingdom and Poland opted out of the Charter (Section 203-1).

101-2 EUROPEAN TORT LAW

In the shadow of these major developments, a common European tort law came into existence. Up until the mid-twentieth century, tort law in Europe consisted of a multitude of national variations and a common European tort law was without form and substance. By the beginning of the twenty-first century, however, common features were cautiously and unsteadily developing in both substance and shape.

Ideas about the way ahead for European tort law differ in a similar way to visions on the political future of Europe: varying from full-fledged codification of European tort law as part of a European Civil Code to the idea that harmonization should only occur insofar as this is required for proper functioning of the internal market. The current situation in European tort law lies between the two extremes and it looks like the latter view is currently the predominant one (Section 612).

Today, 'European tort law' is frequently mentioned and discussed at various levels—thus, it clearly exists even though the concept as such is not strictly defined although it has become the umbrella term for a number of features concerning tort law in Europe. Two preliminary remarks need to be made regarding the terminology of European tort law: in the use of the phrase 'tort law' and also in the use of 'European'.

This book uses the terminology of 'tort' rather than 'delict' or 'extra-contractual liability'. This is not self-evident. Although the word 'tort' derives from the French word

for wrong,[2] in a legal sense 'tort' is a typical common law term which does not have a true parallel in continental legal systems. That said, a number of European comparative law books on extra-contractual liability currently use the terminology 'tort' and this now has become common parlance. Undoubtedly, 'European extra-contractual liability law excluding agency without authority and unjust enrichment' would have been a more accurate description but it would also have been somewhat awkward and unnecessarily confusing to have chosen alternative terminology with the same meaning.

The word 'European' in 'European tort law' also needs further clarification although it is not intended to be a very clearly defined concept. Rather, it points at various 'Europes': the European continent, the Contracting Parties of the European Convention on Human Rights, and the EU. In fact, three tiers of European tort law can be distinguished.

The upper tier is binding European tort law. This tier consists, first, of the legislation of the EU in the area of tort law, particularly Treaty provisions, certain Regulations and Directives, and the case law of the ECJ in Luxembourg. A prominent example of EU tort law is the so-called *Francovich* case law of the ECJ concerning liability for breach of EU law, which is linked with Article 340 TFEU regarding the extra-contractual liability of EU institutions (Section 205). The upper tier also consists of the case law of the European Court of Human Rights in Strasbourg based on the European Convention on Human Rights. This case law addresses the Contracting Parties and is applied in the interest of individuals—such as regarding their safety, health, privacy, and family life—and has an impact on various areas of national tort law (Section 202).

The lower tier of European tort law consists of the various national tort laws, the array of which show the diversity of the nations of Europe. Whereas in medieval times the West European legal landscape was characterized by a *ius commune* based on Roman law, the rise of the nation-state in the eighteenth century more or less eroded this harmony. However, due to increasingly permeable borders and transborder information exchange, domestic laws have become increasingly influenced by other national and supranational systems.

The link between the upper and lower tiers of European tort law is comparative law: the art of comparing and analysing the range of European legal systems and discussing the desirability and feasibility of a realistic European tort law—a European *ius commune*. Currently, these discussions are mainly concentrated in the academic area but some have culminated in specific proposals for principles or rules such as, for example, the Principles of European Tort Law and Book VI of the Common Frame of Reference (Section 612). Unlike the supranational sources of the first tier, these principles and comparative law are not binding. They do, however, provide a method of interpretation, both for supranational and national law. With the Common Frame of Reference, the European Commission aims to bring more consistency and coherence to the terminology of EU legislation (Section 612).

[2] In French one could say: 'On a *tort* de parler de European tort law.' (It is *wrong* to talk about European tort law.)

The three tiers can be distinguished but they cannot be separated. Comparative law influences the legislation of the EU and the case law of the European Court of Justice (Section 104-1); the case law of the European Court of Justice (ECJ) is influenced by the case law of the European Court of Human Rights (Section 203-5); and national legislation and case law are influenced by the law of the EU, the European Convention on Human Rights, and sometimes by comparative law (Section 104-2). These developments are illustrative of the end of the so-called 'billiard ball State' and the emergence of a multilayered international order.

The three tiers also demonstrate that 'European tort law' does not necessarily imply unification, harmonization, or even convergence. Although a convergent tendency is apparent at some points, it is also clear that differences between the Member States remain substantial. This is not only the case as regards the contents of tort law but also as regards the differences in procedure, legal culture, and social, economic, and political backgrounds. European tort law is not simply about a slowly growing harmony in certain respects but also about a rich diversity in many others (Sections 608–610); hence, European tort law does not automatically imply a common European tort law. This book could, therefore, also have been entitled *The European Laws of Torts*.

101-3 INTERNATIONAL TORT LAW

Tort law is not only governed by national law and European law (both the EU and the European Convention on Human Rights) but also by global international treaties which govern liability for risks having an international impact. Certain aspects of these treaties will be discussed in Section 1416-2.

An obvious example of a risk having an international dimension is the liability for damage caused by nuclear accidents. The first treaties on this matter date from the early 1960s, shortly after the first nuclear power stations were opened.[3] After the Chernobyl disaster in 1986 the system was amended to increase the funds available for victims. The basic principles of these treaties are that (a) liability is channelled to the operator of a nuclear installation, (b) the operator's liability is absolute, that is, there is no defence such as *force majeure* available, and (c) liability is limited in amount and time. Under the 1997 Protocol to Amend the Vienna Convention, the liability of the operator of a nuclear plant is limited to 300 million SDR.[4] In addition to this limited liability, a fund was created by the Contracting Parties to provide additional financial means to compensate for damage caused.[5] The Protocol also provides for additional amounts to be paid by parties to the Convention, based on the nuclear capacity of each State.

[3] Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960); Brussels Convention Supplementary to the Paris Convention (1963); Vienna Convention on Civil Liability for Nuclear Damage (1963).

[4] Protocol Amending the Vienna Convention on Civil Liability for Nuclear Damage (1997). An SDR (Special Drawing Right) is a monetary unit based on a basket of international currencies. Its value fluctuates daily.

[5] Convention on Supplementary Compensation for Nuclear Damage (1997).

A second area of risks having an international impact is in the liability of air carriers, initially governed by the Warsaw Convention 1929[6] and now replaced by the Montreal Convention 1999.[7] These Conventions focus on the contractual relationship between an air carrier and its passengers. The non-contractual liability of an air carrier for damage caused on the ground to people and property is governed by the Rome Convention 1952[8] which holds the aircraft operator strictly liable for damage on the surface caused by an aircraft in flight. Liability is limited according to the weight of the aircraft but this ceiling can be breached if the aircraft operator engaged in gross negligence or wilful misconduct. However, the Convention is of limited practical importance as it has only been ratified by 49 countries. The aim is to replace the Rome Convention with the Montreal Convention on Compensation for Damage Caused by Aircraft to Third Parties 2009.

A third area regarding liability for international impacts is that of accidents at sea. The Athens Convention 1974 and the 2002 Protocol govern a sea carrier's contractual liability towards its passengers[9] and additionally cover passengers on board a ship that is registered in a Member State or flies its flag, as well as passengers who have bought their tickets in a Member State or who depart or arrive in one of its harbours. When the 2002 Protocol enters into force, the carrier will be strictly liable up to an amount of 250,000 SDR with *force majeure* being the only defence. For damage between 250,000–400,000 SDR the carrier is liable unless he proves he was not at fault. The owner of the ship is obliged to take out liability insurance. A variety of liability rules apply to damage to cabin luggage, damage to other goods (eg cars on a ferry), and accidents on board not classed as a shipping incident.[10]

Non-contractual liability of the sea carrier is dealt with by the Convention on Limitation of Liability for Maritime Claims 1976 which provides for strict third party liability of the carrier for personal injury and property loss. This liability is limited and the limits differ according to the ship's tonnage and the type of damage caused. Liability limits are not applied if the loss resulted from the personal act or omission of the ship owner or salvor, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result.

Finally, an important set of international rules governs liability for oil pollution at sea.[11] The CLC Convention[12] applies to damage suffered as a result of maritime casualties

[6] Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw 1929).

[7] Convention for the Unification of Certain Rules for International Carriage by Air (Montreal 1999).

[8] Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome 1952): in the EU it only entered into force in Belgium, Italy, Luxembourg, and Spain.

[9] Convention Relating to the Carriage of Passengers and Their Luggage by Sea (Athens 1974) and the Protocol (2002), which will enter into force 12 months after it is accepted by ten States. The Convention and the Protocol are incorporated into EU law by Regulation 392/2009 of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ L 131/24, 28.5.2009. The Regulation will make the Convention rules gradually applicable to purely domestic sea travel.

[10] See for a brief overview, Bernard A. Koch, ETL 2009, 644–647.

[11] International Convention on Civil Liability for Oil Pollution Damage (1969).

[12] International Convention on Civil Liability for Oil Pollution Damage (1969).

involving oil-carrying ships. Liability is on the owner of the ship, and liability is strict apart from some specific exceptions that must be proven by the ship owner. The rules apply to all vessels carrying oil as cargo. Compensation for environmental damage is limited to the costs incurred for reasonable measures to reinstate the contaminated environment: for large ships of over 140,000 gross tonnage the liability limit is 89.77 million SDR[13] but this limit does not apply in the case of intentional or reckless conduct of the ship owner. In addition to this Convention, an Oil Pollution Fund was established[14] one of the purposes of which is to pay compensation to victims of oil pollution damage who are not able to obtain any or adequate compensation under the CLC Convention.

Other treaties concern matters of private international law rather than substantive matters. They determine the competent court and applicable law in cases with an international aspect. In the EU, these topics are now covered by a number of Regulations (Section 203-3); however, some Conventions in this area remain relevant, such as the Hague Convention on the Law Applicable to Products Liability 1973 (Section 1407-1), and The Hague Convention on the Law Applicable to Traffic Accidents 1971 (Section 1405-1).[15]

102 AIM AND FOCUS OF THE BOOK

102-1 AIM OF THE BOOK

The aim of this book is to introduce the reader to the main features of European tort law in a textbook format. References will be made to other comparative books in the area of European tort law, particularly Christian von Bar's *The Common European Law of Torts*, Walter van Gerven's *Tort Law*, Basil Markesinis's *The German Law of Torts*, and the *Unification of Tort Law Series* of the European Centre for Tort and Insurance Law.[16]

This book will show crucial aspects of European tort law by illustrating that: (a) similar factual problems arise throughout the tort law systems; (b) when viewed from afar, the solutions to these problems do not seem to be very different; (c) a closer look partly confirms these similarities but also shows some striking differences in the way the problems are being solved; and (d) digging beneath the surface may reveal the roots of the differences in the various historical and cultural backgrounds and the varying policy views as to what can be considered fair, just, and reasonable solutions in tort law cases.

[13] The liability limits were amended by the 1992 Protocol and the 2000 Amendments.

[14] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

[15] See for the text, entry into force, and parties to these Conventions the website of the Hague Conference on Private International Law: <http://www.hcch.net>.

[16] Christian von Bar, *The Common European Law of Torts*, Vols. 1 and 2 (1998–2000); Van Gerven (2000); and the *Unification of Tort Law Series*, published by the European Centre of Tort and Insurance Law.

The emphasis in this book will be on aspects (a)–(c). Chapter 6 will discuss some issues on point (d); on which see Sections 608–610.

To learn and understand the basics, three national tort law systems are examined in more detail: France, Germany, and England (Section 102-2). The choice of only three national systems is mainly a practical one: a survey of additional legal systems would certainly provide a more precise and advanced picture of European tort law, but only to the detriment of conciseness and the ability to retain an overview.[17] Clearly, there are numerous tort law systems in Europe, and this text cannot give a complete picture of European tort law (if ever such a picture were possible). Given these limitations, it is not the aim of this book to make the case for a common European tort law (if such a common law is desirable) or to look for common denominators throughout Europe. There are other, more extensive and detailed, comparative studies dealing with these topics to which reference will be made throughout this book, particularly to Book VI of the Common Frame of Reference and the Principles of European Tort Law (Section 612).

102-2 THREE NATIONAL SYSTEMS

The choice to limit the national tort law systems to those of France, Germany, and England is based on a number of considerations.

First, France, Germany, and England represent three major legal traditions that have influenced a considerable number of other legal systems in the EU. Common law has influenced the laws of Cyprus, Ireland, and Malta. French tort law has left traces in Belgium, Hungary, Italy, Luxembourg, the Netherlands, Poland, Romania, and Spain; and German tort law is linked to Austrian, Bulgarian, Czech, Greek, Latvian, Portuguese, Slovakian, and Slovenian law. Outside this sphere are the closely connected Nordic legal systems of Denmark, Finland, and Sweden.

European tort law is about more tort law systems than there are countries, since some countries comprise more than one legal system and, thus, more than one tort law system. For example, the United Kingdom comprises three tort law systems: the law of England and Wales, of Scotland, and of Northern Ireland.

Second, France and England represent two opposite policy approaches to tort law. Whereas French tort law primarily focuses on compensation for the victim, rules of strict liability, and the principle of distributive justice, the predominant focus of English tort law is on the defendant's conduct and the principle of corrective justice and barely considers rules of strict liability. These differences are particularly, though not solely, recognizable in the area of accident law and in the way in which liability of public authorities is dealt with. German tort law takes a more or less intermediate position: on the one hand, it formally and dogmatically often focuses on the defendant's conduct (fault liability), but at a policy level it is heavily inspired by the principle of distributive

[17] Compare Zweigert and Kötz (1998), 44.

justice. The additional value of German tort law is that it is the most elaborated and systematized tort law system in Europe, and possibly in the world, which makes it an important source for legal questions and answers.

Third, from an economic, political, and demographic point of view, France, Germany, and England basically represent the main powers in the EU. They comprise a substantial part of the European population, representing more than 40 per cent of the EU citizens and producing more than half the EU's gross national income.[18] Even though these three countries are far from having a majority vote in the European Council, they have a politically dominant position in the Union. Points of difference and conflict between these countries, including those on harmonizing European private law and tort law, will be of major importance for moving the European discussion forward.

The downside of this choice of the 'Big Three' is that many interesting developments in other countries will go unmentioned. This holds not only for the Scandinavian and East European countries, but also for countries such as Spain, Italy, and the Netherlands which, although rooted in the French *Code civil*, have developed their own characteristic domestic tort laws.

103 COMPARATIVE LAW

103-1 COMPARATIVE LAW IN THEORY

This book is primarily a comparative law book.[19] As mentioned, it analyses and compares three national systems (France, Germany, and England) and two supranational systems (EU and the European Convention on Human Rights).[20]

It is generally assumed that the cradle of contemporary comparative law is in Paris, with Edouard Lambert and Raymond Saleilles organizing the first International Congress for Comparative Law during the World Exhibition of 1900. The turn of the century was marked by progress in art, technology, and the sciences, as well as by wealth and splendour. Technological developments had started to facilitate international communication by means of international transport (trains) and telephone. Tourism also began to develop—albeit for the lucky few—and the first signs of international cooperation became visible. In other words, it was a fruitful time for internationalization and

[18] <http://www.worldbank.org>.

[19] This book does not aim to explore the theories of law and economics for the area of tort law. Although this is an exciting and very useful approach which, as with comparative law, deepens and broadens knowledge of national tort law rules, there are other books to serve this purpose. There are indeed no tort law books combining comparative law with law and economics and for a good reason. An additional meta-system would prevent the reader from seeing the wood for the trees.

[20] See on comparative law eg Zweigert and Kötz (1998); Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006); Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Elgar, 2006); Basil Markesinis and Jörg Fedtke, *Engaging in Foreign Law* (Oxford: Hart, 2009); Patrick Glenn, *Legal Traditions of the World. Sustainable Diversity in Law*, 4th edn. (Oxford: Oxford University Press, 2010).

innovation in the law. However, these developments vanished with the outbreak of the First World War in 1914.

One of the early approaches to comparative law was, not surprisingly, an evolutionary one. The idea was that law progresses, and 'primitive' legal systems (read: non-western systems) could learn from the 'modern' ones. This was linked with the imposition of western legal systems on colonized countries, particularly in Africa and Asia. In a time of optimism, comparative law was more generally considered to be of help in 'improving' the law. However, it soon became apparent that the dichotomies 'modern–primitive' and 'better–worse' were false. Indeed, law is always on the move but the fundamental question is in which direction it moves. 'Progress' does not necessarily mean improvement—a concept the appreciation of which greatly depends on the view one has on society which is, in turn, strongly influenced by culture.

Until the end of the twentieth century, comparative law occupied a rather modest position in academic research and teaching. It was considered to be a useful instrument to understand other legal systems and to put one's own system in an international perspective. The fruits of comparative law studies were mainly of academic interest, considered to be 'difficult and, surely, very interesting; beautiful to know something about, but not immediately relevant to the daily life of the law'.[21]

In this respect, comparative law is seen as sophisticated legal tourism. In order to get to know foreign legal systems, legal travel guides (handbooks, monographs, case law) are studied to gain knowledge of the most interesting legal sites, their history, their cultural background, and their current functions. Once familiar with the area, comparative books, articles, and other legal travel guides are written, and the laws of the world are mapped and classified, identifying differences and commonalities. This touristic aspect is the 'fun' element of comparative law and remains one of the most important drivers for studying legal systems other than one's own. Closely linked to this entertaining aspect of comparative law is its educational character. By studying other legal systems, one gains a better understanding of one's own system as it is mirrored in the foreign system and its background and values. And this would, indeed, ideally lead to mutual understanding.

103-2 COMPARATIVE LAW IN PRACTICE

Comparative law is not only about 'having fun'. In the latter part of the twentieth century, it gained momentum and is now used for a variety of practical purposes. In Europe, this evolution may be influenced by the process of European integration; it may also just result from the fact that we are living closer together (the 'global village' situation); it may, finally, be an autonomous process, occasioned by the lawyer's search for fresh perspectives, in particular when completely new legal problems are to be solved.[22]

[21] T. Koopmans, 'Comparative Law and the Courts', *ICLQ* 45 (1996), 545.
[22] T. Koopmans, 'Comparative Law and the Courts', *ICLQ* 45 (1996), 545.

Comparative law is increasing in importance in *law firms* that may look for rules in other countries that best serve the interests of their clients: for example, rules that minimize a client's taxes, rules that are the most favourable as regards financial consequences of divorce, rules providing the highest compensation payment for personal injury, or rules that enable class or group actions. Here, the rules of private international law are at issue, which determine the court that is competent to hear a case and the law to be applied to the case. In international tort law claims, there is usually no contract in which the competent court and the applicable law are agreed—in Europe, these issues are determined by the Brussels I Regulation (competent court) and the Rome II Regulation (applicable law).

National legislators may make use of comparative law in order to assess a country's position on the regulatory market. If one country has a stricter tax regime than others, it may lose out on the number of companies having their seat in that country. If the national financial regulator is subject to a more stringent liability regime than other regulators, the government may use that as an argument to decrease the regulator's risk of being held liable for inadequate supervision.

If the *European Commission* intends to propose legislative measures to harmonize the laws of the Member States, it will usually begin the process by conducting a comparative law survey in order to assess the comparative state of affairs in the Member States. For example, before issuing the draft Directive on Unfair Commercial Practices, surveys were carried out to map the rules and cases in this area in the Member States. In this way, the European Commission could show that there are differences between the Member States. If those differences also cause a distortion of the internal market, the Commission has a legal ground for proposing legislation and the Council and Parliament for adopting it (Section 610-6).

National and supranational legislators are surrounded by *lobbyists*. Companies and their umbrella organizations are particularly active in 'informing' governments and parliaments about their views and the way legislation should be amended. For example, the basis for lobbying may be a comparative study showing that the current law is not providing a level playing field for companies because it deviates from the legislation in other jurisdictions. This occurs on both a national and a European level.

National courts, particularly the highest courts, may use comparative law when confronted with complicated and/or disputed cases in order to find a direction for their decision. In common law countries this happens occasionally but in civil law countries the use of comparative law by the national courts is, in fact, very rare (Section 104-2).

The *European Court of Justice* not only applies EU law but also develops the law on the basis of legal principles common to the Member States. Although the ECJ will usually try to find the common grounds of those principles, its decisions are not necessarily based on the highest common denominator (see Section 203-4).

In recent years, comparative law has been used as a means to achieve *harmony among the nations*. This was, in fact, one of the earliest aims of comparative law and was marked by the first World Conference on Comparative Law in Paris in 1900. A century later, it is again an important driving force for many academic comparative lawyers in Europe.

A new spirit emerged in particular when comparative law turned its attention to common legal principles within the EU. Many lawyers even envisage a harmonized European law, preferably in the form of a European Civil Code (Section 612).

This important internationalization of private law (and tort law) is facilitated by universities funding research in this area and by the seemingly endless possibilities of sharing information through the internet. Moreover, transborder information-sharing is also increasingly exchanged in person due to the growing number of travelling students and researchers. In this respect, the opening of the European airline market may have contributed to European academic discourse now that travel has become more widely available, even to those with a student's or academic's purse.

103-3 PITFALLS OF COMPARATIVE LAW

When dealing with comparative law, and thus when dealing with the content of this book, it is prudent to be aware of a number of pitfalls. Three deserve particular mention.

First, the legal rules and cases to be compared may not be written in the same language. Therefore, writing about different legal systems means that the language of at least one of the legal systems needs to be translated. And even the best translation cannot prevent some information being lost and some incorrect information being added because words in one language may not mean exactly the same thing in another. There is no real solution for this, other than that one needs to be aware of the issue. National law is often very much an extension of the national language: whereas, in science, technical terms may be translated without too many problems, in the law many terms have developed at a national level over centuries. Each word has created its own habitat and an exact word-for-word translation of legal terms is therefore hardly possible. Of course, the language issue does not exist in common law countries like England, Canada, Australia, and the United States. Here, comparative law is much more common (Section 104-2).

Second, rules and cases are only one of the many elements of a legal system. Rules and cases cannot be detached from that system and looked at in isolation. It is therefore important to know the broader context and the bigger picture to evaluate rules and cases. An important difference in this respect is that between codified systems and common law systems. This difference impacts on the way courts 'find' a decision. This is not only so because the rules are different but also because the courts work differently. This becomes particularly evident in legal procedures, and this is in its turn reflected in the considerable differences between how decisions of the highest court look. For the French Cour de cassation, usually one or two pages suffice for a decision with no dissenting opinion and no reference to previous case law or legal literature. The German Bundesgerichtshof does not allow dissenting opinions, either, but there are usually a number of references to earlier case law as well as a number of comments on the views of the legal literature on the legal question at issue. Decisions of the UK Supreme Court usually run to dozens of pages and contain references to earlier case law ('precedents') but only rarely refer to legal literature.

Third, national legal systems are closely linked with national cultural values. This means that differences between legal systems may not be properly understood without a broader knowledge of the cultural and historical background of the respective countries. From a tort law perspective, these different backgrounds may, for example, explain the difference in appreciation of strict liability rules between England, on the one hand, and Germany and France, on the other (Section 606). Hugh Collins once famously remarked that, at conferences, German professors typically present systematic lists of rules or events, the longer the better, whereas French lawyers explore abstract concepts, and English legal scholars mostly tell stories.[23] Over the past decades of European cooperation and integration, these cultural differences have not particularly changed, and it is unlikely that they will change substantially in years to come. This issue will be explored in more detail in Section 610.

104 COMPARATIVE LAW, NATIONAL LAW, AND EU LAW

104-1 INFLUENCE OF COMPARATIVE LAW ON EU LAW

Over the past decades, comparative law has lost its innocence (Section 103) and is becoming an important source for legislators, judges, and lawyers, both on a national and a European level.

> This evolution may be influenced by the process of European integration; it may also just result from the fact that we are living closer together (the 'global village' situation); it may, finally, be an autonomous process, occasioned by the lawyer's search for fresh perspectives, in particular when completely new legal problems are to be solved.[24]

In EU institutions, 'such as the Council, the Commission and the Court—where lawyers from all Member States work closely together—"law making" and "solution finding" are unavoidably activities in which all national legal backgrounds play a role.'[25] According to Baron Mertens de Wilmars, a former president of the ECJ, recourse to comparative law is essentially a method of interpretation of Community law itself.[26]

[23] Hugh Collins, *The European Civil Code: The Way Forward* (Cambridge: Cambridge University Press, 2008), 256. Collins's remark is reflected in the different ways in which my French, German, and English students in London structure their essays. French students are inclined to explore the topic through binary oppositions, German students tend to structure their essays in sections, subsections, and sub-subsections, whilst essays from English students may look like the Thames meandering through southern England: there is a beginning and an end but the text in between may be quite a winding matter. Undoubtedly, these traditions of how to organize the materials do not say anything about the inherent quality of the paper.

[24] T. Koopmans, 'Comparative Law and the Courts', *ICLQ* 45 (1996), 545.

[25] Walter van Gerven, 'The Emergence of a Common European Law in the Area of Tort Law: The EU Contribution', in Duncan Fairgrieve, Mads Andenas, and John Bell (eds.), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002), 138.

[26] Josse Mertens de Wilmars, 'Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes', *Journal des Tribunaux* (1991), 37; see also Walter van Gerven, 'Comparative Law in a Regionally

Although this remains mainly unnoticed by the outside world, the offices of the European Courts in Luxembourg accommodate the biggest comparative law research centre in Europe. It is beyond doubt that the Courts intensively use the available knowledge when developing EU law although this remains implicit. Usually the Courts confine themselves to general expressions such as 'legal principles common to all or several Member States'.[27]

The Opinions of Advocates-General, however, regularly contain comparative analyses.[28] An important example in the area of liability for breach of EU law is the Opinion of Advocate-General Tesauro in *Brasserie du Pêcheur and Factortame*. In this case, the ECJ further elaborated the *Francovich* case law on the principle of Member State liability for loss or damage caused to individuals as a result of a breach of EU law (Section 205-1). In his Opinion, the Advocate-General pointed out that most Member State held rules on liability for legislative acts but that this liability was subject to various limitations. In line with this common concept, the ECJ ruled that a Member State will only be held liable where a sufficiently serious breach of a superior rule of law which intends to confer rights on individuals is established.[29]

In order to acknowledge the existence of a general principle of law, the ECJ does not require that the rule is a feature of all the national legal systems. Similarly, the fact that the scope and the conditions of application of the rule vary from one Member State to another is immaterial. The Court merely finds that the principle is generally acknowledged and that, beyond any divergences, the domestic laws of the Member States show the existence of common criteria.[30] See in more detail about the general principles of law, Section 203-4.

104-2 INFLUENCE OF COMPARATIVE LAW ON NATIONAL LAW

Comparative law can be used to look at the structure of foreign rules and decisions, but it makes more sense to look at the outcome of the rules and the policy reasons given by the legislator and the courts. As Lord Bingham said: 'In a shrinking world there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching

Integrated Europe', in Andrew Harding and Esin Örücü (eds.), *Comparative Law in the 21st Century*, WG Hart Legal Workshop Series, Vol. 4 (London/New York: Kluwer International, 2002), 155.

[27] See Koen Lennaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', *ICLQ* 52 (2003), 873–906; François Van der Mensbrugghe (ed.), *L'utilisation de la méthode comparative en droit européen* (Namur: Presses universitaires de Namur, 2004).

[28] See for the tasks and role of the Advocate-General at the ECJ, Section 203-2.

[29] ECJ 5 March 1996, Joined cases C-46/93 and C-48/93, ECR 1996, I-1029 (*Brasserie du Pêcheur and Factortame III*), paras. 47–55, about which see Section 205-2. See also ECJ 15 June 2000, Case C-237/98, ECR 2000, I-4549 (*Dorsch Consult v Council and Commission*) on liability for lawful acts in which implicit reference was made to French and German principles, on which see Section 1806. See furthermore Opinion AG Léger before ECJ 30 September 2003, Case C-224/01, ECR 2003, I-1023 (*Gerhard Köbler v Austria*), paras. 77–85 as regards liability for wrongful judicial decisions.

[30] Opinion AG Léger before ECJ 30 September 2003, Case C-224/01 (*Gerhard Köbler v Austria*), para. 85 with further references.

that outcome.'[31] Particularly in milestone cases, the highest national courts show an increasing interest in and need for comparative information in order to answer difficult questions. Here, comparative law is used as a mirror for national law and an instrument to prevent gaps between legal systems from growing and perhaps sometimes to provide support to decrease the size of the gaps. Because differences in structure will linger, the interesting issues concern the substance of the law.[32]

English courts are very experienced in making use of comparative materials, particularly from the legal systems of other Commonwealth countries. Of course, common language facilitates this, but recent English case law has also produced examples of the explicit use of comparative law in a European context, for instance the speeches of Lord Goff of Chieveley in *White v Jones*[33] and of Lord Bingham of Cornhill in *Fairchild v Glenhaven Funeral Services*.[34] In the latter, the claimants attempted to claim compensation for the damage they suffered from an asbestos-related occupational disease (mesothelioma). They had worked for two employers, each of whom was in breach of its duty to protect its employees from inhaling asbestos dust, but the claimants could not prove whether their illness was caused by the first or the second employer, or by both. For this reason, the Court of Appeal dismissed the claims. In the House of Lords, Lord Bingham of Cornhill considered the way other jurisdictions had dealt with the issue:[35]

> Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question.[36]

Partially on the basis of this comparative approach, the House of Lords amended the requirements for the 'but for' causation test, reversed the judgment of the Court of Appeal, and found for the claimants.[37]

[31] *Fairchild v Glenhaven Funeral Services Ltd & Others* [2002] 3 All ER 305, para. 32, per Lord Bingham of Cornhill.

[32] See extensively Guy Canivet, Mads Andenas, and Duncan Fairgrieve (eds.), *Comparative Law Before the Courts* (London: BIICL, 2004); T. Koopmans, 'Comparative Law and the Courts', *ICLQ* 45 (1996), 545–556; Basil Markesinis, 'Case Law and Comparative Law: Any Wider Lessons?', *ERPL* 11 (2003), 717–734.

[33] Lord Goff in *White v Jones* [1995] 1 All ER 691, 710, on which Van Gerven (2000), 219–224 and Markesinis and Unberath (2002), 338–348; see Section 503-4.

[34] *Fairchild v Glenhaven Funeral Services Ltd & Others* [2002] 3 All ER 305, on which see Section 1107-3.

[35] He particularly referred to Von Bar's *The Common European Law of Torts*, Van Gerven's *Casebook on Tort Law*, Markesinis and Unberath's *The German Law of Torts*, and Spier's *Unification of Tort Law: Causation*.

[36] *Fairchild v Glenhaven Funeral Services Ltd & Others* [2002] 3 All ER 305, para. 32, per Lord Bingham of Cornhill.

[37] See for an overview of recent cases in which English courts made use of comparative law Hannes Unberath, 'The German Courts', in Guy Canivet, Mads Andenas, and Duncan Fairgrieve (eds.), *Comparative Law Before the Courts* (London: BIICL, 2004), 313, n 35.

German case law also provides examples of the use of comparative law, for instance the case in which the Bundesgerichtshof rejected a wrongful life claim referring to the then recent approach adopted by the English Court of Appeal in *McKay v Essex Health Authority*.[38]

In contrast, the French Cour de cassation never refers to foreign national law. It is, however, interesting to note that in *Perruche*, also a wrongful life case, the court asked the French Comparative Law Institute to issue a research report which was then notified to the parties for use in the proceedings.[39]

Comparative law is not only interesting from a convergent but also from a divergent point of view. In this sense, it can illustrate how legal cultures, legal structures, legal reasoning, and legal thinking differ. If these differences are obstacles to a common European market, this could be a reason to remove them. The same goes for areas in which the differences are not acceptable from a human rights or safety point of view. But there are other fields of tort law where no direct need exists to eliminate the differences and where differences in legal cultures, structures, reasoning, and thinking may linger and can flourish (Sections 608–610).

105 PLAN AND STRUCTURE OF THE BOOK

105-1 OVERVIEW

Part I of this book provides an analysis of the main tort law issues in three European legal systems: France (Chapter 3), Germany (Chapter 4), and England (Chapter 5). These analyses are preceded by an introduction to the European Convention on Human Rights and the sources of liability in EU law (Chapter 2) and followed by a concluding chapter on common European tort law (Chapter 6).

Subsequently, Part II provides a structured discussion of the requirements for liability: the protected rights and interests (Chapter 7), intention and negligence (Chapter 8), violation of a statutory rule (Chapter 9), strict liability (Chapter 10), causation (Chapter 11), and damage and damages (Chapter 12).

Finally, it will be shown in Part III how the rules are applied in various categories of liability: liability for damage caused by movable objects (Chapter 14), by immovable objects (Chapter 15), and by other persons (Chapter 16); liability for not providing help in emergency cases (Chapter 17); and, finally, liability of public authorities (Chapter 18).

[38] BGH 18 January 1983, BGHZ 86, 241, referring to *McKay v Essex Health Authority* [1982] 2 All ER 771 (CA), on which see Section 708-2. See also BGH 27 June 1995, NJW 1995, 2407 (wrongful birth), on which see Section 707-2 and BGH 5 November 1974, BGHZ 63, 140 (reference to French law in a case regarding liability for sports injuries).

[39] Guy Canivet, 'The French Private Law Courts', in Guy Canivet, Mads Andenas, and Duncan Fairgrieve (eds.), *Comparative Law Before the Courts* (London: BIICL, 2004), 191, referring to Ass. plén. 17 November 2000, D. 2001. 332, note Denis Mazeaud and Patrice Jourdain. See also Conseil d'État 29 October 2003, Droit Administratif 2004, 32, with reference to an English High Court decision.

The book provides a framework for structuring the discussion on European tort law. It brings together comparative law, EU law, and human rights law. The structure is open and flexible and is aimed to be responsive to the particular features of the various national systems. It is intended as an aid to comparison and discussion, not as a quasi-draft for a European legal system. The book's structure is not aligned to any one national legal system and thus presents equal hurdles for all readers.

105-2 PART I: SYSTEMS OF LIABILITY

The first part of this book discusses the main features of the national tort laws and supranational tort law.

Chapter 2 deals with 'Europe' and sets out the relevance of EU law and the ECHR of the European Convention on Human Rights for tort law (Section 201), and introduces the European Court of Human Rights and the ECHR (Section 202). A brief account of the history and judiciary of the EU is then followed by an overview of the sources of liability in EU law (Sections 203–206). The first source is the relevant EU legislation, such as Article 340 TFEU on the liability of the EU institutions, as well as the important instruments of the Regulation and the Directive. The second source is the case law of the ECJ, particularly the development of the *Francovich* case law on the liability of Member States and individuals for breach of EU law.

In the following three chapters, the main features of the national tort law systems are set out. For each country, information is provided on the history of the legal system, its structure (codification or common law), the judiciary, and the legal literature.

French tort law (Chapter 3) is characterized by its broad general principles. Only a few rules govern most of the law of extra-contractual liability and these are laid down in the Napoleonic *Code civil* of 1804, which is still in force. The main fault liability rule can be found in article 1382 CC (liability for one's own *faute*), but in cases of personal injury and property damage, the strict liability rule of article 1384 al. 1 CC is of much more importance. This rule is developed by the Cour de cassation and establishes a strict liability for damage caused by a thing (*chose*) (this rule is, in fact, as general as it sounds). The Cour de cassation also developed a general strict liability rule for damage caused by other persons which supplements the more specific strict liability rules for parents (for damage caused by their children) and for employers (for damage caused by their employees). Hence, in France, in cases of personal injury and property loss, strict liability is the rule and fault liability the exception.

German tort law (Chapter 4) is characterized by its systematic approach and its many subtle distinctions. Probably the most characteristic feature of German tort law are judge-made rules needed to fill the lacunae in the Bürgerliches Gesetzbuch (BGB, Civil Code) of 1900, a striking example of which is the creation of the so-called *Verkehrspflichten* in the early twentieth century. These are safety duties based on negligence, and generally require a very high level of care. The proper place for these *Verkehrspflichten* in the legal system is strongly debated in the legal literature, in which systematic aspects are

generally considered to be of great importance even if their practical impact is not always clear.

In contrast, English tort law (Chapter 5) is characterized by its traditional approach based on its roots in medieval times—some would say that it has been in existence since time immemorial. The area of non-contractual liability is not governed by rules but by torts which provide a remedy (eg damages) if something has gone wrong in a particular way. There are a multitude of specific torts, but the most important and most general is the tort of negligence. This tort imposes liability on an individual who has not acted carefully, but only if that person owed another person a duty of care. This latter aspect is the most characteristic feature of the tort of negligence, and in a number of areas it is still an important obstacle for liability.

Chapter 6 covers the possibilities and impossibilities of a European *ius commune*—a common European law—particularly in the area of tort law. Over the past decades, there has been growing support for discussing the harmonization of national private laws, including national tort laws. Chapter 6 will discuss the thresholds for harmonizing the national laws, in light of the different systematic approaches to tort law (codified law versus case law), and the differences in legal cultures and legal policies (such as the role of rights). From this perspective, doubts will be cast on the desirability and feasibility of European harmonization, and an agenda for further debate will be proposed.

105-3 PART II: REQUIREMENTS FOR LIABILITY

The second part of the book analyses and compares the requirements for liability in the three national legal systems and in supranational European tort law. The goal of Part II is to look beyond the formal national terminology (as discussed in Part I) and to focus on the factual requirements for liability.

Chapter 7 first deals with protection of the *person* (Sections 702–708). This not only concerns a person's right to life, bodily integrity, physical health, and mental health, but also personality rights, such as the right to privacy. As regards this latter aspect, the case law of the European Court of Human Rights is of particular importance. Protection of the person also includes the sensitive and much discussed issues of wrongful birth (wrongful conception) and wrongful life (prenatal harm). Second, the chapter analyses the protection of the right to *property*, which is particularly relevant in German and English law (Section 709). Here, one of the questions will be whether property interests represent only the value of a damaged object or also the value of its use. Finally, the focus will be on the protection of *economic (commercial) interests* (Section 710). These interests generally enjoy a lower level of protection than personal and property rights. In England particularly it is feared that a general rule to compensate pure economic loss would lead to a cascade of claims and make tort law unsustainable. This will be contrasted with France, where tort law has survived a general liability rule that also protects against pure economic loss.

In Chapter 8, the two aspects of fault—intention and negligence—are analysed. The key question will be what these qualifications of personal conduct in fact mean and

what role they play in tort law. Certain liability rules require that a person has acted intentionally; in most situations, however, liability only requires that someone acted negligently and this is where the gravity of the chapter lies. In such cases, courts usually establish negligence by balancing the defendant's freedom to act and the claimant's interest to be protected against harm. This balancing technique, which results in unwritten rules, will be extensively illustrated.

Liability cannot be based only on the violation of an unwritten rule or precedents but also on the violation of a specific statutory rule. This will be the topic of Chapter 9. If a plant nursery uses banned pesticides, an engineer installs wiring contrary to health and safety rules, or a builder builds a house without permission, they violate statutory duties. In principle, such violations give rise to liability for the damage caused, but the legal systems deal with this basis for liability in different ways.

Liability without fault is generally known as strict liability. Rules of strict liability in the various legal systems will be illustrated in detail in Part III. In Chapter 10, the concept of strict liability will be analysed, and it will be shown that the difference between fault and strict liability is a gradual one rather than one of principle. In fact, most liability rules are a combination of fault and strict elements. When finding rules, courts and legislators in all jurisdictions use different elements from both categories to achieve what they consider to be the best mix to come to a fair decision.

Chapter 11 focuses on the causal connection between the tortfeasor's conduct or the cause for which he is strictly liable, on the one hand, and the damage, on the other. Particular problems arise if it is difficult to establish who caused the damage or if there is more than one possible legal cause. In these matters of causation, it is pivotal and often decisive as to who has the burden of proof. For example, if someone is vaccinated against a particular disease and subsequently suffers severe health problems, does that person have to prove that there was a causal connection or does the manufacturer have to prove that there was not? A general difference in causation is that the English and French approaches are rather more practical, whereas the German approach has developed detailed theories to deal with this requirement for liability.

Damage and damages are the topics of Chapter 12 which begins with a discussion of the functions of damages: these are not only aimed at compensating the claimant but also at vindicating his rights and deterring the tortfeasor and other potential wrongdoers. The victim's right to damages for personal injury differs substantially from system to system, particularly in the area of non-pecuniary loss. Differences are also apparent if someone is injured or killed in an accident, and as a consequence, his relatives suffer harm. For example, loss of maintenance and the non-pecuniary harm for the loss of a loved one (damages for bereavement or for grief and sorrow). Finally, the chapter analyses the rules applying to the victim's contributory negligence. This defence generally leads to a lower amount of damages and in extraordinary circumstances even to a reduction of the compensation to zero. Whereas England and Germany are reluctant to attribute contributory negligence to children, the French approach is remarkably less child-friendly.

105-4 PART III: CATEGORIES OF LIABILITY

The final part of the book also assumes a comparative and supranational point of view and deals with various categories of liability, such as liability for movable and immovable objects and liability for persons, both on the basis of strict and fault liability. A key feature of these categories is the person acting in the role of supervisor over an object or a person. Chapter 13 introduces this part of the book by setting out the different ways such a supervisor can be indicated. Subsequently, it briefly touches on the topic of liability for information, both as regards situations in which someone is obliged to provide information (eg a doctor or a bank), and in which someone has to ensure that voluntarily provided information (eg in a book or on a website) is correct and reliable.

When someone causes personal injury or property damage, movable objects often play an important role. This is illustrated in Chapter 14 covering liability for damage caused by animals, products, motor vehicles, and dangerous substances. Whereas liability for animals and products shows a number of similarities in the various legal systems, liability for motor vehicles and dangerous substances deviates sharply. For example, in England liability for motor vehicles is still based on negligence, whereas France has a system of almost absolute liability. The efforts of the European Commission to bring about more harmony to liability for road traffic accidents and for damage caused to the environment almost entirely failed. Even in the most harmonized area, that of liability for defective products, important differences remain across the legal systems.

Liability for immovable objects concerns damage caused on premises, grounds, and roads and is the topic of Chapter 15 which deals with events such as falling roof-tiles, collapsing buildings, and unsafe swimming pools and stadiums. In France, the general strict liability rule for things also applies to immovable objects, whereas in Germany and England liability is based on negligence: more particularly on the German *Verkehrspflichten* and the English Occupiers' Liability Acts. Specific attention will be paid to liability of the highway authorities for unsafe roads.

Someone can also be liable for damage caused by another person with whom he has a special relationship. The most obvious examples are the responsibility of parents for children and of employers for employees (in common law also known as 'vicarious liability'). These are the topics of Chapter 16. Liability of the employer for damage caused by the employee differs between the legal systems, in that England and France provide for strict liability rules and Germany for a liability for rebuttable negligence. The case law in Germany, however, has limited the employer's defences and has also provided ways around his liability, which make the practical differences with English and French law negligible. Liability for children shows more differences, with France providing for the parents' strict liability, Germany for a liability for rebuttable negligence, and England for a traditional fault liability regime.

Chapter 17 discusses whether someone can be liable for failing to rescue a person from a dangerous situation. Is someone who sees another person in danger of drowning obliged to come to his rescue? The legal systems, again, provide different answers.

A subsequent question is what are someone's duties if he undertakes a rescue. Is he required to be successful or is he only obliged not to make the victim's position worse?

Finally, Chapter 18 can be considered the *pièce de résistance* and deals with one of the most disputed topics in tort law: liability of public authorities. In this chapter, the link with public law is a complicating factor, as is the role of discretion when assessing public authorities' liability. The legal systems show a variety of approaches in this respect and also at a constitutional level with respect to the way the judiciary is allowed to scrutinize acts of the legislature and the executive. Adding to this complexity is the case law of the two supranational courts, the ECJ and the European Court of Human Rights which increasingly influences the liability of public authorities. This chapter shows in particular how intertwined supranational law, national law, and comparative law have become. It also shows the dynamics of this part of European tort law, even though the direction of the various developments is not always clear (see Section 101-2).