OLD AND NEW DIRECTIONS IN COMPARATIVE TORT LAW

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Abstract: This article offers a review of Common Law and Civil Law Perspectives on Tort Law and explores the contribution the book makes to an ever-growing scholarly literature on comparative tort law. It sets outs by illustrating the development of comparative tort law scholarship in the last two decades, discussing different objectives and approaches that have been adopted and goes on to illustrate the objectives and methodology that Bussani, Sebok and Infantino adopt in their book. The article examines the reviewed book in the context of the significant judicial innovations that have taken place in the theory and practice of tort law, both in civil law and common law jurisdictions, notwithstanding their different concepts of enforcement of law—judicial law making in the common law jurisdictions and the primacy of legislation in civil law jurisdictions. This article notes how civil law and common law traditions have been enriched by various initiatives that promote comparative study of law thereby leading to some degree of uniformity in private law, especially in tort law.

Keywords: *Tort law, comparative law, products liability, judicial innovation, European private law, tort law unification, causation*

(A Review of Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (New York: OUP, 2022))

I. Introduction: Comparative Tort Law

The last two decades have seen renewed interest in comparative study of private law, and tort law is an area where there has been extensive collaborative research and scholarly publications in the civil law and common law jurisdictions. There are at least two justifications for adopting a comparative approach to the study of law. Firstly, there is an intrinsic value in comparison, in the sense that it lets us study different legal systems and compare them simply out of curiosity: as one celebrated legal scholar put it, "the subject has intrinsic intellectual interest, and because knowing more rather than less is generally a good thing".[1] Secondly, and

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1 Mark V Tushnet, "Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action" (2004) 36 Connecticut Law Review 649, 663.

more importantly, there are instrumental reasons for engaging in the rewarding study of different legal systems from a comparative perspective. Where there is a perceived need or the political will to harmonise a particular branch of domestic law, comparative legal research methodology provides tools for identifying principles that underlie a particular branch of law in other jurisdictions. Legal scholars and practitioners may search for new approaches to existing problems by drawing inspiration from other jurisdictions. Judicial decisions of one jurisdiction become persuasive authority in other jurisdictions for the quality of their reasoning.[2] Tort law is an important branch of private law, where a "cross-jurisdictional dialogue" among courts has come to play a significant role.[3] This has been made possible by several decades of comparative scholarship, bringing civil law and common law jurisdictions ever closer. It is against this background that the recent book, *Common Law and Civil Law Perspectives on Tort Law*,[4] by three distinguished tort law comparativists, Mauro Bussani, Anthony Sebok and Marta Infantino will be best reviewed. This remarkable book demonstrates how lively and productive the comparative approach to studying tort law can be.

Until the end of the 20th century, comparative tort law was a field in which there were only a few case books and manuals. One of the few exceptions was Frederick Henry Lawson and Sir Basil Markesinis' two-volume study of negligence law under English, German and French law, published in 1982.[5] In 1986 Markesinis published the first edition of his much-acclaimed casebook on German tort law, in which he analysed domestic rules and principles in the light of the French and Anglo-American experiences.[6] In the 1990s, the situation began to change. In the last 30 years, there has been an appreciable increase in the number of casebooks, handbooks and manuals on comparative tort law in English, especially in Europe.

In 1996, the European Group on Tort Law, a scholarly group established in 1992 within the "European Centre of Tort and Insurance Law" (ECTIL) in Vienna, under the intellectual guidance of Austrian tort scholar Helmut Koziol, launched its "Unification of Tort Law" series, which inquired into how tort law questions were dealt with in many European and selected non-European jurisdictions.[7] In collaboration with the Institute

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2 Basil S Markesinis, *Comparative Law in the Courtroom and Classroom* (Oxford: Hart Publishing, 2003).

3 Paula Giliker, "Vicarious Liability in the Common Law World: Comparative Conclusions" in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (London: Bloomsbury, 2022), 238.

4 Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (New York: Oxford University Press, 2022).

5 Frederick H Lawson and Basil S Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and in the Civil Law* (Cambridge: Cambridge University Press, 1982), in 2 volumes.

6 Basil S Markesinis, *A Comparative Introduction to the German Law of Torts* (Oxford: Clarendon Press, 1986), currently published in its 5th edition as Basil S Markesinis, John Bell and André Janssen, *Markesinis's German Law of Torts* (London: Bloomsbury, 2019). During his time at the University of Texas, Markesinis launched the "Foreign Law Translations" project, devoted to translating into English and making electronically available tort law decisions from different European jurisdictions: see The University of Texas at Austin, "Foreign Law Translations", available at https://law.utexas.edu/transnational/foreign-law-translations/ accessed 10 March 2024.

7 See Jaap Spier (ed), *The Limits of Liability: Keeping the Floodgates Shut* (The Hague: Kluwer Law International, 1996); Jaap Spier (ed), *The Limits of Expanding Liability: Eight Fundamental Cases in a Comparative Perspective* (The Hague: Kluwer Law International, 1998); Helmut Koziol (ed), *Unification of Tort Law: Wrongfulnes*s (The Hague: Kluwer Law International, 1998); Jaap Spier (ed), *Unification of Tort Law: Causation* (The Hague: Kluwer Law International, 2000); Ulrich Magnus (ed), *Unification of Tort Law: Damages* (The Hague: Kluwer Law International, 2001); Bernhard A Koch and Helmut Koziol (eds), *Unification*

for European Tort Law (ETL), also based in Vienna, in 2001 the ECTIL began publishing comparative monographs on a variety of tort law topics in its "Tort and Insurance Law" series.[8] The ECTIL publishes the *European Tort Law Yearbook* presenting statutory reforms, case law highlights and doctrinal updates from all European jurisdictions.[9] The ETL publishes the series "Digest of European Tort Law", collecting court decisions from almost all European jurisdictions on the most fundamental aspects of tort law.[10]

A different strand of comparative tort law research was established towards the end of the 1990s by German professor of Private Law, Christian von Bar, who published the two-volume masterpiece on the common law of torts in Europe in 1998 and 2000.[11] That research inspired the "Study Group on a European Civil Code" (Study Group) led by the same author to publish its work on the European principles of non-contractual liability arising out of damage caused to another, published in 2009.[12] The volume may be likened to a restatement of European tort law, in which the tort law principles are accompanied by an extensive article-by-article comparative law commentary providing an overview of rules and approaches of various European jurisdictions on the issues covered by each provision.[13]

In the meantime, other European scholarly groups, instead of engaging in a quest for the best possible tort law rules and codifying them, focused their efforts on building and developing a better knowledge of European tort laws. This approach led to projects on the

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of Tort Law: Strict Liability (The Hague: Kluwer Law International, 2002); Jaap Spier (ed), *Unification of Tort Law: Liability for Damage Caused by Others* (The Hague: Kluwer Law International, 2003); Ulrich Magnus and Miquel Martín-Casals (eds), *Unification of Tort Law: Contributory Negligence Tortfeasors* (The Hague: Kluwer Law International, 2004); WV Horton Rogers (ed), *Unification of Tort Law: Multiple Tortfeasors* (The Hague: Kluwer Law International, 2004); Pierre Widmer (ed), *Unification of Tort Law: Fault* (The Hague: Kluwer Law International, 2005). The series was meant to provide the background material for the elaboration of the "Principles of European Tort Law" (PETL), which were released in 2005: European Group on Tort Law, *Principles of European Tort Law. Text and Commentary* (Vienna: Springer, 2005) (a second edition of the book is currently in preparation). Three further books were published in the "Principles of European Tort Law Series": Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Cambridge-Antwerp-Portland: Intersentia, 2016); Piotr Machnikowski (ed), *European Product Liability: An Analysis of the State of the Art in the Era of New Technologies* (Cambridge-Antwerp-Portland: Intersentia, 2016); and Miquel Martín-Casals (ed), *The Borderlines of Tort Law: Interactions with Contract Law* (Cambridge-Antwerp-Portland: Intersentia, 2019).

8 Thirty-seven books have been published so far. The list is available at http://www.ectil.org.

9 See Institute for European Tort Law, "European Tort Law Yearbook", available at https://www.oeaw.ac.at/etl/publications/european-tort-law-yearbook/ accessed 10 March 2024. In addition, the ECTIL manages an online repository of translated European case law on tort law called EUROTORT: see http://ectil.org/ectil/Eurotort.aspx accessed 10 March 2024. The ECTIL and the ETL also coordinate the only dedicated tort law journal in Europe, the *Journal of European Tort Law*. For more information, see http://ectil.org and http://etl.oeaw.ac.at.

10 Some of the volumes in this series are: Bénédict Winiger, Helmut Koziol, Bernhard A Koch and Reinhard Zimmermann (eds), *Essential Cases on Natural Causation* (Wien-New York: Springer, 2007); Bénédict Winiger, Helmut Koziol, Bernhard A Koch and Reinhard Zimmermann (eds), *Essential Cases on Damage* (Berlin/Boston: de Gruyter, 2007); and Bénédict Winiger, Ernst Karner and Ken Oliphant (eds), *Digest of European Tort Law Vol 3: Essential Cases on Misconduct* (Berlin/Boston: de Gruyter, 2018).

11 See Christian von Bar, *The Common Law of Torts in Europe* (Oxford: Clarendon Press, 1998 and 2000), 2 volumes.

12 Christian von Bar (ed), *Non-contractual Liability Arising Out of Damage Caused to Another* (Munich: Sellier, 2009).

13 *Ibid*.

"Ius Commune Casebooks on the Common Law of Europe" (Ius Commune Casebooks), the "Common Core of European Private Law" (Common Core), and the "Comparative Studies in the Development of the Law of Torts in Europe".

Under the umbrella of "Ius Commune Casebooks", launched in 1994 by Walter van Gerven with the aim of publishing casebooks on European law for educational purposes, two casebooks on tort law were published, in 1998 and 2000, collecting translated cases and materials mostly from England, France and Germany.[14] Focused on unearthing commonalities and differences between private law in European countries, the "Common Core" project, launched in 1993 by Mauro Bussani and Ugo Mattei, has since 2003 released six tort law books, dealing with pure economic loss, strict liability, ecological damage, pre-contractual liability, protection of personality rights, causation, and mass harm.[15] All the six books are based on collective studies carried out through the use of hypotheticals that are discussed from the perspective of different national legal systems. Finally, the project "Comparative Studies in the Development of the Law of Torts in Europe", which was launched in the 2000s by David Ibbetson and John Bell, took a distinctive approach by focusing on comparison as much as on history. Between 2010 and 2012, the project published nine volumes containing national reports from selected Western European jurisdictions on the history of tort law doctrines and rules on products liability, liability between neighbours, medical liability and traffic liability.[16]

The above list would not be complete without considering the casebooks, textbooks and manuals on comparative tort law produced outside the framework of wider projects and initiatives. One cannot ignore the valuable contributions such as Gert Brüggemeier's

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14 Walter van Gerven, Jeremy Lever, Pierre Larouche, Christian von Bar and Geneviève Viney, *Cases, Materials and Text on National, Supranational and International Tort Law: Scope of Protection* (Oxford: Hart, 1998); and Walter van Gerven, Pierre Larouche and Jeremy Lever, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart, 2000).

15 See Mauro Bussani and Vernon V Palmer, *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), also translated into Chinese (Beijing: China Law Press, 2005); Franz Werro and Vernon V Palmer (eds), *The Boundaries of Strict Liability in European Tort Law* (Durham: Carolina Academic Press, 2004); John Cartwright and Martijn Hesselink (eds), *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press, 2008); Monika Hinteregger (ed), *Environmental Liability and Ecological Damage in European Law* (Cambridge: Cambridge University Press, 2008); Gert Brüggemeier, Aurelia Colombi Ciacchi and Patrick O'Callaghan (eds), *Personality Rights in European Tort Law* (Cambridge: Cambridge University Press, 2010); Marta Infantino and Eleni Zervogianni (eds), *Causation in European Tort Law* (Cambridge: Cambridge University Press, 2017); and Tomas Arons and Rjanka Rijnhout (eds), *Mass Harm in Europe* (Leiden: Intersentia, 2023). Two other volumes on tort law are under preparation: One on standard of care in negligence and the other on compensation for personal injury.

16 Simon Whittaker (ed), *The Development of Product Liability* (Cambridge: Cambridge University Press, 2010); James Gordley (ed), *The Development of Liability between Neighbours* (Cambridge: Cambridge University Press, 2010); Ewoud Hondius (ed), *The Development of Medical Liability* (Cambridge: Cambridge University Press, 2010); Wolfgang Ernst (ed), *The Development of Traffic Liability* (Cambridge: Cambridge University Press, 2010); Miquel Martín Casals (ed), *The Development of Liability in Relation to Technological Change* (Cambridge: Cambridge University Press, 2010); Nils Jansen (ed), *The Development and Making of Legal Doctrine* (Cambridge: Cambridge University Press, 2010); Michael Lobban and Julia Moses (eds), *The Impact of Ideas on Legal Development* (Cambridge: Cambridge University Press, 2012); Paul Mitchell (ed), *The Impact of Institutions and Professions on Legal Development* (Cambridge: Cambridge University Press, 2012); and John Bell and David Ibbetson, *European Legal Development: The Case of Tort* (Cambridge: Cambridge University Press, 2012).

books on the general principles of tort law (focusing on English, French, German and US tort law) and on tort law reforms in Brazil, China and Russia;[17] Cees van Dam's manual on English, French, German and EU tort law;[18] the collective work led by Helmut Koziol on basic questions of tort law from a comparative perspective;[19] the comparative tort law handbook with translated provisions and cases from several jurisdictions, including China and the United States, by Thomas Kadner Graziano;[20] and the overview of tort law in the world's legal traditions offered by the collection of comparative essays edited by Mauro Bussani and Anthony J Sebok.[21]

Needless to say, this is just a cursory outline of the scholarly works on comparative tort law in English during the last few years, with particular emphasis on Europe. It is in this rich context that the book under review should be appreciated.

Section II of this article considers the ambition, objectives and methodology of *Common Law and Civil Law Perspectives on Tort Law*. Section III locates the reviewed book in the landscape of contemporary or modern tort law scholarship. Section IV, by identifying the universal challenge that adjudication in private law poses, demonstrates the significance of judicial innovation in tort law, which the authors Bussani, Sebok and Infantino skilfully explore. Section V is a brief conclusion.

II. The Goals and Methodology of Common Law and Civil Law Perspectives on Tort Law

Common Law and Civil Law Perspectives on Tort Law makes a valuable contribution to comparative legal studies. It mainly covers non-contractual civil liability for injuries in five legal systems: England, the United States, France, Germany, and Italy. The authors say in the Introduction to the book that they selected these jurisdictions because these "outstanding" systems were the ones they "were more familiar with".[22] Nevertheless, the book incidentally deals with other jurisdictions. For instance, the analysis of compensation schemes for medical malpractice includes Belgium and the Scandinavian

17 Gert Brüggemeier, *Common Principles of Tort Law: A Pre-statement of the Law* (London: BIICL, 2004); and Gert Brüggemeier, *Modernising Civil Liability Law in Europe, China, Brazil and Russia* (Cambridge: Cambridge University Press, 2011).

18 See Helmut Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Vienna: Jan Sramek, 2015).

19 Cees van Dam, *European Tort Law* (Oxford: Oxford University Press, 2nd edn., 2013) (the 1st edition was in 2006).

20 Thomas Kadner Graziano, *Comparative Tort Law. Cases, Materials and Exercises* (Abingdon: Routledge, 2018). A twin publication by the same author covers comparative contract law: Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (Cheltenham: Edward Elgar, 2nd edn., 2019). Taken together, the two casebooks complement each other in offering a broad comparative overview of the fundamental pillars of the law of obligations.

21 Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law. Global Perspectives* (Cheltenham: Edward Elgar, 2nd edn., 2021). To this list, one should also add comparative historical books, such as those of Nils Jansen, *The Structure of Tort Law* (Tübingen: Mohr Siebeck, 2019) and Bénédict Winiger, *Responsibility, Restoration and Fault* (Cambridge: Intersentia, 2018).

22 Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (n. 4), ix.

countries;[23] rules on recovery of economic and non-economic loss for family members in case of death of a loved one, and statutory provisions on causation are investigated with regard to all continental European legal systems;[24] and the history of products liability is canvassed taking into consideration several European and extra-European jurisdictions.[25] As the authors say in their preface, "the purpose of this book is to provide scholars, lawyers, and law students with a comparative overview of the law of civil liability, hopefully paving the way to future discussions and debates".[26]

The book has eight chapters, each of which focuses on a foundational issue at the core of tort law and, rather than presenting a comprehensive study of each country, the book focuses on the study of a few "patterns of questions", through which it becomes possible to explain rules and arguments used by judges and academics in their respective systems. Chapter I briefly describes the history, structure and context of tort law architecture in each of the five jurisdictions examined.[27] Chapter II discusses the notion and role of fault, as well as the boundary lines between fault-based and strict liability.[28] Looking at the losses that may be recovered, Chapters III–VI investigate rules on the recoverability of damages for personal injuries (in medical malpractice: Chapter III),[29] of non-economic loss (claimed by primary and secondary victims: Chapters IV and V),[30] and of pure economic loss (Chapter VI).[31] Chapter VII examines rules and techniques which are employed to assess the causal relationship between the defendant's tortious act and the resultant harm caused to the plaintiff.[32] Chapter VIII finds common threads running through all the previous chapters, by describing how technological, economic, and social developments have changed the way fault, injury and causation are assessed in products liability regimes.[33]

Each chapter delves into the historical development of statutory rules, judicial decisions and scholarly works, showing how tort law systems are made from within and in line with the experience of other jurisdictions. Importantly, every chapter proposes a thesis that sheds new light on the topic covered. For instance, Chapter I: "The Place of Tort Law" emphasises how the social, economic and institutional architecture of each jurisdiction has had an impact on the development of tort law rules. Chapter II: "Legacies and Projections" powerfully demonstrates how, despite the traditional reliance in each jurisdiction on the standard of the so-called reasonable person in negligence liability, courts are generally sensitive to the defendant's (and may be of the plaintiff's—in the case of contributory negligence) particular characteristics. Chapters III–VI do not only explore the many points of fracture between tort law narratives and tort law practice inasmuch as recoverable losses are not only concerned with but also investigate the interrelationship

23 *Ibid*., 62.
24 *Ibid*., 92, 118, 158, 179.
25 *Ibid*., 240, 245.
26 *Ibid*., ix.
27 *Ibid*., 1–19.
28 *Ibid*., 21–50.
29 *Ibid*., 51–88.
30 *Ibid*., 89–111 (Chapter IV), 113–142 (Chapter V).
31 *Ibid*., 143–176 (Chapter VI).
32 *Ibid*., 177–212.
33 *Ibid*., 213–247.

between tort remedies and other possible forms of legal redress for injury: contractual damages for private insurance and public or statutory compensation schemes. By providing several judicial illustrations of the most widespread theories of causation, Chapter VII: "England: Between Pigeonholes and General Clause" challenges the idea that theories are self-explanatory and unveils the many contradictions in the prevailing narratives of causation formulas. With its focus on developments in products liability law, Chapter VIII shows how ideas travel from one jurisdiction to another and transform themselves throughout the journey.

Overall, the book is a powerful reminder that tort law rules and remedies do not exist in isolation. Rather, tort law is part of a broader system, in which every element invariably influences (and is influenced by) others and contributes to determining who can get compensation, where, for what and against whom. Further, the book emphasises how tort law exists and develops responding to cultural and linguistic practices, social values, economic contingencies, litigation patterns, procedural rules, and neighbouring institutions—from criminal to contract law, from administrative to social security and insurance law.

III. Old and New Directions in Tort Law Scholarship

Common Law and Civil Law Perspectives on Tort Law brilliantly fits with the trend of growing scholarship on comparative tort law that, as demonstrated by the literature review in Section I of this article, has expanded exponentially, especially in Europe, in the last 30 years. This book shows that there is a renewed interest in the philosophy of tort law. For years, the field has been dominated by law-and-economics approaches, under which tort law is seen as an instrument to create incentives for people to minimise social costs, and a duty of care arises only if the product of the cost (burden) of taking precautions (burden, B), and the probability of loss (P) is of greater amount than the gravity of loss (L).[34]

34 As is well known, this formula was first developed by Judge Learned Hand in the case *United States v Carroll Towing Co* 159 F 2d 169 (1947) and became the standard test to determine whether a legal duty of care has been breached. For a criticism of Hand's formula, see Richard W Wright, "Hand, Posner, and the Myth of the 'Hand Formula'" (2003) 4:1 Theoretical Inquiries in Law 145. In recent years, it has become increasingly clear that Hand Formula leaves out important dimensions of reality and that additional perspectives are needed. The best example of the new approach is offered, in the American scholarship, by the debate around the idea that tort law is a form of "civil recourse" developed by John Goldberg and Benjamin Zipursky in their book, *Recognizing Wrongs* (Cambridge: Harvard University Press, 2020). As Goldberg and Zipursky explain: "A person who is the victim of a legal wrong is entitled to an avenue of civil recourse against one who wrongs her. As should be apparent, this principle is capacious. Indeed, it figures in other departments of law beyond tort law. Regardless, it is central to tort law" (at 3); but see also, as far as Europe is concerned, Thomas Kadner Graziano, "The Purposes of Tort Law" (2023) 14 Journal of European Tort Law 23 and Helmut Koziol, *The Aims of Tort Law: Chinese and European Perspectives* (Vienna: Jan Sramek, 2017). According to Goldberg and Zipursky, their approach provides a better explanation and model of the norms of tort law than that offered by efficiency and corrective justice (230–239, 266, 350). There is for the time being no consensus as to which approach to explaining tort law might be superior. See for instance Mark A Geistfeld, "Tort Law and Civil Recourse" (2021) 119 Michigan Law Review 1289; Marta Chamallas, "Beneath the Surface of Civil Recourse Theory" (2013) 88:2 Indiana Law Journal 527; and Michael L Rustad, "Twenty-First-Century Tort Theories: The Internalist/Externalist Debate" (2013) 88 Indiana Law Journal 419. The book by Bussani, Sebok and Infantino demonstrates that the debate is alive and well.

It thus confirms that this is the tort law century. As is well known, property law theory dominated private law thinking in the Western legal tradition until the 19th century, being considered the foundation on which the whole legal system was and should be built.[35] From the 19th century onwards the primacy of property was overshadowed by the rise of contract law, with many speaking of the 20th century as the "century of contract".[36]

It is only since the 20th century that the significance of tort law has emerged everywhere as a key instrument in maintaining social order, spreading risks and losses, and dispute resolution.[37] What is interesting to note, especially from the point of view of the civil law tradition, is that this emergence has been everywhere led by courts and legal scholarship. If tort law is essentially judge-made law, even in civil law jurisdictions, judges learn the law and get new ideas (also) from textbooks, commentaries and other scholarly contributions.[38]

Undoubtedly, *Common Law and Civil Law Perspectives on Tort Law* does not cover all the civil law and common law jurisdictions. It does not even cover, as many of the edited works mentioned in Section I, all civil law and common law jurisdictions in Europe. This is understandable, though. Books dealing with all (or almost all) European jurisdictions are for instance those published by the ECTIL and the ETL, by the "Study Group", the "Ius Commune Casebooks", the "Common Core" and the "Comparative Studies in the Development of the Law of Torts in Europe" project.[39] These books are typically many hundreds of pages long, written by a team of authors who often act as national reporters, many of whom are committed to a more or less overt legal harmonisation agenda.[40] By

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35 For the civil law tradition, see Stefano Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: Il Mulino, 3rd edn., 2013), 75–106 and Paolo Grossi, *L'ordine giuridico medievale* (Bari: Laterza, 6th edn., 2000), 237–240; for the common law tradition, see Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge: Harvard University Press, 2011); Gregory S Alexander, *Commodity and Property: Competing Visions of Property in the American Legal Thought, 1776-1970* (Chicago: University of Chicago Press, 1997); and AWB Simpson, *A History of the Land Law* (Oxford: Oxford University Press, 2nd edn., 1986).

36 James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon, 1992), 161–230 and Rodolfo Sacco and Giorgio De Nova, *Le contrat* [Contract] (translated by Philippe Chauviré and Adam Loiseau, Brussels: Larcier, 2023), 19–32.

37 Leon Green, "Tort Law Public Law in Disguise" (1959 and 1960) 38 Texas Law Review 1; Robert L Rabin, "The Historical Development of the Fault Principle: A Reinterpretation" (1981) 15 Georgia Law Review 925, 945–948; John CP Goldberg, "Twentieth Century Tort Law Theory" (2003) 91 Georgetown Law Journal 513, 524; G Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 2nd edn., 2003); and Nils Jansen, "The Development of Legal Doctrine in Europe: Extracontractual Liability for Fault" in Nils Jansen (ed), *The Development and Making of Legal Doctrine* (n. 16), 1, 29–30.

38 See Mauro Bussani, "European Tort Law—A Way Forward?" in Mauro Bussani (ed), *European Tort Law. Eastern and Western Perspectives* (Berne: Stämpfli, 2007), 365, 378; G Edward White, *Tort Law in America* (n. 37), 3–10; Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (New York: Oxford University Press, 1996), 1023–1035; James Gordley, "Tort Law in the Aristotelian Tradition" in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), 131; and Paolo Grossi, "La proprietà nel sistema privatistico della Seconda Scolastica" [Property in the Private Law System since the Second Scholasticism] in Paolo Grossi (ed), *La Seconda Scolastica nella formazione del diritto privato moderno* [The Second Scholasticism in the Formation of Modern Private Law] (Milan: Giuffrè, 1973), 197.

39 See Section I of this article.

40 See ECTIL and ETL (nn. 7–10), Study Group (n. 12), Ius Commune Casebooks (n. 14), Common Core (n. 15), Comparative Studies in the Development of the Law of Torts in Europe (n. 16).

contrast, the book by Bussani, Sebok and Infantino is much more limited in both size (it is 250 pages long) and authorship (being authored by an American and two Italian scholars), and is not specifically linked to any harmonisation project, although the authors have all been involved in one or more of the above endeavours.[41] However, instead of pursuing the path taken by many of the books mentioned in Section I, which often focus only on the three "major" European jurisdictions, England, France and Germany,[42] the authors of *Common Law and Civil Law Perspectives on Tort Law* have extended their study to the United States and Italy. As regards the common law, the addition of the United States challenges the historical dominance of England within the common law tradition and demonstrates how, in the last century, that leading role has shifted, in a variety of fields including tort law, to the United States.[43] As to the civil law side, the inclusion of Italy demonstrates that, between the two conventional extremes of French and German law, many variants are possible, often displaying a high degree of originality.

From a comparative point of view, Italy is today mostly described as a mix of French (codified) and German (scholarly) legal traditions.[44] This traditional view of Italy as a French-German mix undervalues not only the common historical roots that these three traditions share,[45] but also the original developments that Italian law produced. One good example in this regard can be the first-ever introduction into a civil code, in 1942, of a provision on tort liability for ultra-hazardous activities, which now appears as art.2050 of the Italian Civil Code.[46] Another example is the autonomous development by Italian

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41 Mauro Bussani is the co-founder of the "Common Core" project and co-editor of the "Common Core" study on pure economic loss. See Franz Werro and Vernon V Palmer (eds), *The Boundaries of Strict Liability* (n. 15). Anthony J Sebok has worked with both the ECTIL and the Common Core. See for instance Anthony J Sebok, "Punitive Damages in the United States" in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Vienna: Springer, 2009), 155; and Anthony J Sebok, "Actual Causation in the Second and Third Restatements: Or, the Expulsion of the Substantial Factor Test" in Marta Infantino and Eleni Zervogianni (eds) (n. 15), 60. Infantino is also a member of the "Common Core" project (see Infantino and Zervogianni (eds) (n. 15)), and the current supervisor of all tort law projects.

42 An almost exclusive focus on England, France and Germany is what characterises the "Ius Commune Casebooks" project, at least as far as tort law is concerned. See Walter van Gerven, Pierre Larouche and Jeremy Lever, *Cases, Materials and Text* (n. 14) and Cees van Dam, *European Tort Law* (n. 19).

43 Christophe Jamin and William van Caenegem, "The Internationalisation of Legal Education: General Report for the Vienna Congress of the International Academy of Comparative Law" in Christophe Jamin and William van Caenegem (eds), *The Internationalisation of Legal Education* (Cham: Springer, 2016), 3, 17–18; Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000" in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006), 19, 67–71; Ugo Mattei, "A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance" (2003) 10 Indiana Journal of Global Legal Studies 383; Ugo Mattei, "Why the Wind Changed: Intellectual Leadership in Western Law" (1994) 42 American Journal of Comparative Law 195.

44 Among many others, John H Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford: Stanford University Press, 3rd edn., 2007), 1; Barbara Pozzo, "Italy" in Jan M Smits, Jaakko Husa, Catherine Valcke and Madalena Narciso (eds), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2023), vol I, 311; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (translated by Tony Weir, Oxford: Oxford University Press, 3rd edn., 1998), 104–105. Italy is considered by Merryman as the civil law system par excellence. See John H Merryman, "The Italian Style I: Doctrine" (1965–1966) 18 Stanford Law Review 39.

45 John H Merryman, "The Italian Style I: Doctrine" (n. 44), 40; Antonio Padoa Schioppa, "A Sketch of Legal History" in Jeffrey S Lena and Ugo Mattei (eds), *Introduction to Italian Law* (The Hague: Kluwer, 2002), 1, 17.

46 See Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (n. 4), 14, 46; Mauro Bussani, *L'illecito civile* [Tort] (Naples: Edizioni Scientifiche Italiane, 2020), 855;

courts, from the 80s of the 20th century onwards, of the notion of *danno biologico*[47] or physical injury, as an original tool to assess personal injuries, that was later adopted by the legislator.[48] Its invention can be put into the context of a spontaneous convergence of Western legal systems towards strategies designed to create a case-to-case consistency.[49] Yet, it also stands as a unique product of Italian courts, which created a new conception of non-economic loss (ie, a broad range of losses that are not in financial terms and not commonly traded in markets) stemming from physical injury, and offered a model for other European jurisdictions to follow. For instance, in the European "Principles on Non-Contractual Liability Arising out of Damage Caused to Another",[50] art.2:201(1) of the Principles of European Law (PEL) states that the "loss caused to a natural person as a result of injury to his or her body or health and the injury as such are legally relevant damage", while art.6:204 of the PEL states that "injury as such is to be compensated independently of compensation for economic and non-economic loss". As the comment on the two provisions clarifies, art.2:201(1) "treats the injury as such as an independent head of legally relevant damage. That takes account of the fact that the practical results of the concept of *danno biologico* have found increasing pervasive acceptance, albeit in various ways and with varied intensity".[51] Comment on art.6:204 of the PEL states further that "a rule in this form [ie, about the idea of an 'injury as such'] is not found in any national civil code or other national legislation. Its substance, which has been essentially adopted from Italy, is however recognised in the laws of several Member States and enjoys increasing acceptance in others".[52]

IV. Judicial Innovation in Tort Law

Evolution guided by a permanent re-discovery of past experience plays an important law in the domain of tort law. Law's historicity, a notion usefully applied here, means not only that law is essentially dynamic and built on the past, but also that law lives through a constant reinterpretation of its past to shape the present. The outcomes of such a process

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Nadia Coggiola, Bianca Gardella Tedeschi and Michele Graziadei, "Italy" in Bénédict Winiger, Ernst Karner and Ken Oliphant (eds), *Digest of European Tort Law Vol 3: Essential Cases on Misconduct* (n. 10), 356, 357–358.

47 A more detailed account is offered by Mauro Bussani, Anthony J Sebok and Marta Infantino in their *Common Law and Civil Law Perspectives on Tort Law* (n. 4), 14, 126–127; Mauro Bussani and Marta Infantino, *La responsabilità civile. Un'introduzione* [Civil Liability: An Introduction] (Naples: Edizioni Scientifiche Italiane, 2022), 153–165; Mauro Bussani, *L'illecito civile* (n. 46), 207–212; Basil Markesinis, Michael Coester and Guido Alpa, *Compensation for Personal Injury in English, German and Italian Law. A Comparative Outline* (Cambridge: Cambridge University Press, 2005), 84–96.

48 See art.138 and 139 of the legislative decree of 7 September 2005, no. 209 (so-called Code of Private Insurance).

49 Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (n. 4), 120–127.

50 Christian von Bar (ed), *Non-contractual Liability Arising Out of Damage Caused to Another* (n. 12), 362.

51 *Ibid*., 362.

52 *Ibid*., 986.

may vary, leading sometimes to the discovery of alleged continuities while at other times ending up in the celebration of perceived discontinuity.[53]

In the domain of tort law both in common law and civil law jurisdictions, the main actors of these processes of re-interpretation are courts. Differently from scholars, courts are constantly exposed and required to respond to pressing social problems; differently from legislators, courts in principle cannot arbitrarily decide not to hear a case. External pressure is therefore brought to bear on courts to deal with novel and urgent legal issues. As recently observed by Kenneth S Abrahams and G Edward White writing on American tort law—an observation universally valid—courts answer to external pressures by "filter[ing] change through received doctrinal frameworks. It is those frameworks that provide the distinctive form of continuity with the past that partly characterizes the development of doctrine in common law fields over time".[54]

The historicity of the law and the centrality of case law in tort law are core features of tort law even in legal systems, such as civil law ones, that are less keen to recognise their significance. This holds particularly true of France. In France, scholars and courts still adhere to the inherently predominant role of legislation in French tort law.[55] Yet, as Bussani, Sebok and Infantino demonstrate, the majority of contemporary achievements of French law—including the invention of a general clause of strict liability of holders of things under the first paragraph of former art.1384 (currently, art.1242) of the *Code civil*[56]—have been brought about by courts.[57] Similar observations can be made about developments in Germany and Italy. We already mentioned how Italian courts created the revolutionary notion of *danno biologico* to ensure uniformity in compensation for personal injuries. As to Germany, suffice it to consider how, after the adoption of the German Constitution in 1949, German courts have developed the protection of the general right to personality (*Allgemeines Personlichkeitsrecht*)[58]and the protection of an established business (*Recht am Gewerbebetrieb*),[59] neither of which were designated as protected interests in § 823 of the German Civil Code (BGB), Title 27: Torts.[60] Yet possibly the best illustration of the significance of courts in determining tort law developments, and of their ability to innovate the law from within, comes from the history of products liability. As is well known, the birth of products liability is often attributed to the concurring

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53 This is well recognised in the American literature on the law of torts. See for instance Kenneth S Abraham and G Edward White, *Tort Law and the Construction of Change: Studies in the Inevitability of History* (Charlottesville-London: University of Virginia Press, 2022), 215–220; G Edward White, *Tort Law in America* (n. 37), 180–208; James A Henderson, Jr, "Expanding the Negligence Concept: Retreat from the Rule of Law" (1976) 51 Indiana Law Journal 466, 484.

54 Kenneth S Abraham and G Edward White, *Tort Law and the Construction of Change* (n. 53), 219.

55 See, eg, Jean-Sébastien Borghetti and Simon Whittaker, "Introduction" in Jean-Sébastien Borghetti and Simon Whittaker (eds), *French Civil Liability in Comparative Perspective* (London: Bloomsbury, 2019), 1, 4.

56 Cass Civ, 16 June 1896, Sirey 1897, 1, 17 (*arrêt* Teffaine); Cass, Chambres réunies, 13 February 1930, Sirey 1930, 1, 121 (*arrêt* Jand'heur).

57 Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (n. 4), 12.

58 Bundesgerichtshoft (the German Supreme Court, referred to as BGH) 25 May 1954, BGHZ 13, 334.

59 BGH 11 November 1958, BGHZ 28, 320.

60 Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (n. 4), 15, 157.

opinion of Justice Roger Traynor in the US case of *Escola v Coca-Cola Bottling Co*, where he proposed the imposition of strict liability on manufacturers whose defective products cause personal injury.[61] Justice Traynor's proposal led to the inclusion of strict liability in s.402A of the *Restatement (Second) of the Law of Torts*.[62] It is commonly agreed[63] that the American-inspired strict liability for defective products was transplanted in Europe following the adoption of Directive 85/374/EEC of 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.[64] Undoubtedly, much of this narrative is correct, but what this historical narrative does not adequately consider is that, with the gradual development of a mass consumer society that allowed wide access to consumer goods, injured consumers' demands for compensation were multiplying in France, Germany, and Italy decades before the adoption of the Directive. As Bussani, Sebok and Infantino point out, since the 1950s courts in all three countries had adopted a variety of devices in order to objectivise the requirement of fault and to relieve plaintiffs from the burden of establishing negligence.[65] In other words, in the absence of any legislative reform, courts in continental Europe were modifying the interpretation given to the basic norms of their respective legal systems to respond to the massive growth of accidents in the newly emerging mass consumption societies.

This seems to confirm the old functionalist view of Konrad Zweigert and Hein Kötz that "the legal system of every society faces essentially the same problems and solves these problems by quite different means though very often with similar results".[66] Perhaps more interestingly, these unconscious parallelisms in legal development show that, in certain legal sectors, the major area of divergence across legal systems does not concern the solution to problems, but rather how this solution is argued, packaged, and presented. All courts effectuate change by adjusting received doctrinal rules, forms and frameworks to meet urgent social needs, but they do it with varying degrees of transparency and openness.

When proposing the introduction of strict liability, Justice Traynor said in *Escola*: "I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has

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61 *Escola v Coca-Cola Bottling Co* 24 Cal 2d 453, 150 P 2d 436 (1944). On Traynor's contribution to products liability, see John W Wade, "Chief Justice Traynor and Strict Liability for Products" (1974) 2 Hofstra Law Review 455. See text indicated by *Escola v Coca-Cola Bottling Co* 24 Cal 2d 453, 150 P 2d 436 (1944) for how Justice Traynor justified the imposition of strict liability.

62 *The Restatement (Second) of Torts* (1965) s.402, later followed by *The Restatement (Third) of Torts: Product Liability* (1998). In *Escola* a Coca-Cola bottle exploded in the hands of a waitress, injuring her. While majority relied on *res ipsa loquitor*, Justice Roger Traynor argued in favour of imposing strict liability.

63 See for instance Cees van Dam, *European Tort Law* (n. 19), 420–423.

64 Under art.1 of Directive 85/374/EEC, "[t]he producer shall be liable for damage caused by a defect in his product".

65 Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (n. 4), 230–239.

66 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (translated by Tony Weir, Oxford and New York: OUP, 3rd edn., 1998), 34.

placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings".[67] He went on to emphasise the reasons and rationale for his position: "Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public".[68]

Nothing comparable happened in Western Europe, where courts reached the same substantial outcomes in an invisible manner, without openly making policy choices. Civil law judges rather did what they do best: they concealed their own creativity and silently modified existing rules by adjusting well-established doctrines on the basic elements of liability, by introducing new presumptions of fault and causation or by recalibrating the evidentiary burden between the litigants.[69]

V. Conclusion

The aim of this article was to provide a brief insight into the lively and evolving domain of comparative tort law and the contribution that *Common Law and Civil Law Perspectives on Tort Law* has made. Among many reasons why it should be said that the book adds value to the literature and brings a fresh perspective on the comparative study of tort law, one must be emphasised: in contrast to many comparative treaties on tort law mentioned above, the book by Bussani, Sebok and Infantino is neither purely descriptive,[70] nor prescriptive.[71] The authors first provide readers with facts and information about rules and doctrines, and then invite readers to think about the underlying rationale of these rules and doctrine, their policy implications, as well as possible alternatives. In sum, *Common Law and Civil Law Perspectives on Tort Law* by Bussani, Sebok and Infantino is a delightful example of modern comparative law scholarship and an invaluable addition to international tort law scholarship, equally suited for lawyers of both common and civil law jurisdictions.

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67 *Escola v Coca-Cola Bottling Co* (n. 60), 461 (Traynor J).
68 *Ibid.*, 462 (Traynor J).
69 Mauro Bussani, Anthony J Sebok and Marta Infantino, *Common Law and Civil Law Perspectives on Tort Law* (n. 4), 230–239. In their book, Bussani, Sebok and Infantino provide many other illustrations of how, underneath the veil of well-established doctrines, courts can relax substantive and evidentiary requirements to take into account circumstances that are relevant to the case at stake: see, eg, 36–42 (on the assessment of fault), 42–50 (on the boundaries between fault and strict liability), 151–168 (on the wrongfulness requirement), and 191–206 (on factual and legal causation).
70 This approach characterises the works carried out by the "Ius Commune Casebooks", the "Common Core" and the "Comparative Studies in the Development of the Law of Torts in Europe" projects: see above nn. 12, 14–16.
71 As much of the research carried out by the ECTIL, the ETL and the "Study Group": see above nn. 7–10.