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John Bell/David Ibbetson, European Legal Development: The Case of Tort (Cambridge University Press, 2012). Comparative Studies in the Development of the Law of Tort in Europe, vol 9, xii+ 213 pp. ISBN 978-1-107-02177-8 (hardback).

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desirable. There are similar idiosyncratic features relating to the various court structures in each system and, particularly in Spain, to the bifurcated system of compensation recovery depending on whether the fault in question gives rise to criminal liability. It is hardly surprising that seven jurisdictions with different legal traditions should show some diversity in approach. But, as this volume shows, there are also many similarities as well. Only through careful and nuanced studies such as are contained in this book can the inevitable limits of an undoubted shared European legal heritage be explored.

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John Bell/David Ibbetson, *European Legal Development: The Case of Tort* (Cambridge University Press, 2012). Comparative Studies in the Development of the Law of Tort in Europe, vol 9, xii + 213 pp. ISBN 978-1-107-02177-8 (hardback).

European Legal Development: The Case of Tort is the capstone of a nine-volume project organised by Professors John Bell and David Ibbetson, both of the University of Cambridge. The scope of the project is breathtaking and it has resulted in publication, first in 2010, and now in 2012, of eight edited volumes, each with different editors, as well as a ninth volume written by Professors Bell and Ibbotson. The subject matter of the first eight volumes can be roughly broken into two groups. The first group comprises five volumes concerning the development of specific doctrinal subjects (products liability, liability between neighbours, medical malpractice, traffic accidents, and liability 'due to technological change'). The second group is more functional: 'the development and making of legal doctrine', 'the impact of ideas on legal development', and 'the impact of institutions and professions on legal development'. The final volume synthesises the earlier volumes and 'analyses the nature and causes of the development of fault liability in tort in the period 1850–2000' in Western Europe (p 1).

The Case of Tort is a form of scholarship that is rarely attempted: a work of comparative legal theory and history focused on one area of private law. Another work that arguably attempted a similar project, albeit with a narrower national focus and a broader doctrinal scope, was Atiyah and Summer's 'Form and

Substance in Anglo-American Law'. The reason this kind of project is rarely embarked on is not only the sheer amount of work required to synthesise the cases, statutes, and scholarly works of multiple jurisdictions over numerous historical periods, but because the work of comparative jurisprudential and doctrinal analysis is fraught with methodological challenges. Adding a historical dimension to the comparative project only increases the book's ambition.

I am happy to report that the book is a success, and, more than that, a pleasure to read. Bell and Ibbetson succeed in their stated aim: they analyse the development of fault liability in tort in the modern era thoroughly and honestly. They are cautious to avoid offering any sweeping explanation for the change documented in volumes one through eight, and they do not offer any tool by which a legal scientist could predict – even with caveat stacked on top of caveat – how the tort law of any given legal system will evolve in the future. This is not to say that The Case of Tort is a work of pure description: it presents itself as an *analysis*, and that is what it is.

First, to methodology. Bell and Ibbetson adopt Rodolfo Sacco's idea of 'legal formants', which commits them to the view that law is comprised of partial and overlapping conceptions that comprise a shared but evolving system of practical norms and beliefs within a certain community. Accordingly, the development of law manifests itself in changes in the expression of these formants in the world. Change in legal concepts can be expressed in terms of four (possible) dimensions: the law's 'formulation', its 'interpretation', the 'context and relevance' it occupies in the larger society and its 'operation' (pp 4–10). These four dimensions form the basic toolkit for Bell and Ibbetson; they return to them over and over again when examining the development of the various subfields of tort law in the doctrinal volumes.

Bell and Ibbetson reject outright the view that attributes all legal development to 'the market or social processes' (p 10) in favour of the view that law is in some way a self-contained system, although it is clear that they would never go as far as to adopt the perspective of certain corrective justice theorists (such as Ernest Weinrib) who view private law as a self-contained system of norms whose grounds do not and should not refer to non-legal reasons. Bell and Ibbetson adopt a stance that supports a more modest form of autonomy for law; they see law as a parallel system of norms with its own center of gravity for the interpretation of meaning that can be affected by non-legal forces. Central to their approach is their discussion of path-dependency (pp 24–32). Bell and Ibbetson emphasise that development in law is governed more by contingent shifts in the past than modern legal scholars would like to admit.

In the middle two chapters of the book Bell and Ibbetson apply their methodology and conclude that between 1850 and 2000 European tort law

revealed two trends. In the law of products liability and medical malpractice there has been 'convergence' and in the law of liability between neighbours and traffic accidents there has been 'divergence'.

For example, despite the fact that the doctrine of *non cumul* would seem to have required the French to develop separate rules and interpretations of those rules, since contract rather than tort handled early products liability cases and all medical malpractice after 1936, French law in products liability in the twentieth century followed a similar 'trajectory' to that of England, Germany, and other nations (p 80) and the 'trajectories of development' in medical malpractice were similar in France and England (p 103). The various doctrines in France, which provided liability in the event of a carelessly manufactured product (contractual liability, strict liability for the keeper of a 'thing' that causes harm under art 1384, and expansion of art 1382 to allow for *faute* in the case of bystander injury), added up to a norm that resembled liability under *Donoghue v Stevenson* or art 823 of the *Bürgerliches Gesesetzbuch* (German Civil Code, BGB), which explains, of course, the relative ease with which the Products Liability Directive of 1985 was adopted. Bell and Ibbetson tell a similar story in medical malpractice, arguing that England move towards France's much more patient-friendly approach to medical malpractice (which 'verged' (p 102) on strict liability event before 2002) occurred within its own rhetoric of negligence (p 103).

On the other hand, according to Bell and Ibbetson, the law of traffic accidents and of liability between neighbours is a story of increasing distance between European jurisdictions. At the outset the grounds for placing these histories under the label of divergence is not obvious. For example, the history of traffic accident law shows a pattern of development of the rules and their interpretation similar to the convergence story of medical malpractice. English law moved towards strict liability 'behind the façade of fault' (p 124) while French law moved more directly towards strict liability through the *Code civil* (art 1384) and statute (the *loi Badinter*). The claim of divergence makes more sense once these shifts in the rules and interpretation of the general tort rules in various nations are compared to the much more dramatic shifts in other nations, such as Sweden and Germany, which adopted more sweeping legislation either to replace the tort system (Sweden) or, from very early on, to separate traffic accidents from the larger tort system (Germany). A similar argument can be seen in Bell and Ibbetson's discussion of liability between neighbours, where they focus not only on the divergent starting points amongst the various nations (some systems classified these conflicts under property law and not tort) but also the growing role that regulatory law played over the twentieth century. The reason for the 'divergence' in tort in this area was not that the tort law diverged in different directions, but rather that it withered away: 'the most important

theme in the development of the law relating to neighbours ... is the insignificance of tort law' (p 150).

The Case of Tort provides a survey of the development of European tort law organised around clear and coherent themes. It offers a structure through which to think about how and why tort doctrines change. One is left, however, unclear about the meaning of 'development' as used in the book. Bell and Ibbetson say that the volumes they have reviewed indicate a distinct trajectory in the development of the law of tort. They summarise this as (1) the move from fault to strict liability and (2) the rejection of the assumption that 'legal liability should go hand in hand with moral responsibility' (p 153). The divergence they describe in the law of traffic accidents and the liability between neighbours is not within tort law but concerns, however, the boundaries of tort law. The story they end up telling is more coherent than they seem to realise: where tort has survived to the end of the twentieth century, it has converged with strict liability. To the extent that its rules could not be interpreted to provide strict liability, or where other parts of the state could manage risk and/or distribute costs better than tort, tort has been replaced (or become limited).

The story told in The Case of Tort, if it is correct (and some corrective justice scholars would surely disagree with its content), invites further inquiry. Can the convergence with strict liability be explained by the limited autonomy account provided at the beginning of the book? If anything, it would seem to undermine the role of path dependency as an explanation, given the dramatic shift from negligence to strict liability. Bell and Ibbetson's second conclusion, that tort law developed to reject a connection between moral responsibility and legal liability, is one for which the groundwork is not obviously established in The Case of Tort, and may even stand in the way of explaining the convergence theme that runs through its analysis. It may be that strict liability has grown because it is consistent with the evolution of European moral and political culture.

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