

BOOK REVIEW

***Markesinis's German Law of Torts*, Basil Markesinis, John Bell & André Janssen eds. 5th ed., Hart 2019.**

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The first edition of this book, printed in 1986, was entitled 'A comparative introduction to the German Law of Torts'. That edition was comprised of an introductory section, providing the readers with general information on the German court machinery, the style and format of the German civil code and its paragraphs on civil liability. The following three main parts were respectively devoted to 'Liability under § 823 I BGB', 'Stricter forms of liability' (dealing with vicarious liability and employers' liability) and 'The remaining Provisions of German Civil Code' (dealing with tort remedies not provided for by § 823 I BGB and pecuniary and non-pecuniary damages). Each of these three parts was composed of two sections, the first devoted to a 'commentary', aimed at giving general information on the background and approach of German law on the issue. The second devoted to the translation of German leading cases annotated by the author, to set them in the broader picture of German law, explain the importance of the case in the development of the law, compare them to English and American law solutions and discuss the issues at the centre of the cases using a general comparative approach. The book offered 87 German cases.

The diminutive title given to the first edition of the book probably reflected the inevitable reluctance of professor Basil Markesinis to suggest that the more than 600 pages of work was not actually a mere introduction to the German civil liability rules, but a comprehensive survey of the theme, for Anglophone readers. A book in which professor Markesinis was artfully able to plainly reveal to his readers the many similarities that the German civil liability rules had with the common law, in answering legal problems concerning tortious cases if the actual solutions given by the German courts were investigated, in place of the words of the statutes. Needless to say, the first edition was largely praised by a number of eminent colleagues, among whom were leading comparative law scholars like Hein Kötz in the *American Journal of Comparative Law* (35, no. 4, Fall 1987: 857-858); Bernard Rudden in the *Cambridge Law Journal* (Mar. 1987, vol. 46, No. 1, pages 161-163) and André Tunc, in the *Revue internationale de droit comparé* (vol. 31, No. 1, Janvier-mars 1987, pages 299-300).

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Two further editions followed and only with the fourth, co-authored with the late professor Hannes Unberath, did the title of the book change to ‘The German Law of Torts’. The title has once again been changed to ‘Markesinis’ German Law of Torts’ in this fifth and latest edition. The book is, by now, a classic. In fact, the success of this book has been undeniable, as proven by its five editions in less than 4 decades. That success could be accounted for not only due to its capacity to provide an extensive and thorough overview of the German rules on civil liability, but also by the way in which it offers its readers a splendid example of the overarching capacity of the comparative methodology to deeply understand the actual functioning of a legal system.

With the publication of the fifth edition, the readers’ gratitude goes once again to its author but also to its two new editors, Professor John Bell, from Cambridge University, and Professor André Janssen, from Radboud University, whose names are well known throughout the international legal community. Their academic experience and abilities are well reflected in the new edition of the book.

This new edition presents a partly different structure to the previous ones. In fact, after a general introduction, each of the following chapters investigates different topics of German civil liability using the solutions given by German courts and comparing them with common law courts decisions. All the translations into English of the relevant Codes and Statutes and of 96 German courts decisions, with their annotations, are respectively collected at the end of the book in Annex 1 and Annex 2, so as to give the reader the chance to directly read the legal provisions and the decisions, permitting further in depth examination of the issues.

The introduction remains largely unchanged from the first edition and offers the reader some initial information on the organization of the German Courts and their judicial style, as well as on the Bürgerliches Gesetzbuch (BGB) and its provisions on tortious liability. The section on the Courts’ decisions had already been expanded in the fourth edition, with paragraphs added on the development of the German judicial decisions, on legal education and on the codal background, which provided the readers with an insightful explication of the attitudes of German judges. Moreover, a paragraph on the Constitutionalization of Private Law and one on the amendments to the BGB, were also added, offering an updated picture of the evolution of tortious liability in Germany.

The second chapter is devoted to the issue of the Breach of Protected interests, that is to say to § 823 I BGB. The title of the Chapter underlines the requirement established by § 823 I BGB of a prejudice caused to the rights or interests enumerated by the same provision to obtain compensation for harm caused by a human conduct, that must be both unlawful (*rechtswidrig*) and coloured by negligence or malice. Among the list of rights and interests discussed (life, body and health, freedom, property, family relationships) I would like to draw the readers’ attention to the section devoted to the evolution, on the basis of the constitutional provisions of articles 1 and 2 of the Basic Law, of the general right to one’s

personality. The protection of this right finds its roots in the judicial rulings that granted the compensation for the infringement of that right notwithstanding the clear contrary wording of § 253 I, II BGB. That judicially created general right to one's personality covers today invasions of either natural and legal persons, often going well beyond what common lawyers would recognize as privacy rights. German courts therefore may grant damages or removal and injunctions for cases such as keeping intimate pictures of an ex-partner, 'neighbour snooping', stalking or sending unsolicited advertisements in any form. These judge made rules were lately challenged by the rise of internet, and the difficulties faced in identifying the actual tortfeasor. The new edition of the book offers the reader two interesting cases on these issues: in the first, the BGH held Google liable for violating the personality right of a person, because the software showing the offensive content on the Google site was written by Google. In the second case, the same BGH rejected the liability of the social media operator for the personality right infringements of their users.

The following sections of the second Chapter are devoted to the examination of the essential elements of civil liability under § 823 I BGB, that is to say unlawfulness, fault, duties of care and causation. Regarding the first two elements it should be remembered that, although the German civil liability system distinguishes, contrary to French law, the element of unlawfulness from the element of fault, which is furthermore abstractly divided into five, or even six, different types of fault, as the authors suggests the practical application of those theoretical rules may sometimes be quite blurred. Hence, German courts decisions on these issues can in certain cases be closer to the common law decisions than would be expected from the initial formal distinction. As to the element of causation, the continuous quest of the German system for a causal paradigm able to encompass all the possible cases clearly emerges, whether it be under the profile of material causation or that of juridical causation. A quest, needless to say, that German lawyers share with many other foreign colleagues, either from civil law or of common law systems.

Chapter 3 is devoted to the issue of the Breach of Legislative Protection under § 823 II BGB and the Intentional harm provided for by § 826 BGB. These two issues were most probably brought into Chapter 3 in order to underline their importance and distinguish them from other cases, having previously been dealt with in Chapter 4 under the title of 'Other headings of tortious liability' together with other provisions. The sections devoted to § 823 II BGB, which provides the liability where there has been fault in the breach of a norm designed to protect specific people or specific interests, were enlarged to provide accounts of cases where the provision of § 823 II BGB may overlap with other liability rules and cases where omissions are the cause of the damages. While the sections devoted to § 826 BGB, which provides liability for any deliberate harm caused to another, not limited in scope by reference to any category of person or harm, extensively investigate the issues of the capacity of the courts to discern and assess the standard of the 'good morals' that must be applied to these cases, to ascertain the behaviours of the defendant.

Chapter 4 is now devoted to Economic Loss and Products. These sections were moved here by the authors of the new edition to highlight the importance of these issues. Especially intriguing from a comparative point of view is the issue of Economic Loss, as German courts differed from common law and most of the civil law courts, by not developing a consistent case law providing, based on tortious rules, protection to third parties who had been economically harmed by the actions or omissions of the defendants. On the other hand, it is not unusual for German courts to protect third parties affirming the liability of those same defendants in force of their contractual obligations.

Chapter 5 is devoted to the issue of the Liability for Others. Under this heading, we find the Tortious Liability for Employees, provided for by § 831 and § 278 BGB. It is very interesting to point out that the search by German courts for the existence of an actual relationship between employer and employee, to hold this latter liable for the damages caused by the former, is often similar in the attitude to that of common law courts. On the contrary, they act in a completely different manner when they have to investigate the unlawfulness of the damages inflicted to the victim. In fact, we must remember that German lawyers use two different theories on the unlawfulness of the damage, the first, traditional, affirms that the element of unlawfulness exists where, looking at the result, the defendant violated one of the interests noted in § 823 I BGB. The second, and more modern theory affirms, instead, that the investigation must concern the conduct of the defendant, and therefore ascertain if his or her interference with one of the listed interests also amounts to the breach of one of his or her duties of care. The application of one or the other of these theories generally has the same practical result, except for in cases of vicarious liability of the employers. As the rule of § 831 BGB does not require in fact the *culpa* of the employer, the application of the traditional rule would entail the liability of the employer even in those cases where the employee was not at fault, and the victim will only be asked to prove the interference. On the contrary, the application of the newer interpretation of the concept of unlawfulness would require the petitioner to prove the existence of the interference of the employee with his or her enumerated interest and, also, that the employee's activity was in breach of one of his or her duties of care. It is also interesting to consider that even in these cases, contract law may play a relevant part in the shaping of civil liability. The last section of the Chapter is devoted to the Liability for those in Need of Supervision, that is to say children and adults lacking capacity.

Chapter 6, written by Professor Colm McGrath, an undisputed authority in the field of German medical liability, is a needed addition to the volume, because of the relevance that medical liability has recently acquired in every western legal system. The Chapter deals with the main aspects of German medical liability illustrating, among other points, the relationship between contractual and tortious liability in cases of medical malpractice and the freedom endowed to German judges to scrutinize medical conducts, if they appear not to be able to offer the required degree of safety, even when those conducts comply with medical

guidelines or accepted medical practice. Moreover, the same Chapter deals with what are called ‘procedural indulgences’, that is to say procedural strategies, unknown to English law (but not to Italian law, I would dare to say), aimed at easing the burden of evidence on the patients.

The following Chapter, number 7, focuses on the issue of no-fault liability, a theme that was, in the previous edition of the book, included in the chapter on vicarious liability. The choice to devote an entire chapter to the issue in the latest edition, is perfectly logical, not only because of the present relevance of the theme in contemporary western legal systems, but also because of the importance of strict liability in the history of the German legal system (starting from its 1838 Prussian Railway Act). The German no-fault liability is characterized by the fact that it is always introduced by legislative provisions, which rule out the judicial creation of general presumptions of liability. German judges must thus exercise self-restraint precisely in force of the long established tradition that reserves to the legislative power the introduction of sectors ruled by strict liability. These legislative provisions provide a number of general clauses that are common to all or most of the strict liability rules. Many of these general clauses are illustrated in Chapter 7, before discussing the main features of four main areas of strict liability, that is to say the Strict Liability Act 1978, the Accidents at work and Social Security Legislation, the Road Traffic Act 1952 and the Statutory Liability for Products.

Chapter 8, devoted to the Liability of Public Authorities, after a general introduction on the basis of Public authorities and public officials’ liability under § 839 BGB and article 34 GG, has a new section on strict liability of administrations in case of expropriation and sacrificial encroachment. The first are the cases where the claimant suffered a loss as a consequence of expropriations or quasi-expropriations, based on unlawful acts, affecting present rights and assets, while in the second cases the losses refer to immaterial interests such as life, health, personal freedom or privacy and not to material goods.

The final Chapter is devoted to the Law of Damages, that is to say to the damages that are to be compensated under German provisions for tortious damages. The Chapter offers a very clear description of the (sometimes) very complex and not always undisputed German rules on damages compensation, offering some interesting comparative hints.

Overall, this book is so clearly written and well organized that the reader is effortlessly accompanied by its authors through the intricacies of German civil liability. At the same time, it is rich in detailed information and clarifications, rendering it invaluable to foreign scholars and German law students or legal practitioners alike. Finally, its comparative references to common law are offered with such a simplicity, that surely no scholar or legal practitioner is left wondering why it is considered a classic of Comparative Law and why a new edition was needed.

