

INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW XI TORTS (1983)

It is no small endeavor to describe accurately the law of torts for a single country. The breadth of "torts" continues to expand with the ever increasing number of conflicts arising from human activity.¹ Imagine trying to describe the law of torts of the entire world. Such a project would demand the canvassing of the full range of torts, from simple battery to the frontiers of products liability. An examination of these topics under various legal systems, such as common law, civil law, socialist, and religious based systems would also be required. Imagine further a project which is not content to merely summarize rules but instead strives to elucidate major strains of tort theory existing in the world's legal literature. The magnitude of such an undertaking is staggering. Surely such a study requires the combined efforts of some of the world's greatest scholars. Yet, the International Encyclopedia of Comparative Law (*Encyclopedia*) has attempted to accomplish just that in its first published volume on Torts.

The degree of the *Encyclopedia's* success depends largely on its own self-defined goals. These goals can be better understood against the background of the *Encyclopedia*. In 1965, under the auspices of the International Association of Legal Science, a group of renowned international legal scholars set out to produce a compendium containing the world's first truly global comparison of broad segments of the law.² When completed, the *Encyclopedia* will contain seventeen volumes, each dedicated to a major topic of

¹ Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others — in short, doing all the things that constitute modern living — there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.

Wright, *Introduction to the Law of Torts*, 8 *CAMB. L. REV.* 238 (1944).

² For a detailed description of the history of the *Encyclopedia*, see Drobniq, *The International Encyclopedia of Comparative Law: Efforts Toward A Worldwide Comparison*, 5 *CORNELL INT'L L. J.* 113 (1972). See also Sprudz, *The International Encyclopedia of Comparative Law: A Bibliographical Status Report*, 28 *AM. J. COMP. L.* 93 (1980).

law.³ In 1983, the first volume was published. This volume was number eleven dealing with torts. As the first completed volume, it may serve as a preview of the style and quality which will be found in the remaining sixteen volumes.

In assessing the *Encyclopedia's* treatment of torts, it is crucial to identify the book's purposes. The work is not a traditional encyclopedia that recites rule after rule. According to those scholars in charge of the project, "[t]he *Encyclopedia* was not designed. . .to serve as a handbook in which practitioners would find the solution to any legal issue arising under the law of some country in the world."⁴ The *Encyclopedia's* mission is quite different. Three broad objectives are identified. The first and primary goal is to provide a global backdrop against which national and international lawmakers can evaluate particular legal issues. The *Encyclopedia* is intended to be especially helpful to lawmakers in developing countries who are in the course of shaping their own law.⁵ Secondly, the *Encyclopedia* is to serve as a major resource to the world's legal academic community. It is designed to aid in the teaching of comparative law and to stimulate further research in the area.⁶ Finally, the participants in the project stress the inherent value of the undertaking. The compilation of such an ambitious book brought together hundreds of scholars from all over the world. These scholars were able to share perspectives and exchange

³ The subjects of the seventeen volumes are as follows:

- I. National Reports
- II. The Legal Systems of the World/Their Comparison and Unification
- III. Private International Law
- IV. Persons and Family
- V. Succession
- VI. Property and Trust
- VII. Contracts in General
- VIII. Specific Contracts
- IX. Commercial Transactions and Institutions
- X. Restitution-Unjust Enrichment and *Negotiorum Gestio*
- XI. Torts
- XII. Law of Transport
- XIII. Business and Private Organizations
- XIV. Copyright and Industrial Property
- XV. Labour Law
- XVI. Civil Procedure
- XVII. State and Economy

For a listing of the chapters for each volume, see Sprudz, *supra* note 2, at 97-101.

⁴ Drobnig, *supra* note 2, at 114.

⁵ *Id.*, at 114-15.

⁶ *Id.*

ideas in areas of common interest. Many of them were introduced to the comparative method of legal study for the first time.⁷

The success of the third objective is impossible for an outsider to measure. Undoubtedly, the individuals who worked on the project greatly benefitted from the undertaking. The reader, however, is more concerned with the first two goals: aiding lawmakers and academics. These objectives are by their nature more susceptible to evaluation. Overall, the *Encyclopedia* provides a convenient, clear, and uncommonly rich overview of tort law throughout the world. It should be quite useful to academics and lawmakers in both the legislative and judicial branches. Yet, the *Encyclopedia* contains an inherent structural flaw that seriously impairs its utility. It is in danger of becoming quickly outdated, perhaps even before its publication. Before addressing this criticism in more detail, I would like to discuss the stylistic and organizational framework of the book which is one of its strong points.

Unlike most compendium, the *Encyclopedia* is not the work product of an anonymous committee. Each volume is divided into chapters authored by individuals. The text necessarily reflects the style and opinion of the respective authors. Given the exceptional caliber of the authors,⁸ this style provides the reader with a more

⁷ *Id.*

⁸ The contributors to the Torts volume and the institutions with which they are associated are as follows:

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University of Athens (Greece)

Byula Eorsi
Professor at the University of Budapest
(Hungary)

John Fleming
Professor, University of California
Law School, Berkeley (USA)

A.M. Honoré
Professor at New College, Oxford
(England)

J. A. Jolowicz
Professor at Trinity College, Cambridge
(England)

Robert M. Kruithof
Professor at the Faculty of Law of the
University of Antwerp (Belgium)

Jean-Pierre Le Gall
Professor at the Faculty of Law and

interesting and full text. The danger with this style is that the book could become a series of unconnected individual essays in which the author's normative assessments are mistaken for objective descriptions of the law. In volume eleven, the danger has been successfully avoided. The authors generally are quite clear when they are describing rules and when they are passing judgment on them. The occasional injection of the author's personal opinion also makes the work more valuable to its intended audience. Indeed, a tragic waste of talent of people like John Fleming and A.M. Honorè would occur if the critical commentary was excluded.

The organization of the chapters is, for the most part, quite logi-

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Ferdinand F. Stone
W.R. Irby Professor of Law and Director
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Andrè Tunc
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Emeritus of Civil Law, University of Athens
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cal. The volume on torts is divided into two parts. Part I is primarily devoted to substantive liability issues.⁹ Procedural and remedial issues are covered in Part II.¹⁰ Many readers, however, will need some orientation to locate particular subjects. The absence of a cumulative index makes locating topics a little more difficult than it needs to be. For example, I expected to find a separate chapter devoted to products liability. Instead, that topic is included in the same chapter with collapsing buildings and wandering sheep.¹¹

One of the great challenges in creating a comparative law resource of global dimension is devising a system of organization and terminology that people throughout the world can use. Early on in the project, a conscious decision was made by the authors not to adopt the organizational structure or terminology of any particular legal system.¹² Rather, they looked to logic and common threads in the law in developing a system of organization. In the long run, this initial development of an international structure from which to analyze tort problems may be the *Encyclopedia's* most enduring contribution. Once the reader spends a little time examining the overall structure of the book and the detailed table of contents following each chapter, he is able to locate specific topics. Since the intended audience of the volumes is policymakers and scholars who are skilled in such research, the problems of unfamiliar structure and terminology are relatively minor.

* The individual chapters in Part I are as follows:

1. Introduction
2. Liability for One's Own Act
3. Liability for Persons Under Supervision
4. Private and Governmental Liability
5. Liability for Damage Caused by Things
6. Professional Liability
7. Causation and Remoteness of Damage

¹⁰ The individual chapters in Part II are as follows:

8. Consequences of Liability: Remedies
9. Personal Injury and Death
10. Various Damages
11. Collateral Benefits
12. Complex Liabilities
13. Procedural Questions
14. Traffic Accident Compensation: Law and Proposals

At the time of this review, only Part I had been published in final form. The individual chapters of Part II, however, were available in paperback.

¹¹ Stone, *Liability for Damage Caused by Things*, in XI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: TORTS, ch. 5, §§ 37-80; 92-128, 228-84 (1983) [hereinafter cited as ENCYCLOPEDIA].

¹² Drobnig, *supra* note 2, at 126.

The book maintains a surprisingly high degree of internal consistency through the adoption of the "typical solutions" format.¹³ Each chapter surveys the legal solutions given by various systems to common critical tort issues. Thus, one can easily compare the manner in which civil and common law jurisdictions have dealt with the issues of informed consent,¹⁴ or the position of socialist and private ownership countries on the issue of governmental liability for torts.¹⁵ This format is useful and convenient. It provides coherency to a project whose scope is otherwise difficult to contain.

Style and structure notwithstanding, the content of the *Encyclopedia* is its most important component. The quality of the content can be evaluated in terms of the range, depth, and accuracy of coverage. The *Encyclopedia*, with one major reservation, scores well on all three counts.

The range of coverage is quite good. Once the reader becomes familiar with the organization of the volume and its chapters, one can find information on most major topics in tort law. The chapter on liability for one's own act, for example, addresses traditional common law intentional torts such as battery,¹⁶ as well as the more elusive concept of abuse of rights.¹⁷ One can find information on liability for trespassing animals,¹⁸ falling space ships,¹⁹ and escaping nuclear energy.²⁰ In short, the expansiveness of the law of torts is adequately reflected in the text.²¹

¹³ *Id.* at 124.

¹⁴ Zepos and Christodoulou, *Professional Liability*, in *ENCYCLOPEDIA*, *supra* note 11, at ch. 6, §§ 67-72.

¹⁵ Eorsi, *Private and Governmental Liability for the Torts of Employees and Organs*, in *ENCYCLOPEDIA*, *supra* note 11, at ch. 4, §§ 255-86, 287-320.

¹⁶ Limpens, Kruithof and Meinertzhagen-Limpens, *Liability for One's Own Act*, in *ENCYCLOPEDIA*, *supra* note 11, at ch. 2, § 107.

¹⁷ *Id.* §§ 230-55. This concept would include a variety of common law torts given separate headings, including private nuisance, malicious prosecution, and abuse of process.

¹⁸ Stone, *Liability for Damage Caused by Things*, in *ENCYCLOPEDIA*, *supra* note 11, at ch. 5, §§ 37-80.

¹⁹ *Id.* § 186.

²⁰ *Id.* §§ 214-25.

²¹ Obviously, some topics are not covered. For example, there is no discussion of the extent of liability of a physician or hospital whose negligence leads to the birth of a child. This is an issue that troubles courts on both sides of the Atlantic Ocean. *Compare* *Graves v. Fulton - DeKalb Co. Hosp. Auth.*, 252 Ga. 441, 314 S.E.2d 653 (1984) and *University of Arizona Health Services Center v. Superior Court*, 136 Ariz. 579, 667 P.2d 1294 (1983) with *Thake v. Maurice*, [1984] 2 All E.R. 513 and *Udale v. Bloomsburg Area Health Authority*, [1983] 2 All E.R. 522, [1983] 1 W.L.R. 1098. See generally Comment, *Judicial Limitations on Damages for Wrongful Birth of a Healthy Infant*, 68 Va. L. Rev. 1311 (1982). One might also quibble about the relative emphasis given certain topics. Almost twice as many pages

The depth and accuracy of the coverage are more difficult to assess. The *Encyclopedia* goes beyond the simple recitation of rules found in most compendium. Each chapter includes some historical perspective and a discussion of policy considerations that affect critical issues. These features of the *Encyclopedia* are its primary strength. Given the inherent page limitations of an encyclopedia format, the level of sophistication of the discussion is truly remarkable.

Andr e Tunc's contribution sets the tone for the volume in his eloquent introduction. This chapter does far more than introduce the reader to the subject of torts. It elucidates many major themes and conflicts in modern tort law: fault versus non-fault liability;²² the relationship between tort and contract;²³ and the role of tort law in modern systems marked by insurance and social welfare programs.²⁴ Tunc addresses these topics in a clear and thought provoking manner. This chapter provides an elaborate backdrop against which particular tort issues can be discussed and evaluated. With some variation, each chapter includes the same type of insightful discussion of policy.²⁵ The depth of discussion by many of the world's leading tort scholars separates the *Encyclopedia* from the ordinary and makes it a most valuable resource for policymakers and academics.

The most serious weakness of the *Encyclopedia* is one that is difficult to control: keeping the text *reasonably* current. It is impossible to stay abreast of all the developments in tort law on a global basis. Most of the chapters were completed in the early to mid-1970's.²⁶ In some cases, a decade has passed between the writ-

are devoted to a person's liability for the acts of minors and adults under supervision than are given to products liability. Also, one should note that the text has a definite western slant. Substantially more information is provided about the law in the United States and Western Europe than the rest of the world. This western bias is explained in terms of the limited amount of available information concerning third-world tort law and the influence of the French, German, and English law on those systems. See Tunc, *Introduction*, in *ENCYCLOPEDIA*, *supra* note 11, at ch. 1, §§ 102-11.

²² *Id.* §§ 113-53.

²³ *Id.* §§ 32-48.

²⁴ *Id.* §§ 421-31, 168-71.

²⁵ Special mention should be made of Professor Honor e's chapter on causation and remoteness of damage. This chapter provides as complete and insightful a discussion of the topic as is possible in an encyclopedia format.

²⁶ The individual chapters were completed as follows:

Chapt. 1: Introduction (1973)

Chapt. 2: Liability for One's Own Act (1974)

Chapt. 3: Liability for Persons Under Supervision (1975)

ing of the text and its publication. Much legal activity has transpired in the last ten years that simply is not reflected in the *Encyclopedia*.

The difficulty in maintaining a reasonably current text is compounded by two factors. First, the authors necessarily rely on secondary sources, such as treatises, for information about particular jurisdictions. These treatises may also contain dated material.²⁷ Second, the hardback format of the book is difficult to supplement in a way that does not destroy the flow of the main text. Yet, many volumes of the *Encyclopedia* will need substantial supplementation before the entire set is completed in the 1990's.²⁸

The *Encyclopedia's* treatment of products liability illustrates the difficulty of avoiding obsolescence. This important issue in tort law is covered as a subsection of a section of a sub-chapter of the chapter on liability for damages caused by things.²⁹ My criticism, however, goes beyond that of emphasis or organization. This chapter of the *Encyclopedia* was completed in 1970. It cannot take into account the important practical and theoretical developments in products liability law that have occurred in the past fourteen years. Between the writing of the text and the publication of the volume, courts have decided many significant cases. The core concept of "defect" has been refined.³⁰ The effect on liability of changing levels of knowledge with the passage of time has been raised.³¹

Chapt. 4: Private and Governmental Liability for the Torts of Employees and Organs (1972)

Chapt. 5: Liability for Damage Caused by Things (1970)

Chapt. 6: Professional Liability (1977)

Chapt. 7: Causation and Remoteness of Damage (1969)

Chapt. 8: Consequences of Liability: Remedies (1971)

Chapt. 9: Personal Injury and Death (1969)

Chapt. 11: Collateral Benefits (1970)

Chapt. 12: Complex Liabilities (1975)

Chapt. 13: Procedural Questions (1969)

Chapt. 14: Traffic Accident Compensation: Law and Proposals (1970)

²⁷ The most frequently cited source of American law is W. Prosser, *LAW OF TORTS* (4th ed. 1971). Occasionally, the 1964 edition of Prosser is the basis of the author's understanding of American tort law. *E.g.*, Eorsi, *supra* note 15. Prosser's treatise was itself recently updated. W. PROSSER & P. KEETON, *TORTS* (5th ed. 1984).

²⁸ It is estimated that the *Encyclopedia* will be completed by 1990. *See*, Sprudz, *supra* note 2, at 97.

²⁹ Stone, *supra* note 11, ch. 5, §§ 257-95.

³⁰ *E.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972). *See generally* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [To Warranty] To Strict Liability To Negligence*, 33 VAND. L. REV. 593 (1980).

³¹ *E.g.*, Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 447 A.2d 539 (1982). *See*

Innovative approaches to the issue of causation have been advanced.³² These cases are not and, given the gap in time, cannot be discussed in the main body of the text. Further, the *Encyclopedia* cannot adequately take into account developments in the theoretical underpinning of products liability law, such as those reflected in the recent law of economics literature.³³ International initiatives in products liability by the Hague Convention,³⁴ the Council of Europe,³⁵ and the European Economic Community³⁶ are simply not mentioned.

The inability to offer current information obviously limits the usefulness of the book to practitioners. Its value to the lawmakers and academics to whom the *Encyclopedia* seeks to appeal is also lessened. Those lawmakers considering proposals to adopt some form of products liability law cannot overlook fourteen years of international experience. Instead of being a primary resource for lawmakers, the *Encyclopedia* may become merely a source of increasing outdated information. This would be a tremendous waste of talent and effort.

The gap between the completion of research and publication also produces substantive inaccuracies and misimpressions. For example, the reader is informed that the United States Federal Torts Claims Act excludes liability for assault, battery, false imprisonment, and several other intentional torts.³⁷ This statement was accurate when written in 1972. The Act was amended in 1974, however, to allow such suits when based on the conduct of law enforcement officers.³⁸ Similarly, the text creates the impression that in the United States there is no remedy for torts committed in

generally *Symposium, The Passage of Time: The Implications for Products Liability*, 58 N.Y.U.L. REV. 733 (1983).

³² E.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980). See generally Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982).

³³ E.g., Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); Calabresi & Hirschhof, *Toward a Test for Strict Liability in Tort*, 81 YALE L. J. 1055 (1972).

³⁴ See generally Reese, *Further Comments on the Hague Convention on The Law of Products Liability*, 8 GA. J. INT'L. & COMP. L. 311 (1982).

³⁵ See generally Hanotiau, *The Council of Europe Convention on Products Liability*, 8 GA. J. INT'L. & COMP. L. 325, 326 (1978).

³⁶ *Id.* at 327-41. See also Orban, *Product Liability: A Comparative Legal Restatement — Foreign National Law and the EEC Directive*, 8 GA. J. INT'L. & COMP. L. 342 (1978).

³⁷ Eorsi, *supra* note 15, ch. 4, § 178.

³⁸ Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680 (h) (1976)). See generally Voger, Gitenstein & Verkuil, *The Federal Torts Claims Act Intentional Torts Amendments: An Interpretive Analysis*, 54 N.C.L. REV. 497 (1976).

the course of the administration of justice. No consideration is given to the growing area of constitutional torts that provides a damage remedy in many cases.³⁹ Such oversights create an image of American law that is seriously flawed.

These criticisms should not, however, overshadow the remarkable achievement of the *Encyclopedia*. It succeeds in providing, for the first time, an insightful overview of tort law throughout the world. The extensive bibliographies accompanying each chapter are, by themselves, valuable resources for the practitioner, lawmaker, and scholar. Like all encyclopedias, this book can provide only the first step in researching an issue. It serves this function with a richness that few other works of its type can match.

It also succeeds in conveying a sense of community within the law of tort. One cannot help but be impressed by the similarity of basic tort doctrine throughout the world. The pervasiveness of the fault principle is particularly revealing. The free market industrial west, the socialist bloc, and the developing nations each have systems of tort law that emphasize the role of fault.⁴⁰ There are significant differences to be sure, but the common reliance on fault suggests shared notions of fairness and responsibility that transcend political or economic systems. The *Encyclopedia* will allow legal educators and policymakers throughout the world to incorporate a global perspective to what previously may have been viewed as only a local problem.

Though not without flaws, the *Encyclopedia* is a landmark in international and comparative scholarship. It sets the benchmark for future research and should broaden the perspective of many people.

Thomas A. Eaton*

³⁹ E.g., *Monroe v. Pape*, 365 U.S. 167 (1961); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). See generally Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984).

⁴⁰ Tunc, *Introduction*, *supra* note 21, ch. 1, §§ 17, 99-115. Even the so-called strict liability of American products liability law retains many elements of the fault ethic. See Powers, *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777 (1983).

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