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und anglo-amerikanischen Rechtsgeschichte

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The Comparative Legal History of the Law of Torts

Edited by

Eltjo J. H. Schrage

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Herausgegeben von

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und Reinhard Zimmermann

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ELTJO J. H. SCHRAGE

Negligence. A comparative and historical introduction to a legal concept*

I. Introduction

In their inauguration of this series of publications the general editors, Prof. H. Coing and Prof. K. W. Nörr stated that their intention was to give rise to a continuation of that tradition of learned scholarship which from a historical point of view kept an eye open for the common features that linked the common law and the civil law – notwithstanding the obvious distinctions. In line with previous volumes this book compares the legal history of *Negligence*, in other words: this collection of essays is devoted to the comparative legal history of liability for unintended harm from the Middle Ages onwards.

In this phrase the words *from the Middle Ages onwards* indicate the framework and the limitations to this volume. Roman law in the narrow sense of the word plays a role only in so far as it is indispensable for the understanding of the medieval and later legal history. Consequently the method of this volume is different from that developed by Buckland and Mc Nair for comparing the Roman law of Antiquity on the one hand and modern English law on the other. This work aims at a dynamic comparison of the similar legal problems concerning negligence and the different solutions given to those problems in the various legal systems. Therefore the contributions covering similar periods should be read together.

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* The author wants to express his profound gratitude to Tony Weir, fellow of Trinity College Cambridge, for his unrivalled hospitality and his willingness to share his longstanding knowledge. Without his continuous encouragement this article could not have been written. Tony Weir furthermore translated the contribution by Mme Auzary-Schmaltz which was originally in French and he corrected the language of several other contributions. The author also wants to thank the Master and Fellows of the aforementioned Trinity College, who elected him as a visiting fellow during the course of 1998.

I am also under particular obligations to my colleague and friend Dr. Waibel (University of Tübingen) who has undertaken the tedious and thankless duty of reducing the conventions employed by an assortment of writers of different nationalities to uniformity for the benefit of the printer, and has discharged it with admirable diligence and accuracy.

The first question to be raised is a terminological one. The danger of an over-simplification lies around the corner. "It is all too easy" Professor Baker writes right at the beginning of his paper, "to assume that words have always meant the same as they do today, and in particular that words which have become part of the lawyer's stock-in-trade represent eternal legal ideas or categories". In early English law the word *negligence* (*negligencia* in Latin) cannot be regarded as a term of art describing conduct of particular kind. Equivalent words were freely used to describe careless acts or omissions, without any sense that there was a general legal concept of negligence, from which answers could be deduced in specific situations. John Baker found even a number of cases dating back to as early as 1662 and 1671, in which the word *negligent* does not seem to have imported fault in the sense of carelessness, but rather the failure to discharge a strict liability.

But the student of the legal history of the 17th century is mainly concerned with causes of actions. In the 17th century, however, there did not exist a form of action called Negligence. The common law was dealing with actions for Trespass and trespass on the Case, while on the continent notably the *actio legis Aquiliae* and the *actio iniuriarum* played a dominant role in legal teaching. But there is a long way to go from these actions as they were used in the early days of the legal history to the general tort of Negligence of to day and the general remedy for unlawful acts, as codified in art. 1382 of the French Code civil of 1804,[1] and then was taken over from there into numerous other continental codifications.[2]

Admittedly the Common Law's Tort of Negligence as such is essentially a creation of the 19th century, though its tendrils reach back to an earlier usage of the word (Ibbetson). Professor Birks is of the opinion that the action on the case for unintentional harm had the potential to reach the 1932-position as early as 1732. Professor McQueen and Mr Sellar state that the case of *Gardner* v. *Ferguson* (1795) is generally regarded as the first case in the modern Scots law of negligence. G. Rotondi writes in 1917, that already the medieval canon lawyers took the first three steps on the road to the general remedy for unlawful acts by categorizing the *actio legis Aquilia* not so much as an *actio poenalis*, but as an *actio poenabilis*, first of all by understanding the sum to be paid by the defendant rather as damages than as a *poena*, secondly by considering the action as passively

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[1] Art. 1382 Code civil: Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer. The text of the German Bürgerliches Gesetzbuch § 823 is quoted *infra*, footnote 22.

[2] *P. Catala, J. A. Weir,* Delict and Torts: A Study in Parallel, in Tulane Law Review XXXVII (1963), p. 573–620; XXXVIII (1964), p. 221–278; 663–716; XXXIX (1965), p. 701–783.

transmissible and thirdly by enlarging the scope of the action to almost every unlawful act or omission.[3] The final step towards a general remedy, however, is ascribed by Professor Feenstra and the great majority of the modern scholars (among whom Rotondi) to Hugo Grotius. Feenstra criticizes a remark made by Kiefer, that the *Usus modernus* had already developed *eine deliktische Generalklausel* before Grotius.[4]

And this leads into the central question of this book. The legal history of the tort of Negligence started off with two actions and similarly so did the law of torts on the continent. Both traditions generalized their initial concepts of specific torts into the universal modern notions, and it is essentially that concept of *generalisation* which makes it possible to compare the legal history of the Civil with that of the Common law. In the Common law the decisive step was made with the ruling that

> "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question",

as Lord Atkin put it in *Donoghue* v. *Stevenson*.[5] There are, however, a few earlier landmarks in the law, such as the case of the unruly horses brought into Little Lincoln's Inn Fields, *Mitchil* v. *Alestree* (1676).[6] The last quarter of the 17th century saw the quiet, gradual emergence of a new species of liability that was to provide one of the two streams that merged in the early 19th century to produce the tort of negligence, the running–down actions, which were the start of a liability in negligence that was independant of trespass, the other stream being the development of an action on the case in tort for negligence in the performance of an undertaking or calling.[7] In 1768 Buller's *Nisi Prius* stated that *Every man ought to take reasonable care that he does not injure his neighbour*, and Prof. Birks points at Sir William Jones who – in his opinion – was in 1781 "the true inventor of the standard of the reasonable man." Tony Weir describes for the time being the importance of the tort of negligence in the common law of today: "announced in hieratic terms in 1932, its principle of liability has become

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[3] *G. Rotondi,* Dalla "Lex Aquilia" all. Art. 1151 Cod.civ. Ricerche storico-dogmatiche, in Rivista di diritto commerciale 14 (1916), p. 942–970, and 15 (1917), p. 236–295; also in his Scritti Giuridici II (1922), p. 465–578 § 1.

[4] *R. Feenstra, infra,* at footnote 104; cf. the text at footnote 78.

[5] *Donoghue* v. *Stevenson,* [1932] A.C. 562.

[6] *M. J. Prichard, Scott* v. *Shepherd* (1773) and the Emergence of the Tort of Negligence [Selden Society Lecture delivered in the Old Hall of Lincoln's Inn, July 4th, 1973], London 1976, p. 16.

[7] *Prichard,* p. 22.