Few Americans, even clever and ambitious ones, feel a need to inform themselves about abroad.¹

INTRODUCTION

Every year I shuttle between three continents: perhaps this is why I have been asked to reflect on the value of “comparative tort law.”² This is a huge and enriching field. A decade ago when I was writing about good faith in private law Reinhard Zimmermann kindly alerted me to how in the 1920’s German courts had used the general provisions of the German Civil Code to engage in “far-ranging juridical interventionism,”³ and how, starting in 1933, German courts exploited this technique to imbue the traditional German legal order with Nazi ideology. It was obvious that, unless I took a greater interest in comparative law and comparative legal history, I would not address critical issues nor face some of the most important dilemmas presented to a legal system; and that it is a poor legal education that does not expose students to the intellectual riches to be found in a contemplation of how other legal systems work across all levels - doctrinal, procedural, social, historical and so on. Comparative tort law stretches from theoretical issues such as the possible relationship of a tort system’s vitality and prominence with the relative paralysis of its legislature,⁴ to procedural matters such as how facts are discovered and dealt with, to empirical issues such as how the judicial use of comparative tort reasoning has varied over time and between jurisdictions.⁵ So I must be extremely selective.

The argument I will make in this paper is that the noble cause of comparative law as an intellectual activity is undermined by those who focus on its forensic utility. Specifically, I will examine the practical value to practitioners and judges in the court of final appeal in an English-speaking jurisdiction of paying attention to how tort issues are analysed in a different jurisdiction when the subject matter

¹ Max Hastings, Comment & Debate, GUARDIAN (London), May 4, 2006, at 32.
² In this article, “tort law” covers both judge-made common tort law as well as statutes in fields that were traditionally governed by the common law of torts (for example, defamation statutes). By “tort law,” I also mean “the law of delict.”
³ Reinhard Zimmermann, ‘Was Heimat hieb, nun heibt as Holle’ The Emigration of Lawyers from Hitler’s Germany: Political Background, Legal Framework and Cultural Context, in JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 1, 58 (Jack Beatson & Reinhard Zimmerman eds., 2004).
⁵ For an outstanding short account in a much-to-be-recommended collection on this topic see H. Patrick Glenn, Comparative Legal Reasoning and the Courts: A View from the Americas, in COMPARATIVE LAW BEFORE THE COURTS, 217 (Guy Cavinet, Mads Andenas, & Duncan Fairgrieve eds., 2004), as well as the outstanding essays in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmerman eds., 2006).
of the domestic case at hand does not positively require it. Why would a tort lawyer in Kansas be interested in how tort law operates in England? Of what value might an appreciation of the tort case law of the Tasmanian Supreme Court be to a lawyer in New Zealand? What dangers lurk for the Canadian judge tempted to dip into the Scots law of delict?

The paper is divided into three Parts. Part I looks at possible benefits that a practitioner or judge in an English-speaking jurisdiction might find in considering tort materials from other English-speaking jurisdictions. I will argue that the benefits of resorting to “comparative tort reasoning” vary greatly according to the focus of the legal analysis in issue: outcomes; arguments; principle; or conceptual arrangement. For example, an awareness of the outcomes of similar fact situations in other jurisdictions has pragmatic value in relation to forum shopping. When the focus is on legal argument, a grasp of comparative materials yields its richest intellectual rewards for the practitioner and judge because “it is arguments that influence decisions”. What about where the focus is on principle, that is where the balance of competing arguments has crystallized into legal principle? Because that balance is contingent on cultural context, the value in considering which legal principles have been accepted in other jurisdictions is also contingent: for example, in the U.S. it seems to be a principle that a defendant in the tort of deceit cannot be liable for coincidental consequences; but that principle is rejected in England. Finally, where the focus is on conceptual arrangements, that is on how principles are organized, there is typically very little utility in considering the structures of other systems.

In short, I argue that, tort materials from other English-language jurisdictions may be of value in the work of the domestic practitioner and judge but that by far the potential for enrichment is greatest in the context of comparative tort argumentation. Moreover, when a comparativist asserts that “comparative law and methodology . . . should be used by all [legal academics] when teaching their own topics of national law,”7 we need not be dismayed. In all English-speaking jurisdictions tort practitioners and judges routinely do use comparative materials, that is material from outside their domestic jurisdiction,8 most notably the fundamental concerns and arguments that courts in other English-speaking jurisdictions have thought of legitimate weight. California cites concerns and arguments from New Jersey judgments, Australia cites Canada, England cites New Zealand, and we all cite Scottish law on a daily basis.9 Indeed, cross-

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8 For example, see the immense influence of the great comparative torts text John G. Fleming, THE LAW OF TORTS (9th ed. 1998).
jurisdictional comparison is central to legal training in the U.S. where the typical torts teacher uses far more out-of-state material concerning legal arguments than in-state. Among English-speaking jurisdictions the real question, therefore, is simply whether the future resort to even more comparative material would be worth the candle.

But in Part II, I address a very strange phenomenon about which we must not be coy: when many people refer to “comparative law” they mean the study of law across, not just jurisdictional but language barriers. I will call this “comparative foreign-language law.” There are a number of reasons why comparative law has been seen as a cross-language study. One has been the popularity in recent decades of the search for the “common core of legal solutions throughout the world... [wherein] the focus has been on the similarity of practical results.”

This, of course, required comparison across language barriers. There has been a lot of abstract writing on the “methodology” of comparative foreign-language law which I will not address since much of it seems tediously to state the obvious: the most effective comparative method is to compare the legal treatment of factually equivalent situations; always read foreign law in its full social, legal, cultural, political and economic context; beware assuming that the law in the books coincides with the law in action and so on. My argument here is that the practitioner and judge in an English-speaking jurisdiction should, for a variety of reasons, exercise extreme caution in using comparative materials from foreign-language systems.

Finally, in Part III, I turn to a body of material I call “coordinated” tort materials: materials that seek to expound tort law across multiple intra-national tort jurisdictions, such as restatements of law by the American Law Institute, or across multiple national tort jurisdictions such as Helmut Koziol’s “Principles of European Tort Law” published in 2005.

I. BENEFITS OF COMPARATIVE TORT MATERIALS FROM ENGLISH-LANGUAGE JURISDICTIONS

A. Basic Contributions

So what can a comparison between the tort systems of English-speaking jurisdictions bring us? There is no doubt that tort tourism can be an entertaining end in itself. It can simply be very amusing to appreciate the quaint doings of

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10 Erik Jayme, Multicultural Society and Private Law German Experiences 9–10 (1999). Jayme notes reasons for this such as “the needs for collaboration in international commerce, the idea of an international community and the anthropological view of human beings as having equal needs.”
foreigners.\textsuperscript{11} Beyond mere intellectual curiosity, we should ask in what general ways might an appreciation of the tort systems of other English-speaking jurisdictions illuminate the work done by domestic lawyers? The diversity of experience suggests a number of ways. First, it is often the case that fact situations have been the subject of tort litigation and given rise to the testing of doctrine in other jurisdictions but not yet locally. A knowledge of such phenomena arms domestic lawyers with some very effective tools with which to examine their domestic tort doctrine and may lead to the conclusion that there is a gap, ambiguity or incoherence in such doctrine.

For example,\textsuperscript{12} the Canadian case of \textit{London Drugs Ltd. v. Kuehne and Nagle International Ltd.}\textsuperscript{13} highlighted the fact that no common law system has yet

\textsuperscript{11} We can learn, for example: that in some cultures a clan has standing to sue for damages but not in Scotland; that New Zealanders cannot sue each other in tort for accidental personal injuries; that Australia no longer has a \textit{Rylands v. Fletcher} rule; that Canadians no longer have a tort of breach of statutory duty; that breach of fiduciary duty is a tort in the U.S.; that in the Scots law of defamation no distinction is made between written and oral communication, nor does the defamatory statement have to be communicated to a third party; that in the United States there are native American legal systems and courts such as the Navajo Supreme Court which resolve cases on principles that include specifically Navajo norms; that there is at least one English court in technical existence that is, arguably, a civil law court and can proceed only in accord with that law [from 1737 the High Court of Chivalry lay dormant until reconvened in 1954 for Manchester Corp. v. Manchester Palace of Varieties Ltd., [1955] 1 All. ER. 387 (C.Chiv.) (U.K.)]; that in Scotland, Shetland and Orkney still retain Udal law derived from the Norse law brought by the Vikings in about 800 A.D. [for a modern acknowledgement of Udal law see definition of “owner” in § 2(1) of the Housing Benefit Regulations 2006 No. 213 (United Kingdom); major differences between Udal and Scots Law include shore ownership rights, important for pipelines and cables; most U.S. employees cannot sue their employer in tort for negligently inflicted injuries; that judgments of the Judicial Committee of the House of Lords are never joint because, technically, they are speeches to the House of Lords Chamber of the Westminster Parliament; and that until the 1960s there was only one judgment issued by the Judicial Committee of the Privy Council because, technically, it is the “advice” of the Privy Councillors to the Queen (on the members’ experience of their unanimity rule see \textsc{Alan Paterson}, \textsc{The Law Lords} 98–99 (1982)].

\textsuperscript{12} Yet another example involves the issue of a pharmaceutical manufacturer’s tort liability for unforeseeable side effects of prescription drugs, which the Thalidomide disaster squarely presented to the tort systems of a number of English-speaking jurisdictions, notably the United Kingdom and Australia in the 1960’s. Had U.S. products liability lawyers been sufficiently sensitive to this issue, they may have more quickly realised that in tort claims against drug manufacturers for unforeseeable risks, despite deploying the rhetoric of “strict” liability found in § 402A of the Second Restatement of Torts, U.S. courts were scarcely ever prepared to impose such tort liability: a situation that became patent after the hostile furor that followed the extraordinary imposition of such strict liability in \textsc{Beshada v. Johns-Manville Products Corp.}, 447 A.2d 539 (1982). Conversely, tort lawyers in English-speaking jurisdictions that have enacted the 1985 European Directive on product liability (namely, England, Scotland and Eire) or clones of it (such as Australia) would today do well to test their interpretation of that Directive with the type of claim known as the “classic” U.S. products liability case: a crashworthiness claim involving the adequacy of the strength of a car’s side panels, truck axle, chair and so on.
formulated a general approach to the question of where, when, and why a defendant to a tort claim can rely on a contractual term, such as an exclusion clause, in a contract which is not between the plaintiff and that defendant. Another example is recovery in negligence for pure economic loss. While this is a backwater in U.S. tort law, it has generated a vast case law in non-U.S. common law systems. An appreciation of the factual scenarios of these cases and how courts dealt with them would definitely enhance the perspective of U.S. tort lawyers. As Justice Posner notes, “just as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations laboratories from whose legal experiments we can learn.”

Of the other general ways in which comparative tort law might assist domestic lawyers, perhaps the most important is that it helps remind domestic lawyers and courts that the local results of cases, the arguments used to support them and the conceptual arrangements of principles are not some unique and universal order ordained by inexorable “logic” or legal “science.” They are culturally and temporally contingent and therefore may be open to forensic re-evaluation.

Now, if we look in detail at how comparative tort law might illuminate the work of domestic lawyers, and so obtain an idea of what future research might be interesting, it is helpful to deal separately with the different types of focus such lawyers may adopt.

B. A Focus on Outcomes

There is no doubt that parties attempt forum-shopping. It is important to note why this can happen even within a federal system such as Australia where there is only one final court of appeal on matters of judge-made “common law”: it is because the states have legislative capacity in areas in which the common law of torts has been active. For example, until 2006 Australian states had divergent statutes with respect to liability in defamation. So while Australia has a unified “common law,” its “tort law” may diverge on a particular issue, hence forum shopping can be attractive.

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15 See e.g. BHP Billiton Limited v. Schultz (2004) C.L.R. 61 (Austl.) (South Australian asbestos plaintiff seeking to sue employer and asbestos suppliers in New South Wales for, inter alia, negligence and breach of statutory duty).
17 Conversely, in the U.S., the “common law” element of tort law is a state matter but certain aspects of “tort law” may be unified by constitutional principles laid down by the Supreme Court and federal legislation, either by direct action or pre-emption. See Samuel Issacharoff & Catherine
Forum shopping arises where more favourable outcomes may be produced because of differences in doctrine, procedural rules or other aspects of the legal environment. Other factors may be the attraction of a more specialised judiciary, more compassionate juries and trial judges, or better access to the courts and so on. The greater a lawyer’s awareness of the pattern of outcomes in other jurisdictions and the reasons for them, the better will be his advice to his client and the arguments on forum that he can put to the relevant court. Thus, for example lawyers for a group of more than 3,000 South African asbestos victims, most black and of modest means, overcame a claim of forum non conveniens


For example, the unique trust law of the Cayman Islands provides tight asset protection that in combination with strict bank secrecy and lack of local income taxes has made this jurisdiction one of the most popular for offshore trusts. Recent examples of forum-shopping in the field of defamation include Dow Jones & Co. Inc. v. Gutnick, (2002) 210 C.L.R. 575 which held that words published on the Internet overseas, that are accessible in Australia, can amount to a defamation committed in Australia; and Berezovsky v. Michaels, [2000] 1 W.L.R. 1004 (H.L.) (U.K.) where the plaintiff, a Russian, brought a libel action in England in respect to an article in the magazine Forbes. 98.9% of the issue in question was sold in the U.S.A., Canada or to U.S. forces while the English circulation was only about 2000 copies. Lord Hoffmann noted:

... the notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer. An English award of damages would probably not even be enforceable against the defendants in the United States. ... The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that New York Times v. Sullivan, 376 U.S. 254 (1964) makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary ...

The plaintiffs are forum shoppers in the most literal sense. They have weighed up the advantages to them of the various jurisdictions that might be available and decided that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action.

(1023–24)

On the importance of the distinction for forum-shoppers see Harding v. Wealands, [2006] UKHL 32 (U.K.).

As we can see in the case of U.S. corporate bankruptcy law, e.g. Marcus Cole, ‘Delaware is not a State’: Are We Witnessing Jurisdictional Competition in Bankruptcy? 55 Vand. L. Rev. 1845, 1863–64 (2002).
before the House of Lords by, *inter alia*, bringing extensive evidence of the unavailability of funding for their claims in South Africa and the absence, as yet, of developed procedures for handling group actions there.\(^{21}\) Similarly, settlements and bankruptcy reorganization plans that seek to cover plaintiffs from different jurisdictions depend on knowledge about the varying domestic doctrinal and process environments as they actually play out.\(^{22}\)

Another potential role for an appreciation of outcomes in tort cases in other jurisdictions is as a “good example or terrible warning.” For example, based on cogent analysis the Australian High Court has held that the builder of a dwelling may owe a duty of care in the tort of negligence to a remote purchaser.\(^{23}\) This result contrasts starkly with the earlier refusal of such a duty by the House of Lords\(^ {24}\) and may usefully remind litigants in Britain that the exposition of this refusal by the Lords was extremely weakly reasoned. My argument here is not that the mere fact of the Australian decision provides a reason to doubt the Lords decision: we should reject justice by head-count. My point is that it might remind us that the reasoning of the Lords does not withstand scrutiny and that their refusal to recognize a duty may therefore be vulnerable to attack.

Outcomes in other jurisdictions may also serve as terrible warnings. For example, “no one can pretend that the existing law [on recovery in negligence for nervous shock] . . . is founded upon principle.”\(^ {25}\) In Britain, for example, the development of the “bright-line” rules in this field arrived at the bizarre point where they would prevent recovery by a mother who suffers psychiatric injury after finding her child’s mangled body in a mortuary on the grotesque basis that “her child’s blood [was] too dry to found an action.”\(^ {26}\) Once one jurisdiction has held “thus far and no further,”\(^ {27}\) as the House of Lords has done in this area, this might remind other jurisdictions that it is both legitimate and sensible to abandon hope that the common law could ever lay down coherent and respectable


\(^{27}\) White v. Chief Constable, [1999] 2 A.C. 455, 500 (per Lord Steyn).
boundaries to such liability, or confirm a jurisdiction in its refusal to allow any such claim.\textsuperscript{28}

On the other hand, it seems clear, at least to me, that the mere fact that a domestic lawyer can show that a party in a comparable suit prevailed in another jurisdiction provides no weight for his client's claim: again, law should not turn on head counts (see below).

C. A Focus on Doctrine

1. Outline

In standard judicial analysis in tort a consideration of various "legal concerns,"\textsuperscript{29} often in tension, and the arguments based on them lead to the formulation of "principles" which are then arranged in a "conceptual framework." For example, most common law jurisdictions have crystallized a principle that a person is not liable for failing to rescue a stranger: here the legal concern with the victim's interest in his person is judged to be outweighed by other legal concerns such as the libertarian concern that individuals should be free to do whatever they wish with their person or property, as long as they do not infringe the same liberty of others.\textsuperscript{30} In most common law jurisdictions this principle is lodged within the conceptual device known as "duty": there is no duty in the tort of negligence to rescue a stranger. At each of these three levels of doctrinal focus - arguments, principles and conceptual arrangement - an appreciation of comparative tort may be illuminating.

2. Concerns and Arguments

Let me first take concerns and the arguments based on them. Mainstream domestic legal analysis seeks to excavate the legal concerns embedded in, perhaps masked by, the legal reasoning published by courts. As Justice Posner has acknowledged,\textsuperscript{31} the form and substance of legal concerns and arguments

\textsuperscript{28} U.S. jurisdictions that have taken a hard line on such claims include Arkansas, Georgia, Kentucky and Oregon: see NICHOLAS MULLANY, PETER HANDFORD & PHILIP MITCHELL, TORT LIABILITY FOR PSYCHIATRIC DAMAGE, ¶¶ 1.250–1.280, ch. 1, n.143 (2nd ed. 2006); and D.J. Gilsinger, 89 A.L.R. 5th 255.


\textsuperscript{31} Posner, supra note 14, for the proposition that it is entirely appropriate for a U.S. court "to cite a decision by a foreign or international court not as a precedent but merely because it contains persuasive reasoning (a source or informational citation), just as one might cite a treatise or a law review article because it was persuasive, not because it was considered to have any force as precedent or any authority."
excavated from judgments and tort discourse in other jurisdictions can also be valuable to the domestic lawyer by widening his palette of ideas. This can be true even where those judgments originate from a tort system with different general principles arranged within a different conceptual superstructure. It may be that a very specific legal concern is raised in a foreign case but has a parallel application domestically: a particularly important example here being the concern that tort rules should not tend positively to encourage abortion.32

A more general example33 of an emerging dual-concern for many of our systems is whether the tort law of our domestic communities should respond as those communities become increasingly multi-cultural, and if so what form that response should take.34 As Erik Jayme asserts, “difference as such has emerged as a value in itself,”35 and this concern with multiculturalism presents many diverse challenges to tort law. The statement that X was seen drinking beer would not be shameful or “defamatory” in most Anglo-Saxon Christian circles; but how is such an issue to be treated in Muslim sub-communities such as those of


33 Legal concerns also arise in relation to how legal reasoning should be presented. Take the unanimous House of Lords decision in Fairchild v. Glenhaven Funeral Services Limited, [2003] 1 A.C. 32 (U.K.), on which see Jane Stapleton, Lords a‘leaping Evidentiary Gaps, 10 TORTS LAW J. 276 (2002). This allowed claimants, who had contracted mesothelioma after several parties had wrongly exposed them to asbestos, to recover from each even though it was not possible to prove that the exposure of any particular defendant was a factual cause of the cancer because of medical ignorance of the aetiology of that disease. All but one of the Law Lords were concerned to avoid using legal fictions when presenting the new rule being created. They explicitly refused to present this new rule in terms of the legal fiction that “on the evidence” factual causation was sufficiently established. An awareness of these Fairchild judgments should galvanize American tort lawyers to appreciate that, although it has gone virtually unremarked, most U.S. asbestos cases have so far proceeded on the basis of legal fictions. See Jane Stapleton, Two Causal Fictions at the Heart of U.S. Asbestos Doctrine, 122 LAW Q. REV. 189 (2006). Similarly, Australian courts which have so far sanguinely allowed such mesothelioma claims must now accept that in doing so they have resorted to the very legal fiction wisely deprecated by the Lords.

34 For a useful introduction to many general issues, see ALISON DUNDEE RENTELIN, THE CULTURAL DEFENSE (2005).

35 Jayme, supra note 10, at 4. See also “a new order based on differences which are accepted and are no longer levelled down by resort to national public policy . . . is the very essence of private law in a multicultural society” (at 25). And the equally splendid analysis by GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).
Leicester (where one third of the population is Asian) and Bradford (where twenty-two percent of the population are from ethnic minority groups, particularly from Pakistan)? What is not reasonably foreseeable behaviour in one sub-community may be reasonably foreseeable in another. What is an acceptable lifestyle choice in one sub-community (loud music, scanty or otherwise revealing attire, religious calls to prayer, cooking odours, or slaughter of cows) is a gross nuisance in another. If a reasonable Christian would wear a crash helmet, is it unreasonable conduct (contributory or comparative fault) when a Sikh does not? When tort law requires a warning to be given, say on a product, what languages should be used? When parties seek to resolve such conflicts within the bilateral form of tort law, bald notions of “accommodation,” “mutual respect,” and “tolerance” may well be useless platitudes. Courts will need to isolate and enunciate the specific legal concerns at play in such cultural-clash cases, a task in which the experience of the tort systems of other multi-cultural societies would be especially valuable.

Next we might ask whether material from another jurisdiction can be legitimately deployed to attack a legal concern enunciated by a domestic judge. Suppose in his reasons for judgment a domestic judge in the court of final appeal cites the alleged socio-economic consequences of a certain legal principle: perhaps he has refused to impose negligence liability on, say, a medical provider or public authority on the basis, inter alia, of his concern with the possibility of “defensive medicine” or the “distortion” of public budgets. Might a comparativist legitimately attack such economic intuitions on the basis that they are undermined by the absence of these effects in other jurisdictions? There are three reasons to think such an attack is not legitimate.

36 See e.g. Kavanagh v. Akhtar, (1998) N.S.W.C.A. 779 (Austl.). See also Mustapha v. Calligan of Canada Ltd., [2005] 138 A.C.W.S.3d 767, where the Ontario Superior Court of Justice at ¶ 211 noted “the background of Mr. Mustapha in the Middle East, where the devotion to and concern for the family is at a higher level than is found in North America . . . predisposed Mr. Mustapha for the reaction that occurred,” namely psychological injury from observing a fly in an unused bottle of commercially supplied water.

37 Church bells; Muslim call to prayer broadcast over loudspeakers; etc.


39 Of course some nations do not embrace their multi-culturalism in the same way. In a highly perceptive comparative analysis, Chief Justice McLachlin of the Supreme Court of Canada noted that “the American ethic is basically one people, one language, one culture. Canada, by contrast, is not a melting pot but a mosaic.” The American Law Institute, Remarks and Addresses at the 78th Annual Meeting, May 14–17, 2001.

40 For example see the attack on Lord Hoffmann by Basil Markesinis and Jorg Fedtke, Authority or reason? The Economic Consequences of Liability for Breach of statutory Duty in a Comparative Perspective, E.B.L.R. 5 (2007). Also see Basil Markesinis, Judicial Style and Judicial Reasoning, C.L.J. 294, 304 (2000).
First, the possibility that empirical evidence about the social effects of a specific law in a foreign jurisdiction exists in an adequately rigorous and refined form is vanishingly small: and it is highly unlikely that sufficient funds will be allocated in the future to designing and carrying out the research required to collect and appropriately analyse statistically significant data. Even in the U.S., where a great effort has been put into empirical analysis of the tort system, we find that the most reliable results are merely impressionistic and do not address the sort of fine-tuned issues at stake in individual cases. Second, even if such empirical evidence of another tort regime were available, there may be social, economic or cultural reasons why that experience cannot be translated to the domestic context.

Third, while it is a valid objection to the domestic judge in the court of final appeal merely asserting “unconfirmed” economic intuitions, he can easily cure the problem and put his reasoning on a sound basis by expressing his concern in terms of the risk that these socio-economic consequences might flow from a finding of liability. Such a concern is legitimate and it is up to such a judge to place a value on the concerns he legitimately identifies, including a preference for any doctrinal shifts that occur within the law to be incremental if possible. If the judge thinks there is even a mere chance that doctors or public authorities might

Ironically, the best recent illustration of the inadequacy of empirical data from foreign systems is provided in Basil Markesinis and Jorg Fedtke, Authority or Reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective, E.B.L.R. 5 at 59-60 and 72 (2007). The authors seek to persuade British courts to expand the liability of public authorities into new fields such as exercising a statutory power to order the removal of an object obstructing vision at an intersection, see Stovin v. Wise, [1996] 3 WLR 388. In support, these authors cite some-what dated surveys which investigated the financial burden of liability on German public authorities between 1974-7 and 1993-5. Yet, as the authors themselves concede, not only did these surveys not provide a “price-tag” for the administration of these liabilities, but the surveys did not even differentiate the new fields in issue such as that in Stovin’s case (for example the surveys merely state that 73.4% of payments were made in relation to “traffic accidents”).

See DON DEWES, DAVID DUFF & MICHAEL TREBILCOCK, EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY 414 (1996); “The great disappointment is that the deterrent effect of tort is limited and uneven or cannot be established by existing studies . . .”; CAROL HARLOW, STATE LIABILITY – TORT LAW AND BEYOND 28 (2004): “Studies of the effect of tort law on public decision-making are uncommon, inconclusive and sometimes unreliable, and such information as we do possess is fragmentary”; BASIL S. MARKESINIS ET AL., TORTIOUS LIABILITY OF STATUTORY BODIES: A COMPARATIVE AND ECONOMIC ANALYSIS OF FIVE ENGLISH CASES 117 (1999); “the testing of hypotheses using empirical research techniques...is expensive and rarely done”; STEPHEN J. CARROLL, ASBESTOS LITIGATION: COSTS AND COMPENSATION (2005); and Peter Cane, Consequences in Judicial Reasoning, in OXFORD ESSAYS IN JURISPRUDENCE, 41 (Jeremy Horder ed., 4th ed. 2000).

As Lord Hoffmann put it in Human Rights and the House of Lords, 62 Mod.L.Rev. 159 at 162 (1999); “the payment of compensation might in fact be detrimental to good policing, because it might make the police defensively unwilling to take risks” (emphasis added).
indulge in wasteful defensive measures he might well assess that risk as one that weighs very heavily against the imposition of liability. The same is true of the mere risk that imposition or failure to impose liability might positively encourage abortion. As an individual we might not agree with the judge’s assessment of the relevant risk but it is not incoherent. We must acknowledge that judges’ valuations may have deep cultural roots that are not the same as those of other jurisdictions, producing different judicial responses even if the risks could be assessed as identical. In short, it is not incoherent for a domestic court to ignore “evidence” of how a legal principle operates elsewhere.

Finally, even though it is in the area of legal concerns and basic argument (for example about abortion, indeterminacy of liability, self-help, or encouragement of rescue, etc.) that comparative tort reasoning offers its richest rewards, a domestic court must be selective in its use of tort material from other English-speaking jurisdictions. The human mind has “bounded rationality”: gathering and processing information is costly so not all material can be addressed. Given there must be limits on what the domestic court can look at, it needs some sort of rule of thumb by which to select the sources which may be of most value. For example, within the group of nations consisting of the UK and the "Old Commonwealth" (Canada, Australia and New Zealand) the de facto rule of thumb seems to be that, while much may be of value in one another's jurisprudence, explorations of comparative materials from farther afield is probably not cost efficient.

This is not a surprising approach: the legal concerns, principles and conceptual arrangements of tort law are closely related to the cultural values and

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44 For example, in France extensive liability is imposed on public authorities and the justification given is that since the collective benefits from the activities of these bodies the burden of those activities should be shared, while in stark contrast, in England such liability is much narrower, and this is explained by a philosophical emphasis on the collective benefit that flows from having the individual yield to the wider public interest: DUNCAN FAIRGRIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY 265–66 (2003).

45 Bosnic, supra note 14: “Suppose a judge happened to read a decision of the German Constitutional Court concerning the right to an abortion and found in it an argument against abortion (or perhaps facts about the motives for or procedures of abortion) that he hadn't seen before and that he found persuasive . . . . All these are examples of unexceptionable citation to foreign decisions.”

46 Dozens of such concerns are identified and evaluated in Jane Stapleton, Duty of Care Factors: A Selection from the Judicial Menus, in THE LAW OF OBLIGATIONS: ESSAYS IN HONOUR OF JOHN FLEMING 59 (Peter Cane & Jane Stapleton eds., 1998).

47 This informal term describes that subset of the (British) Commonwealth of Nations comprising the pre-1945 Dominions. The less diplomatic term is the “white commonwealth”.

48 Within the UK-Old Commonwealth group there exists a vigorous email discussion group: the Obligations Discussion Group run by Jason Neyers of the University of Western Ontario. To be added to the list send a message to obligations-request@uwo.ca.
legal structures of a society, and there is little doubt that lawyers and judges within this group of nations tend to think there is a greater affinity with each other in all these respects than with other, even English-speaking, jurisdictions. This is, at least, a more palatable explanation for their Western neglect of comparative English-language legal materials from outside this "white Commonwealth." It is also an explanation why courts in this group of nations rarely venture into US tort law in any fully engaged manner.

Moreover, within this group of nations, we often see domestic courts being even more selective on the basis of the relative intellectual utility of the materials from other jurisdictions. Not unexpectedly a domestic court finds greater illumination in material from other jurisdictions which: attempts to provide general guidance rather than to decide a case on the narrowest possible grounds; provides succinct reasoning about the case in hand rather than an exhaustive survey of previous case law or an academic discourse on the general area of law; and above all contains lucid reasoning raising sound and persuasive legal concerns, crystallized where possible into general principles that are presented in a simple transparent conceptual arrangement. When one or more of these qualities is lacking the domestic court is unlikely to gain much from the material from another jurisdiction.

49 Even among those who accept that tort law is conditioned by cultural context, there is disagreement about the nature and extent of that influence. See Nikolas Roos, NICE Dreams and Realities of European Private Law, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 197, 202–13 (Mark Van Hoecke ed., 2004) comparing the "culturalist" approaches of Reinhard Zimmermann and Pierre Legrand.

50 For example, legal materials from the world's largest democracy, India, are available at www.commonlilii.org but are rarely referred to in the West. But see Michael Kirby, The Supreme Court of India and Australian Law, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA (B. N. Kirpal et al eds., 2000).

51 It is more common for such a court selectively to cite only those U.S. cases that accord with the result the British or Commonwealth court intends to adopt locally.

52 And therefore prestige. These characteristics are not static but wax and wane. There was a time when John Fleming, the "doyen" of Commonwealth torts scholars (according to Lord Cooke of Thorndon in Hunter v. Canary Wharf Ltd., [1997] A.C. 655, 717 (U.K.)), vividly contrasted the intellectual power of the Supreme Court of Canada and the House of Lords (John Fleming, Employee’s Tort in a Contractual Matrix: New Approaches in Canada, 13 OXFORD J. LEGAL STUDIES 430, 439 (1993); see also John Fleming, Economic Loss in Canada, 1 TORT L. REV. 68 (1993)) concluding that the former clearly eclipsed the latter. Today I am sure John would say the current House of Lords had more than made up the lost ground.

53 See, alas, the proximity of some recent decisions of High Court of Australia such as: Cattanach v. Melchior, (2003) 199 A.L.R. 131 with 69,493 words supported by 666 footnotes; Perre v. Apani, (1999) 164 A.L.R. 606 (68,900 words, 539 footnotes); and Brodie v. Singleton Shire Council, (2001) 180 A.L.R. 145 (61,918 words, 599 footnotes). The barriers such length presents to courts in other jurisdictions is reflected in how rarely these landmark Australia decisions have been cited by British courts: Cattanach twice; Perre three times; and Brodie only twice.
3. Principles

At the level of the crystallization of tort principles there is some potential for fruitful cross-fertilization. There are, of course, classic examples of this from the past. When in *MacPherson v. Buick* (1916)\(^{54}\) a U.S. court re-analysed the balance of legal concerns in the tort of negligence, it swept away the privy fallacy and ushered in the modern era of that dominant and voracious tort. Sixteen years later the House of Lords also swept the fallacy aside, expressly drawing support from the principle found in *MacPherson*, with Lord Atkin famously formulating it as the "neighbour principle". This principle of law recognized in *Donoghue v. Stevenson*,\(^{55}\) formally an appeal on the Scots law of delict, went on to be adopted throughout the rest of the common law world.

While on Scots law, we might note that, being an English-speaking "mixed system"\(^{56}\) of law, the influence of its civil law heritage can be studied free of the distortion of translation. For example, we can see that in Scots law precedents tend often to be used more to illustrate principle and "rights" than to provide a close factual analogy.\(^{57}\) By an appeal to principle, specifically to the general principle of reparation for loss wrongfully caused, *damnum injuria datum*, it may therefore be possible to create new entitlements in delict more freely than in England and Wales where the focus is on (the availability of) remedies under specific ‘nominate’ wrongs or ‘torts’. Since the highest court of appeal for delict claims from Scotland, the House of Lords, is the same body as the highest court of appeal for tort claims from England and Wales, the development of principle in Scotland has the potential to influence the tort law of the latter jurisdiction in significant ways.\(^{58}\) A future example here might be personality rights.\(^{59}\)

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56 Other mixed systems include: Quebec, Louisiana, Puerto Rico, The Philippines, Sri Lanka, and Israel. South Africa and Scotland are particularly interesting examples for English-speaking lawyers: see e.g. *Southern Cross: Civil Law and Common Law in South Africa* (R. Zimmermann & D. Visser eds., 1996); *Reinhard Zimmermann, Kenneth Reid & Da Visser, Mixed Legal Systems in Comparative Perspective Property and Obligations in Scotland and South Africa* (2005).
57 *Martin Hogg, Obligations* 73 (2003); see also *Joe Thomson, Delictual Liability* (3rd ed. 2004). Indeed in Scotland certain law texts, written principally in the 17th, 18th and 19th Centuries, are regarded as a source of law. Alan Rodger, *Savigny in the Strand, 28–30* THE IRISH JURIST 1, 14 (1995) argues that "any generalisations ventured by the Scottish judges themselves tend to be drawn from the convenient quaries of the institutional writers."
58 Nonetheless, this strong informal tendency to ‘coordination’ and convergence between the two jurisdictions in tort/delict operates formally on an opt-in basis.
59 On which, see http://www.law.ed.ac.uk/ahrb/personality, part of “Privacy, Property, Personality,” a project of the Arts and Humanities Research Council Research Centre for Studies in Intellectual Property and Technology Law based in the School of Law at the University of Edinburgh. For example, at a highly stimulating conference on rights of personality rights at the
A final lesson from Scots law of delict is that the value of comparative law to the domestic lawyer is in inverse proportion to the density of local case law. If, as in Scotland, that density is low there will be more perceived need and enthusiasm to search for ideas from other systems. And if, as in Scotland, the local system is a mixed one this comparative law strategy has a double potential to be fruitful.

But we should not ignore the fact that, though there has long been considerable comparative communication and cross-inspiration between English-speaking common law systems, their principles of tort law now diverge in many ways. The cultures, legal cultures and legislative environments within which tort law operates are not equivalent and such differences, though not necessarily apparent, may profoundly influence how tort principles are shaped, applied and perceived: the concerns of tort law are culturally and historically contingent. As Justice Windeyer of the High Court of Australia noted, "too much store can be put upon uniformity of law when it operates in conditions that are not uniform."

For example, determination of important tort issues such as duty, standard of care, vicarious liability and immunities are influenced by domestic cultural attitudes, for example to medical practitioners and patients' rights, insurance, commercial product suppliers such as bars, the profit motive in general, employers, the home and family, lawyers, the press, organized religion and public authorities. There are even differences between English-speaking jurisdictions in relation to which torts are actionable per se, and this may signal quite significant variations in how the respective cultures value the underlying

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Law School, University of Strathclyde in May 2006 I was delighted to witness a debate on whether dwarf tossing might be a tort and, if so, owed by whom to whom and under what circumstances!

60 A dynamic fuelled by the gradual abolition of appeals to the Privy Council.


62 The modern Western concern with privacy is an example here. In medieval times European travellers shared their hostelry bed with strangers, often with up to ten strangers, and the practice of sleeping several to a bed, usually naked, was not considered demeaning. NORBERT OHLER, THE MEDIEVAL TRAVELLER 93 (Caroline Hillier trans., 1989).


65 Lord Cooke of Thorndon in Hunter v. Canary Wharf Ltd., [1997] A.C. 655: "The reason why I prefer the alternative . . . is that it gives better effect to widespread conceptions concerning the home and family."

66 Is circumcision a battery?

67 See DUNCAN FAIRGRIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY (2003).
interest at stake. Judicial perceptions of such “instincts and traditions of the people” and “common law rights” are sometimes asserted in proud terms. For example in one case Lord Goff of Chieveley stated:

[W]e may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world... we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed...upon an assumption of freedom of speech...

Even bolder were the comments of Lord Hoffmann in a recent case:

Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers.

More generally Lord Hoffmann has emphasised “the real differences...in the history, cultures, and political structures of” the United States, Germany and the United Kingdom, and concluded that in the latter:

...confident democracy...we have our own hierarchy of moral values, our own culturally-determined sense of what is fair and unfair, and I think

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68 See e.g. S. Balganes, Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence, 35 COMMON LAW WORLD REVIEW 135 (2006).
71 In A & Ors v. Secretary of State for the Home Dept., [2004] UKHL 56, ¶ 88. See also: “...a power to detain people indefinitely without charge or trial... Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom.”(¶ 86); “...such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its own laws and political values, comes not from terrorism but from laws such as these.” (¶ 97). Similarly strident were His Lordship's comments in A & Ors v. Secretary of State for the Home Dept., [2005] UKHL 71, ¶ 82: “When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal “rendition” of suspects to countries where they would be tortured. See Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 COLUM. L. REV. 1681, 1681–1750 (2005).”
it would be wrong to submerge this under a pan-European jurisprudence of human rights.\textsuperscript{72}

Examples of divergences abound.\textsuperscript{73} For example the judge-made law of torts in England and Wales: did not develop analogues of the tort set out in §402A of the Second Restatement or the U.S. tort of retaliation against an employee in violation of public policy; and, despite its abolition in another part of the common law world, has retained the tort of breach of statutory duty. Perhaps the most prominent recent example of divergence from within the Commonwealth is when the Privy Council acknowledged that the common law of New Zealand appropriately embraced a principle of negligence liability,\textsuperscript{74} which the House of Lords, drawn from the same pool of Law Lords, has refused to admit to the common law of England and Wales.\textsuperscript{75} Lord Lloyd of Berwick, speaking for the Privy Council, noted “whether circumstances are in fact so very different in England and New Zealand may not matter greatly. What matters is the perception.”\textsuperscript{76} Similarly, though Australia and New Zealand are extremely close in many socio-economic and cultural ways, aspects of their tort systems could not be in starker contrast. Finally we have seen that even when a federal system such as Australia has a unified “common law,” the “law of torts” will diverge where the states have legislative capacity in the field traditionally addressed by common law of torts.\textsuperscript{77}

We might speculate about the causes of this divergence of principles within the Common Law world. What is clear, however, is that modern Commonwealth tort lawyers do not regard this phenomenon as objectionable 	extit{per se}. Indeed, most


\textsuperscript{73} As an Australian my favourite illustration of this has to do with bush hospitality: since 1914 the Australian High Court has rejected the special \textit{ignis suus} rule (which makes the landowner vicariously liable for such escapes caused by the negligence of mere licensees) on the explicit basis that “contemporary conditions in this country have no real similarity to urban conditions in medieval England where the escape of domestic fire rivalled plague and war as a cause of general catastrophe” and that such a liability rule would have been an intolerable restriction on “the tradition of hospitality in the bush and would have been a disincentive to pastoralists to allow Aboriginal communities to camp on their holdings.” Barnie Port Authority v. General Jones Pty. Ltd. (1992)179 C.L.R. 520, 534, 566. \textit{See also} Whinfield v. Lands Purchase and Management Board, (1914) 18 C.L.R. 606, 616 (per Griffiths C.J.).

\textsuperscript{74} That a local government inspector owed a duty of care to avoid economic loss to the plaintiff when he inspected the foundations of a building. Invercargill City Council v. Hamlin, [1996] 1 N.Z.L.R. 513 (P.C.); [1996] A.C. 624.


\textsuperscript{76} Invercargill City Council v. Hamlin, [1996] UKPC 56, 56 ¶ 31 (Appeal taken from New Zealand).

\textsuperscript{77} See supra note 16.
would probably argue that it is the inevitable and healthy manifestation of the adaptability of the common law to local circumstance and its ability to fashion appropriate principles. As Lord Cooke has remarked:

"It has become widely appreciated that there may be more ways than one in which national common law systems, starting from the same roots, may justifiably go. Different chains of reasoning and weightings of values may be reasonably open ... national ethos is allowed its own weight." 78

In short, while legal argument is easily transferred across jurisdictional boundaries because the concerns on which argument rest are foundational and simply expressed, the same cannot be said for principles crystallized by a local evaluation of legal concerns.

Finally, we must acknowledge that the role of the court of final appeal is to "judge," not provide some intellectual survey of world law. Suppose a court of final appeal in one jurisdiction is reliably informed that another English-language jurisdiction resolved the exact tort issue in dispute in favour of the plaintiff on the basis of principle X. Suppose further that both jurisdictions are extremely similar in all cultural parameters and share the same range of legal concerns and conceptual arrangements. Besides prompting extra care in the evaluation of the issues, even "anxious review," 79 does the existence of principle X in the other jurisdiction have any legitimate role in the resolution of the case? I do not think so. In my view it is not an incoherent or necessarily objectionable situation that: a barrister’s immunity from suit in negligence is wider in Australia than in New Zealand, Canada and the UK; British local authority building inspectors do not owe the duty of care to building owners that New Zealand ones do; U.S. lawyers who carelessly fail to lodge a client’s private law claim within the limitation period are not liable to the client if that claim had a less than even chance of success while in a parallel situation the British lawyer would be liable; and so on.

Accepting Lord Steyn’s view that “tort is not underpinned by a single overarching rationale ... it is a mosaic of interwoven principles of corrective and distributive justice," 80 I argue that the tort principles embraced by courts staffed by reasonable people may legitimately be different, and therefore produce different results between jurisdictions. The reason the courts of final appeal diverge may not even be based on different circumstances but merely on “an

intellectual preference for one outcome over another." It is, therefore, dangerous to argue that a determination of tort entitlements in another jurisdiction "must also have some bearing in giving concrete effect to the vague notions of 'fair' and 'reasonable'." I see no reason for such an extraordinary conclusion. But what if a considerable number of other jurisdictions have adopted the same principle X? Even here I believe there is a slippery slope from the argument that material describing the position in other legal systems "provides a check . . . that the problem identified in these appeals [by the Appellants] is genuine" to the separate assertion that it "is one that requires to be remedied" in the Appellants' favour. A "head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions" should be irrelevant. What is critical is the judge's "basic sense of justice."

4. Conceptual Arrangement of Principles
Two systems of tort law might embrace identical principles and produce identical results, but these may not be arranged in the same conceptual architecture. Even more rarely than in the case of principles of tort law will a comparison with the different conceptual arrangement in another jurisdiction be fruitful for the local practitioner or judge. For example, unusually in the common law world, breach of fiduciary duty is a tort in the U.S., yet it is hard to see how an awareness of this arrangement would in itself be of assistance to a non-U.S. judge or practitioner.

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81 Anthony Mason, Old and New–Commonwealth Final Courts of Appeal and Their Perspectives on the Common Law, 18 (13th Commonwealth Law Conference, Melbourne 16 April 2003). My favorite example of this concerns two U.S. cases involving the same defendant and the same allegedly defective intra-uterine device: the first court, a federal appellate court applying Arkansas law, found for the plaintiff; two days later the second court, the Delaware Supreme Court, reached the opposite conclusion. Juries were not involved at any stage of either case. Marianne Corr, Problems with the EC Approach to Harmonization of Product Liability Law, 22 Case W. Res. J. Int'l. L. 235, 242 (1990). The cases are: Hill v. Searle Labs., 884 F.2d 1064, 1070 (8th Cir. 1989) and Lacy v. G.D. Searle & Co., 567 A.2d 398 (Del. 1989).

82 BASHI S. MARKESINIS, FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS 352 (1997), emphasis added.


84 Id. (emphasis added). Also see Macfarlane v. Tayside Health Board, [1999] UKHL 50; [2000] 2 AC 59 at 81 (per Lord Steyn): "the discipline of comparative law does not aim at a poll of the solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations. And it reminds us that the law is part of the world of competing ideas markedly influenced by cultural differences."

85 Fairchild, [2003] 1 AC 32, ¶ 32 (per Lord Bingham).

86 Id. (emphasis added).

87 See also the structural line between contract and tort: in Scotland consideration is not a requirement for contract; English courts are well aware of this structural difference but see no advantage in adopting the Scottish position. Needless to say, the feeling is mutual.
But there may be occasions when a domestic court of final appeal might fruitfully be prompted to reconsider the structural form of local tort law on the basis that it is less intellectually “convenient” for some reason than that in another system. Take the area of causation in the law. Historically many common law jurisdictions have used causal language to capture two quite distinct legal questions: was the tortious conduct of the defendant historically involved in any way with the injury of which complaint is made? And if so, is that consequence of the tortious conduct judged to be within the (normatively) appropriate scope of liability for the particular cause of action? Thus in some U.S. jurisdictions we have the twin labels of “factual cause” and “proximate cause”; in others “legal cause” is used for the former enquiry; while in yet others it is used for the latter. To make the situation even more fractured the First and Second Restatements used the term “legal cause” to refer to the amalgam of both enquiries! Meanwhile, in the past some Commonwealth courts have tried to distinguish the enquiries by saying that they are concerned respectively with the search for “a cause” and “the cause.” Others have referred to the latter enquiry as a determination of whether the damage was “too remote,” a bizarre term given that it does not refer in any was to physical or spatial proximity!

Many of us have argued that this is an obfuscatory state of affairs. Now the American Law Institute’s Draft Restatement (Third) has adopted a much more transparent conceptual arrangement.\(^8\) causal language is to be restricted to the first enquiry which is termed “factual causation” and the second enquiry is to be labelled “scope of liability.” Henceforth the factual nature of the former enquiry

\(^8\) The Draft Restatement arrangement also allows us to identify issues more accurately. Take coincidences. A coincidental consequence of a course of conduct is a consequence the risk of which is not generally increased by the occurrence of that type of conduct. For example: D carelessly speeds along a road and this happens to bring the vehicle to a position where a tree falls on the vehicle injuring a passenger. It is well settled that speeding is careless and it is foreseeable that trees sometimes fall onto vehicles passing along a road. But, although in this freakish event the speeding was historically involved in the injury to the passenger (because but for the speeding, the tree would have missed the passenger), in general speeding does not increase the risk of trees falling on vehicles. The fact that speeding resulted in such an outcome on this particular occasion is a coincidence. The current assumption in the U.S. seems to be that a tortfeasor is never held legally responsible for a coincidence, but this is not the case in other common law jurisdictions (see e.g. Smith New Court Securities Ltd. v. Scrimgeour Vickers Ltd. [1997] A.C. 254 (U.K.)). It is therefore misleading to mask the coincidence issue as one of whether there is, what Justice Calabresi calls, a “causal linkage” between tortious conduct and injury (Guido Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 71–72 (1975); Liriano v. Hobart Corp., 170 F.3d 264, 271–72 (2d Cir.1999)). Far more convenient, because it allows more future flexibility in the development of the common law, is to identify this issue as a straightforwardly normative one. The Draft Restatement does this by treating coincidences as raising an issue going to the scope-of-liability. Other common law jurisdictions would greatly benefit from this conceptual arrangement because coincidental consequences are a common problem in tort cases.
and the normative nature of the second will be patent. Old terms such as “proximate cause” and vacuous “fudges” such as “substantial factor” are to be abandoned, and the relevance of a factor intervening between tortious conduct and injury, such as lightning or a criminal act by a third party, will be seen for what it is: relevant, not to the factual issue of whether the tortious conduct was involved in the history leading to the injury of which complaint is made, but relevant to the normative issue of whether the tortfeasor should be liable for this particular consequence of his tortious conduct. Lawyers in non-U.S. common law systems would benefit from examining this new conceptual arrangement. For example, the current jurisprudence of the Supreme Court of Canada continues to deploy “substantial factor” in just the sort of incoherent and indefensible ways that are rightly condemned in the Draft Restatement. Similarly, important decisions of the House of Lords and High Court of Australia would have been much clarified and simplified had such a conceptual arrangement as that of the Draft Restatement been used.

Finally, we must note that, while in jury-free tort systems the debate about which conceptual arrangements are preferable is not skewed by institutional competition between judge and jury decision-making, this has a profound influence in the U.S. There is a deep fracture in US tort law that divides the loud rhetoric of the importance, almost sanctity, of jury decision-making and the typically covert manoeuvres made by U.S. courts and advocated by tort academics to prevent issues from reaching the jury. Fundamental structures of US tort doctrine reflect this fracture, which is most nakedly exposed in cases where courts seek to restrain liability in negligence. The polarization between two crystallized duty rules of law with which the judge governs access to the jury (namely: a duty-owed-to-the-whole-world; and no duty to rescue a stranger) is unique to U.S. tort law and a fine illustration of this schizophrenic attitude to jury decision-making. The most astute US tort lawyers are prepared candidly to concede that “whether we are better served by giving juries or judges more or less normative work to do...is largely a political judgment, not a legal one”, but it is

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90 A conceptual arrangement that allocates the decision on an issue to the jury has important consequences: the decision will be unelaborated; it will be heavily protected from appellate review; and it will not provide any precedent in the future.

91 Jane Stapleton, Controlling the Future of the Common Law by Restatement, in EXPLORING TORT LAW 262 (M. Stuart Madden ed., 2005). Contrast the “subterfuge” of allocating to the jury, which “can give results without reasons of explanations”, tragic choices that we wish to “paper over.” GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 88 (1985).

clear that any analysis of the conceptual arrangements adopted in U.S. tort law would be incomplete without reference to this normative context.

D. A Digression on Theory

Though my focus in this paper is on the utility of comparative tort law for practitioners and judges, I want to digress at this point to say something about theory. US tort scholars now embrace "high theory" with an enthusiasm their peers in other English-speaking jurisdictions do not. Indeed, it has been asserted that today "tort scholarship in the United States veers from one universal solvent to another . . . ."93 while Posner, in noting the antitheoretical tradition of the common law, observes that "suspicion of theory is a bright thread in the tapestry of English thought."94

It was not always thus in the U.S. In 1907, James Coolidge Carter wrote:

In nothing is human vanity more largely displayed than in the love of a theory. The simple and beautiful forms in which consequences develop themselves when a sufficient cause is assumed . . . furnish a pleasure which the mind desires to hold in its grasp, and it recoils from any scrutiny into facts from a secret fear that the possession will be endangered, and turns back to revel in the delights of the theory.95

Later, in 1930, Karl Llewellyn also did not see great merit in constructing a general theory of law:

[T]he difficulty . . . is that there are so many things to be included, and the things to be included are so unbelievably different from each other. Perhaps it is possible to get them all under one verbal roof. But I do not see what you have accomplished if you do.96

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94 Posner, supra note 14 at 418. See also Allan C. Hutchinson, Evolution and the Common Law (2005) for the argument that no grand theory will satisfactorily explain the dynamic interactions of change and stability in the common law.
95 JAMES COOLIDGE CARTER, LAW: ITS ORIGIN GROWTH AND FUNCTION 217 (G.P. Putnam's Sons 1907).
There is, no doubt, an intriguing cultural history behind why, in the closing decades of the twentieth century, there was this “flight from doctrine” to theory in U.S. legal academia. Certainly it has its critics, one of whom noted:

[T]he obsession of United States torts theorists with superficially attractive simplifying arguments, which, after being denounced by the partisans of some other simplifying argument, seem inevitably to end up more complex than the material they set out to simplify. If, as I believe, there is an irreducible complexity in most important problems, then a strategy which accepts complexity from the start is more likely to avoid disaster than one which starts with impossible simplifications. But the cost of such a strategy is the inevitable disappointment for those who seek breakthroughs.

There seem to me to be structural as well as cultural reasons for the popularity of tort theory in the U.S. Within the one nation of the United States there is a multiplicity of tort-law jurisdictions and therefore a diverse range of persuasive precedents by which a court may be influenced. Added to the resultant phenomenon of doctrinal fragmentation, there is the fact that within any one U.S. jurisdiction lower courts are subjected to weak control by appellate courts, thanks in great part to the reverence paid to that institutional buffer or “black-box,” the jury. This means that courts enjoy greater freedom from the shackles of precedent, and therefore greater freedom to make law than that enjoyed by courts in non-US common law systems. A “theory” of “U.S. tort law” must, like a “restatement” of it, seek some abstract, common denominator account and thereby may falsely suggest some convergence dynamic. In addition, the career profile of U.S. tort scholars requires an output that addresses more than the tort materials of their State jurisdiction. In such an environment theory can be expected to flourish.

But if we contrast the common law systems of the England and Wales, Canada, Australia, and New Zealand we find that doctrinal development of the judge-made common law of torts is formally unified: nationally there is only one

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97 Comment to the author made by Geoffrey Hazard (Thomas E. Miller Distinguished Professor of Law at the University of California, Hastings School of Law), at the Council Meeting of the American Law Institute in New York City, October 2006.
98 Howarth, supra note 90 at 1423. See also Christopher J. Robinette, Can There be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine, 43 BRANDEIS L.J. 369 (2005); and ALLAN C. HUTCHINSON, EVOLUTION AND THE COMMON LAW (2005) who argues that no grand theory will satisfactorily explain the dynamic interactions of change and stability in the common law.
final court of appeal on such issues. So while in the U.S. there may be dozens of final pronouncements on a point of common law torts, in non-U.S. common law jurisdictions there will only be one and, unlike Continental courts labouring under the formal supremacy of a private law Code, these pivotal judgments of the final court of appeal in non-U.S. common law jurisdictions can be and are noticeably more candid in their reasoning. Yet the reasoning in these final courts of appeal is, for theorists claiming descriptive legitimacy, embarrassingly pluralistic and uninfluenced by legal philosophers. 100 Tort law is revealed to be generated by a melange of legal concerns, some moral, some economic, some symbolic, some distributive, 101 quite impossible to capture by rarefied mono-theory.

There are other reasons besides descriptive failure why I think lawyers in non-U.S. common law jurisdictions eschew tort theory. In England and Wales, Canada, Australia and New Zealand the common law of torts is not only unified, as it is in say Germany and France, but it consists of the pronouncements of one final court of appeal, the judges of which enjoy pre-eminence and great prestige within the national legal system. Legal academics in these jurisdictions therefore have a realistic hope of affecting, quite directly and quite soon, the development of the common law of torts: their work is not a source of law but many seek as their audience the few judges sitting on that final court of appeal and the intermediate courts that feed that court. In such an environment theory tends to be a less attractive career strategy than providing this audience with a compelling, doctrinally thorough and precise, critique of a quite small body of relevant precedent, not least when these appellate judges openly tell academics that “we are . . . helping each other to make law.” 102

In this connection I should report that at the Conference at which this paper was delivered in the Fall of 2006, a number of participants offered another reason why theory was popular in the U.S. legal academy and not in the rest of the

100 “There is little overt sign . . . that the work of legal philosophers has yet greatly shaped the opinions of our judges.” Alan Rodger, Savigny in the Strand, 28–30 THE IRISH JURIST 1, 8 (1995). Note also Lord Rodger’s view that “precisely because the law has evolved in thousands of cases, there may be no completely satisfying principles to be discovered” in the common law, just as “the texts of Roman Law which have come down to us do not on the whole contain statements of general legal principles” (14–15).

101 Johan Steyn, Perspectives of Corrective and Distributive Justice in Tort Law: the John Maurice Kelly Memorial Lecture 7–8 (Faculty of Law University College Dublin, 2002). Such a corrective justice lens also ignores what the most eminent judges tell us: that in cases determined by the court of final appeal reasons of distributive justice may well be “decisive” and that more generally “tort is not underpinned by a single overarching rationale. It is a mosaic of interwoven principles of corrective and distributive justice.” In short, when we look to restate the actual law-making performed by courts, theory is of little use in identifying sufficiently clear standards let alone the appropriate overarching architecture.

102 Lord Hope, Opening Remarks, at Conference on Rights of Personality in Scots Law (The Law School, University of Strathclyde, 5 May 2006).
Western world. The argument, as one person expressed it, is “that theoretical research may present a higher level of thinking, and that perhaps American scholars are simply ahead of their counterparts in Europe and other places.” Moreover, it was pointed out that tort theory has recently become popular in a few non-U.S. elite institutions such as Toronto and in Israel. Unsurprisingly, I prefer not to conclude that tort scholars in the U.S., Toronto and Israel are somehow simply intellectually “ahead” of those elsewhere. Rather my experience suggests to me that, for non-academic reasons, Israelis and some Canadians tend to seek respect, success and even jobs in US legal academia. In contrast, Britons and Australasians tend not to do so. They confine their ambition to directly influencing the creation of tort law in their jurisdictions, and anywhere else courts are open to doctrinal analysis with a high level of precision.

Once we understand why a certain theoretical account of tort law has influence in one jurisdiction and not in another, we might then ask what value might comparative law be to theorists? One obvious advantage is that it provides yet wider landscapes against which to test descriptive theories. An acknowledgement of the significant divergences between superficially comparable English language jurisdictions would push economic theorists to accept the weight given by courts to socially-contingent values incommensurable with money; and press certain corrective justice theorists to acknowledge the cultural and temporal relativity of “rights”. Normative theories might also find the comparative perspective chastening to the extent that a comparative sensibility carries with it a norm of respect for cultural difference and an acknowledgment of socially-validated legal change; and it can challenge the myopia of a theory with its implicit assumptions and static bias. For example, the corrective justice standard of justification of private law might itself be revealed as no more than a Western cultural artefact, the norms of which ignore the phenomenon of societies elsewhere that happily base core socio-legal relations on group standing and group responsibility.

E. The Special Case of the United States

1. Non-U.S. English-speaking lawyers looking at U.S. tort doctrine
It is worth addressing the United States specifically at this point not least because there is a marked, if unreciprocated, enthusiasm by many non-U.S. tort lawyers to delve into U.S. tort doctrine. For academics attraction lies, understandably, in the domestic and international prestige of acquiring an understanding of the diverse legal environment in the world’s current super-power, and getting published in one of its law reviews! This appreciation can also sometimes advantage non-U.S. practitioners, for example when a reference to the U.S. phenomenon of market-share liability prompts the domestic court to create a similar liability or draw
support for a finding of proportionate liability for an indivisible injury.\textsuperscript{103} But, as in all comparative "borrowings," such reference to U.S. tort law is impressionistic, merely illustrative and scarcely qualifies for the description of "legal transplant." Tort law cannot simply be "exported" because there will always be structural and cultural features which cannot be ignored and which have no equivalent in the potentially "importing" system. Not least of these in the U.S. system is the "constitutionalization" of tort law by the Supreme Court.

So we should ask, of what perils should a non-U.S. lawyer looking to U.S. tort materials be aware? U.S. tort law is certainly the outlier within the English-language jurisdictions for reasons that may not be easily adjusted for by non-U.S. practitioners and judges.\textsuperscript{104} For example, though tort law is overwhelmingly a state matter, state legislatures are relatively paralyzed when it comes to enacting comprehensive private law reform and this has effects that the non-U.S. tort lawyer may not appreciate. For example, she may be shocked to discover that contributory negligence was a complete defense to U.S. tort claims until relatively recently, and that in many jurisdictions the abandonment of this bar was only achieved by judicial decision. Without this comparative insight the non-U.S. lawyer would fail to understand the crucial subtext of many U.S. tort cases dating from before this change.

Indeed, the non-U.S. lawyer must be alert to the general fact that in the U.S. it is culturally accepted that courts can be considerably more adventurous with doctrine and the boundaries between causes of action than non-U.S. common law courts can.\textsuperscript{105} For example, the new tort recorded in §402A Restatement (Second) of Torts (1965) arguably had its origins in a 1913 case\textsuperscript{106} where a single trial judge simply abandoned the doctrine of privity and decided that a commercial buyer of food should be able to sue the distant seller in warranty. Today, just as the various state enactments of the Uniform Commercial Code have made the US law on warranty quite complex, so too the state common law versions of the rule in § 402A are riddled with variables that are daunting for the non-U.S. lawyer.\textsuperscript{107}

But there is also a trap for the unwary non-U.S. lawyer who believes that U.S. judges say what they mean in authentic 'legal realist' style. For example, the emergence of § 402A was uniformly accompanied by ringing pro-consumer

\textsuperscript{103} Compare the House of Lords decision in Barker v. Corus UK Ltd., [2006] UKHL 20, 2 A.C. 572 (U.K.) with the decision of the Hoge Raad of October 9, 1992 on which see Ewoud Hondius, \textit{A Dutch DES Case—Pharmaceutical Producers Jointly and Severally Liable}, 2 EUR. REV. PRIV. L. 409 (1994).


\textsuperscript{105} Summers, supra note 94.

\textsuperscript{106} Mazetti v. Armour & Co., 135 P. 633 (Wash. 1913).

\textsuperscript{107} And, of course, results can diverge even where the law is identical: see the two U.S. cases, supra note 78.
judicial rhetoric of "strict liability" for defective products. But in fact, when push came to shove and courts were faced with cases in which the relevant product danger was unforeseeable at the time of supply, US courts refused to impose strict liability in design and warning cases: they refused to require manufacturers to conform to impossible standards. For example, out of the thousands of design defect cases brought against product manufacturers over the past few decades there seem to be, at most, only three where a U.S. court was prepared to follow the logic of its strict liability rhetoric and impose that liability. Not one involved a pharmaceutical! Had Europeans been more sensitive to this it may have alerted them to the fundamental political and doctrinal dilemmas of imposing strict tort liability on manufacturers for unforeseeable risks, and they may have balked at agreeing to the ambiguous "all-things-to-all-parties" wording of the notorious 1985 Directive on Products Liability.

Process and procedure are also culturally contingent in ways that may not be obvious. The non-U.S. lawyer might not appreciate fundamental features of US tort doctrine, for example, that most U.S. employees injured at work are unable to sue their employer because workers' compensation is their "sole" remedy. The non-U.S. lawyer will, therefore, fail to understand why the emergence of the common law rule in §402A of the Restatement (Second) of Torts (1965) had such an impact on U.S. tort law: it provided employees with a route to tort-level damages if they could identify some product with which they worked and successfully allege that its "defective" condition caused their injury. Though rarely remarked on in the U.S., the results can seem bizarre to the non-U.S. lawyer. For example, where an employer buys an unguarded cutting machine and later his employee is severely injured by the blade, the employer escapes any tort sanction. The loss either remains on the victim or is shifted to a, perhaps entirely innocent, non-manufacturing party in the chain of supply of the machine such as a wholesaler or retailer.

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108 See, supra note 12.
109 DAVID G. OWEN, PRODUCTS LIABILITY LAW 700, n.167 (2005). Owen states "the two pillars of modern products liability law in America" are "that manufacturers must guard against risks only if they are foreseeable, and that manufacturers must guard against those risks only by precautions that are reasonable" (38).
110 How can a product be defective for failing to warn of something no one could have known about? Why is he state of the art of substitutes relevant but not the state of the art of discovering the need for a substitute? See also Jane Stapleton, Liability for Drugs in the U.S. and E.U.: Rhetoric and Reality, 26 REV. LITIGATION 991 (2007).
111 This is the result in jurisdictions that evaluate design defect using consumer expectations. See Owen, supra note 104, at 296 and 490.
112 This is typically the result in jurisdictions that evaluate design defect using risk-utility: on the basis that the removability of the guard meant the machine's risks outweighed its utility. See Owen, supra note 104, at 302 and 315.
Also, as I noted earlier, a tort lawyer from outside the U.S. may not appreciate that a covert concern with jury decision-making in the U.S. generates a pronounced tendency to crystallize rules of law with which the trial judge can govern access to the jury. Conversely, in the United States access to a jury trial is so much taken for granted as a right, that it evokes scant comment. Yet in other jurisdictions there is far more ambivalence: for example in the recent Scottish case of Heasman v. J.M. Taylor & Partners a person suffered personal injuries in a car accident and sued the defender in delict; thereupon the defender challenged the use of a jury on the basis that it would contravene his right to a fair hearing under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms! Indeed, it is a striking feature of the U.S. tort system that lawyers seem to find little if anything to object to in two juries reaching opposite outcomes in cases of identical facts. In non-U.S. systems the ideal of like cases being treated alike is much more in evidence.

Similarly, the nature and degree of concern over rates of litigation is culturally contingent. For example, to establish that American resort to tort litigation is far greater than in economically comparable countries does not establish that its litigation system is in need of reform. There is no doubt, for example, that the role of tort law in the U.S. is not the same as in New Zealand where for decades tort claims for personal injury by accident have been excluded in favour of a state-run comprehensive accident compensation scheme. Clearly, empirical findings may also be highly location-dependent. For example, the landmark work of Lloyd-Bostock, that suggested individuals’ attribution of responsibility for accidents in England was influenced by what they knew of the law’s attribution, may well be specific and not generalizable to the US which was outside her empirical frame of reference.

2. U.S. lawyers looking at tort materials from other English-speaking jurisdictions

Bounded rationality explains and partially justifies the indifference of U.S. legal practitioners and judges to otherwise-relevant non-U.S. English-language materials. In U.S. tort law the palette of domestic tort ideas and arguments is probably sufficiently rich not to require or justify looking farther afield unless, of

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115 See Sally M. Lloyd-Bostock, Common Sense Morality and Accident Compensation, in PSYCHOLOGY, LAW, AND LEGAL PROCESSES 93, 101 (David P. Farrington et al. eds., 1979) (noting that accident victims may first determine a right to compensation and then attribute fault to justify compensation); and Sally Lloyd-Bostock, Fault and Liability for Accidents: The Accident Victim’s Perspective, in COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 139, 150–51 (Donald Harris et al. eds., 1984).
course, the case has some overt foreign element such as a forum non conveniens claim. Moreover, there will be important aspects of U.S. tort law that have no close parallels elsewhere, such as the specific constitutional constraints on it recognized by the U.S. Supreme Court. So, each year as I teach U.S. products liability in Texas, I do not find much need to trawl non-U.S. case law for ideas additional to those available within U.S. material: not least because the comparative palette of tort ideas presented to U.S. law students is drawn from across the country, not merely the state of tuition.

There is, however, one area in which U.S. lawyers would benefit from a comparative perspective on tort law. An awareness of the issues presented to courts of final appeal in other English-speaking jurisdictions can fruitfully expose them to types of claim, and thereby to legal issues, that have either not yet been litigated in a U.S. jurisdiction or have been "fudged" in local jurisprudence. As we noted early on, this appreciation can challenge, illuminate, and enrich a lawyer's grasp on his or her own system of tort law. Though an individual U.S. lawyer may not have the resources to engage in such research, the Restatement projects of the American Law Institute, of which the torts restatements have by far been the most used and influential, provide one valuable avenue by which notice of useful non-U.S. English-language developments can be given to domestic lawyers. Restatements are, however, only reconsidered after long interludes. Other avenues need development: perhaps the ALI might consider some electronic technique for notifying highly relevant tort cases from other English-speaking jurisdictions?

116 Remember I am only concerned in this paper with the value of comparative tort law to practitioners and judges. Those engaged in academic projects such as legal history and theoretical comparative studies must address the wider world where the international circulation of ideas can be a fascinating phenomenon: how Roman law affected legal systems down the ages (REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION (1996); PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (1999)); how from Mediterranean mercantile customs the law merchant spread to English law, thereafter to the United States and then into treaty law (see THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 663 (5th ed. 2001) and R. Coquillet, Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607–76, 61 B.U.L. REV. 315 (1981)); how the special tort liability for commercial suppliers of defective products spread from the U.S. to the EU and thereupon to other nations; and how non-Western legal systems deal with the issues we call tort or delict (see for example, the alternative to the "winner takes all" litigation rule of the Tiv tribe of Northern Nigeria discussed in Ewoud Hondius, The Supremacy of Western Law, in VIVA VOX IURIS ROMANI: ESSAYS IN HONOUR OF JOHANNES EMIL SPRUIT 337, 340 (L. De Ligt et al. eds., 2002): arguing that the idea of the supremacy of Western law is basically flawed. In general see H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2d ed. 2004)).

II. Benefits of Comparative Tort Materials from Foreign-Language Jurisdictions

A. For U.S., Canada, Australia and New Zealand

Next we need to consider whether in their work a legal practitioner or judge in an English-speaking jurisdiction outside the European Union would be assisted by a consideration of the tort law of a foreign language jurisdiction? Apart from the general advantages of perhaps being alerted to novel types of factual dispute and formulations of legal argument, is it likely, for example, that a Supreme Court judge in a New Zealand tort case would find significant further illumination by seeking to understand the relevant Spanish law on the contentious issues? Were the Supreme Court of California\textsuperscript{118} and the High Court of Australia\textsuperscript{119} in some sense wrong or at least unwise not to refer to the German concept of contract with protective benefit for a third party when they found that a claim lay in the tort of negligence when due to a lawyer's carelessness the intended beneficiary of a will failed to inherit? Certainly the case law suggests that courts in the U.S., Canada, Australia and New Zealand do not find any advantage in a regular consideration of the tort law of foreign-language jurisdictions. Why might this be?

I. The Multi-Linguist’s Problems

Assume our common law judge or practitioner is perfectly multi-lingual: she would still face a number of problems handling foreign-language law. First, consider concepts and conceptual arrangements: once we leave the common law world, as we do when we enter foreign-language jurisdictions, we find highly sophisticated legal environments within which we will search in vain to find direct parallels of certain distinctive legal categories that common lawyers use such as trustee, consideration and estoppel. Conversely, we will find concepts with no direct parallel in the common law, and though these can be of use in English-speaking jurisdictions with a mixed heritage such as Louisiana\textsuperscript{120} and

\textsuperscript{118} Biakanja v. Irving, 49 Cal.2d 647, 650 (1958) held that a notary public who negligently failed to direct proper attestation of a will became liable in tort to an intended beneficiary damaged because of the invalidity of the instrument. See also Lucas v. Hamm, 56 Cal.2d 583 (1961) which extended the Biakanja rationale to the attorney-client relationship and held that an attorney who negligently drafted a will could be held liable to a person named in the will who suffered deprivation of benefits as a result of the negligence.

\textsuperscript{119} Hill v. Van Erp, (1997) 188 C.L.R. 159 (Austl.).

\textsuperscript{120} There are "many cases where common law judges employ the concepts of the civil law in order to assist them in their interpretation of the common law." W. J. Zwalve, Ryall v. Rolle \textit{and the Civilian Tradition}, 56 LA. L. REV. 437, 439 (1995). See also Charles Donahue, Jr., \textit{Ius
Scotland, their transplantation into simple common law systems is perilous. Again take the German concept of a contract with protective benefit for a third party, a construct that Germans exploit to deal with the perceived inadequacies of tort law as codified in the German Civil Code: why on earth would California or Australia want to address this foreign phenomenon when local tort law suffers from no such inadequacy?

There may also be many structural features of a foreign jurisdiction that need to be understood: thus a recent decision of the House of Lords has been attacked for its referring to German tort law while apparently neglecting the allegedly relevant fact that, like most U.S. employees, German workers cannot sue their employer in negligence.\textsuperscript{121}

More generally, there are broad contrasts in legal style between Old and New World jurisdictions. For example, reference to common Roman law origins can help deflate trivial or artificial differences between jurisdictions within the Old World.\textsuperscript{122} In contrast, amongst judges and practitioners in the New World jurisdictions of North America and Australasia there is a pronounced indifference to Roman law,\textsuperscript{123} perhaps based not merely on their common law rather than civilian heritage (Quebec and Louisiana excepted) but also on an embarrassment about Roman law’s tolerance of slavery and a repulsion for a legal system that had been accessible only to a Latin-comprehending Christian elite.\textsuperscript{124}

Another vital contrast relates to the status and form of judicial reasoning. Though it is widely known in the common law world that the status of case law is different in Code systems, it is not widely known what that status is for individual foreign-language jurisdictions and how, for example, it might vary between areas


\textsuperscript{121} Tony Weir, \textit{Making it More Likely v. Making it Happen,} CAMBRIDGE L.J. 519, 521 (2002): “The tour d’horizon was admittedly superficial. Omitted is the salient fact that in almost none of the jurisdictions glanced at would the claimants in \textit{Fairchild} have succeeded: in most places an employee simply cannot sue his employer in tort, since workmen’s compensation or social security takes its place.”

\textsuperscript{122} But see note 164, infra.

\textsuperscript{123} Even in U.S. academe, there may be open hostility. For example, John G. Fleming who had escaped the holocaust as a schoolboy noted Roman law, has a “curious, almost neurotic, fascination for British scholars” and that “the whole retention [in a modern comparative law text] of this Roman law relic [of the Lex Aquilia] surely owes more to nostalgia than to functional justification.” \textit{Comparative Law of Torts,} 4 OXF. J. LEG. STUDS. 235 (1984).

of tort law and over time. Moreover, not all tort doctrine is derived from the Code and later statutes: there is a great deal of judge-made tort law, some of which exhibits a spirit that is antithetical to that originally associated with the Code. Indeed the great John Fleming noted that "the modern law of torts in all of the principle civil law countries is today judge-made, a vast gloss overlaying a few exiguous Code articles." Yet how intellectually accessible is that case law to the common lawyer? In the New World legal realism urges courts to provide reasoning that is not only coherent and rigorous, but also candid and transparent in identifying and evaluating the underlying values in tension. While it is true that, within the subtle and rich jurisprudence surrounding a Civil Code, civilian courts sometimes treat Code text as an impassable obstacle, narrow tram-tracks that allow only a very limited amount of manoeuvre and adaptation to new challenges, often such courts covertly manipulate the Code's provisions. Typically adopting the direction pointed to by some eminent jurist, these courts are willing to be highly "creative" in their manipulation to reach the desired result, far more creative than (at least non-U.S.) common law courts tend to be in their respectful approach to statutory interpretation. Such nuances are not a simple matter for the practitioner or judge in an English-speaking jurisdiction to grasp.

The importance of this for our purposes is that a common lawyer looking for inspiration from the legal values in play in Continental judgments will often be disappointed because the latter can be "absorbed with ways to outflank the Code without taking us into their confidence why these manoeuvres are thought desirable. German, no less than French, courts are articulate about means but not ends." Furthermore, even where the court in a foreign-language jurisdiction

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125 Ewoud Hondius, Precedent in East and West, 23 PENN ST. INT'L L. REV. 521
An interesting question is whether the recent development of electronic resources, making case law more accessible across the Continent may lead judicial analysis to converge as judges cite and engage with a wide pool of cases.
127 Fleming, Comparative Law, at 241.
129 Fleming, Comparative Law, at 242. Consider also the "inscrutable language in which the [European Court of Justice] traditionally clothes its judgments": Alan Rodger, Saviγny in the Strand, 28–30 THE IRISH JURIST 1, 10 (1995). For an enlightening general study of the contrasting approaches to judicial discourse and accountability between the U.S. Supreme Court, the French
does enunciate values, the weight put on them is culturally contingent in ways that are complex and hard for the outsider to appreciate. For example, in one society there may be a long tradition of expecting young adults to assume responsibility and care for the elderly which is supported by an expectation that people will be supported in their old age.

In short, the general indifference of North American and Australasian courts and practitioners to the tort law of foreign-language jurisdictions seems a wise response to inescapable phenomena. For them there is no more to be reliably derived from foreign-language jurisdictions than from English-speaking ones, namely notice of novel types of factual dispute and formulations of legal argument: moreover, there are added perils of misinterpretation. The common law world seems, at least to me, to be rich enough for most needs of tort practitioners and judges in English-speaking jurisdictions, and claims that they should also address foreign-language legal materials, let alone that they should routinely do so, are not supported by compelling argument. Indeed we should be mightily relieved that our North American and Australasian judges are not tempted to acquiesce to the pressure of such claims.

2. The Mono-Linguist’s Problems
But of course the perils involved when tort practitioners and judges in English-speaking jurisdictions resort to foreign-language legal materials are even graver because most common law judges and practitioners are fully fluent only in English: access to foreign-language legal materials will be second hand. For that reason, the legal and linguistic capacity of the translator is crucial, but so too is availability and quality of the translated materials. As we all know from experience of our domestic tort system; some judges, legal commentators and empiricists are more gifted than others; and even between gifted lawyers there are large disagreements about the law. I have no doubt that the percentage of gifted lawyers in foreign-language jurisdictions is at least as high as that in English-language ones. But how confident can a domestic practitioner or judge be that it is the output of these foreign lawyers that are put up for translation into English?

This problem is especially acute in Code systems where certain academic commentaries on tort law both within and outside the Civil Code have influence


130 Another example is the absolute protection to human dignity enshrined in Article 1 of the 1949 post-Nazi Constitution (Basic Law, Grundgesetz) of Germany.

131 Contrast the social functions of adoption in the U.S. with those in Turkey where adopters must be over 35, adoptees are mostly over 30 and usually remain part of their natural family. David Nelken, Book Review of The Enigma of Comparative Law: Variations on a Theme for the 21st Century by Esin Orucu, 26 LEGAL STUD. 129, 134 (2006).
and authority far beyond any academic materials in English-speaking jurisdictions, except for the US Restatements. The fact that, whereas the English legal tradition treats judges as the senior partners in law-making, the Continental tradition recognizes legal academics in this role, partly explains why some Continental jurists make statements that such and such is the “correct” “solution” to a legal issue. Such language can shock lawyers in common law jurisdictions where it is customary to couch normative arguments with greater reserve, unless they appreciate that these Continental lawyers seek to have their academic commentaries accepted as law. The legal cultural reasons for this difference in the role of jurists are fascinating in their own right, especially in comparison to U.S. and other common law systems. But the point I want to make here is that of the six or so most authoritative and extensive commentaries on the German Civil Code and extra-code law of obligations, none has been translated into English. This means that English speakers do not have these texts available so as to provide the necessary foils for the one extensive text on German tort law that has been written in English. Moreover, to my knowledge there are no other texts, written in English or in translation, that deal in detail with tort law in other foreign-language jurisdictions.

This raises a further problem, that of appropriate selection. Faced with the practical limits of adjudication and bounded rationality, even the most enthusiastic advocate of the use of foreign-language legal materials in common law courts could not support a comprehensive survey of all such materials from all foreign-language jurisdictions: no sane Taxing Master would approve the costs a party would have to expend to marshal the necessary experts in such material.

132 Indeed, Continental jurists are sometimes mandated reading for common law judges! See Civil Jurisdiction and Judgments Act 1982 (United Kingdom, chap. 27), § 3(3) as amended.
133 Another reason is the limits of language. English has words that convey the “resolution”, “remedy” or “resolution” of a problem without the implication that this is the only “solution” that may be possible. Languages other than English may not have this diversity of expression so that a translation into the term “solution” may mislead the English reader into thinking the writer means something more normatively loaded than merely “a resolution.”
Nor could such an advocate defend a selection that was random. But there seem to be little debate about possible methodologies of selection.\footnote{Jack Beatson, \textit{Book Review}, 120 LAW Q. REV. 175, 178 (2004).}

It is true that Basil Markesinis and Jorg Fedtke have recently asserted that when, in following their direction to address the law of foreign jurisdictions, we make our selection:

\begin{quote}
[A] single one can be enough, provided it is an advanced system, with a roughly comparable socio-economic environment and offers reasonable accessibility to its sources and experience.\footnote{Basil Markesinis and Jorg Fedtke, \textit{Authority or reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective}, E.B.L.R. 5 at 66-7 (2007).}
\end{quote}

Accordingly, in their campaign to persuade British courts to expand the liability of public authorities into new fields, they select Germany as their favoured foreign jurisdiction. This is not simply because they believe that the German legal system deserves lavish praise: “structure, system, and internal consistency are attributes highly valued by German lawyers; and their Civil Code...has adopted them to perfection”\footnote{\textit{Ibid} at 9.}. They select Germany on the basis of their belief that “Germans have masses of the kind of raw empirical data relevant to the liability of public authorities. The flaw in their approach is that these data are in no way adequate to the purpose Markesinis and Fedtke seek to put them: they are simply too crude. Moreover, it is extremely unlikely that the research and analysis needed to produce compelling socio-legal data in the future from any jurisdiction will receive the necessary funding.\footnote{\textit{Ibid} at 67.} So we are left without an obvious criterion of selection. This is problematic since there would seem to be a number of different possible criteria. For example, the United States has more citizens of German descent than of French; New Zealand has more citizens of Scottish descent than Spanish; Australia has more citizens of Greek descent than of German. Should this affect the selection? What about language pools within the domestic jurisdiction? In which case U.S. courts should presumably prioritise materials from Spanish-speaking jurisdictions.\footnote{See Note 41 and accompanying text.}

What about a traditional comparatists’ device, the “legal family”? In which case England should look to Singapore rather than Germany.\footnote{Spanish is the second most common language in the United States after English. According to the 2000 United States Census, Spanish is spoken most frequently at home by about 28.1 million people aged 5 or over.}\footnote{Materials from the Commonwealth are available on the net at Commonlii.} What about the
relationship between “parent” systems and “colonies” or “derivatives”\textsuperscript{144} In which case India and many African nations should look to England rather than culturally closer jurisdictions. What about major trade partners? In which case Australian courts should address Japanese law\textsuperscript{145} and U.S. courts will need to look at Chinese law.\textsuperscript{146} What about military partners? Should U.S. courts give particular emphasis to the law of those countries that contain most of the overseas U.S. Defense Department installations: Germany (302), Japan (111) and South Korea (106)?\textsuperscript{147}

B. For Eire, Scotland, England and Wales

These three Old World English-speaking jurisdictions share membership of the European Union with a large number of foreign-language jurisdictions and, for some judges in this trio of jurisdictions, this provides a reason to pay attention to foreign-language materials from the individual Member States even where the case at hand involves a purely domestic legal issue of tort law. For example, having specifically asked counsel for material describing the position in European legal systems\textsuperscript{148} in a landmark mesothelioma case, \textit{Fairchild}, creating a special rule of proof of causation, Lord Bingham stated that:

\begin{quote}
In a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.\textsuperscript{149}
\end{quote}

Must there be? One by one, jurisdictions will confront an issue. When are there enough resolutions so that a sufficient “uniformity” of outcome can be detected and exercise this normative pull on the undecided? What if the early consensus offends a court’s sense of justice? What if the source of the foreign-language material or its translator is not reliable? What if, as alleged by Tony Weir in relation to this same decision, the foreign-language material was superficially “glanced” at without reference to a highly relevant contextual fact?\textsuperscript{150}

\begin{flushright}
\textsuperscript{144} Basil S. Markesinis & Jorg Fedtke, \textit{The Judge as Comparativist}, 80 Tul. L. Rev. 11, 68 (2005). \textit{See also} 34, 97.
\textsuperscript{145} On which, see \textit{Hirosi Oda, Japanese Law} (2001).
\textsuperscript{147} Department of Defense, Base Structure Report, Fiscal Year 2005 Baseline, at 2.
\textsuperscript{149} \textit{Fairchild}, (2003) 1 A.C. 32, ¶ 32 (U.K.) (per Lord Bingham).
\textsuperscript{150} \textit{See, supra} note 116.
\end{flushright}
Significantly, in this same case the Lords also looked at English-language materials to which they wisely paid very much greater attention. In the decision of the Supreme Court of California of Rutherford v. Owens-Illinois Inc.\textsuperscript{151} the Lords found a range of pertinent arguments in a familiar common law conceptual framework and in their own language the subtle nuances of which presented no barrier to understanding.\textsuperscript{152} Again in the subsequent case addressing the issue of whether liability under Fairchild should be in solidum or proportionate, no member of the House of Lords referred to the material concerning foreign-language jurisdictions that had been proffered by counsel but three members\textsuperscript{153} used arguments found in a variety of materials from the U.S.\textsuperscript{154} In short, the practice of the judges in English-language jurisdictions, even those in the EU, to look to foreign-language materials on tort cautiously and only intermittently is both legitimate and wise. Indeed, were we to accept the extraordinary argument of Basil Markesinis, that once a judge does refer to foreign material in one case, he must explain why he is not using it in each and every case thereafter,\textsuperscript{155} a new judge would have a real incentive not to refer to that material in any case...ever!

\textsuperscript{151} 67 Cal. Rptr. 2d 16 (1997).
\textsuperscript{152} Lord Rodger has noted that "our judges can read the cases [from other English-language jurisdictions] for themselves and can assess how their reasoning could be fitted into the existing scheme" which is crucial because "to be really helpful... the [foreign] authority would have to be investigated in detail and would have to be capable in some way of application within the framework of our own system." Alan Rodger, Savigny in the Strand, 28–30 THE IRISH JURIST 1, 19 (1995).
\textsuperscript{153} See Barker v. Corus (UK) Plc. [2006] UKHL 20, per Lord Hoffmann, per Lord Walker of Gestingthorpe at ¶ 111 and Baroness Hale of Richmond at ¶ 122.
\textsuperscript{155} Basil Markesinis, Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law, 80 TUL. L.REV. 1325, 1361–62 (2006); "If that same judge had, on an earlier occasion, himself resorted to foreign law, one would expect him to tell his audience why in this newer case the foreign experience was of no relevance." (Markesinis also asserts that where one judge mentions foreign law "would it not be reasonable, constructive and courteous to expect [his colleagues in the same decision] to try and counter in a specific manner this material rather than pass it by in silence?"
(at 1371.) Justice Scalia asserts a similar point to attack any citation of foreign law: "to invoke alien law when it agrees with one's thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry." Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia J., dissenting).
III. BENEFITS OF "COORDINATED" TORT MATERIALS: RESTATEMENTS, EU "PRINCIPLES"

A. Intra-National Coordination by Restatement of Tort Law

A final possible source of comparative tort materials for the practitioner and judge in an English-speaking jurisdiction are what I will call “coordinated” materials: those that seek to capture or review tort law across more than one formal judicial or legislative jurisdiction. American lawyers are completely familiar with ALI restatements. Restatements exist for and are funded by U.S. practitioners, judges and other users: they are in this sense “bottom-up” projects. The general motive for these intra-national projects is apolitical, in the sense that there is no explicit or covert aim to rearrange formal law-making power. Rather the aim is to provide a fulcrum for the dissemination of information about divergences and convergences among the dozens of jurisdictions that operate within one nation and one national market place.

That such divergences have grown up after a relatively short time since they developed from a common source in England (Louisiana excepted) is testament to the centrifugal tendencies of the common law method, it not being tied to any Code text. In addition, U.S. tort law is further fragmented by local state legislative reforms, perhaps most notoriously in the area of joint and several liability. As noted earlier, this doctrinal fragmentation is, I suspect, one reason why tort theory is much more popular in the U.S. than in other English-speaking

156 See e.g. THE RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005).

157 There are however debates about the degree to which the ALI processes are or can be politically neutral. See e.g. Frank J. Vandall, Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2 (b) Design Defect, 30 U. Mich. J.L. Reform 261, 279 (1997), “the ALI’s mission is no longer to restate the law, but rather to issue pro-manufacturer political documents”; Richard A. Posner, Address to the American Law Institute, 18 May 1995, “who would have imagined that the special interests would place the Institute under siege, as if it were a real legislature . . . the increasing political character of American law [means] . . . it is more and more difficult for the Institute to engage with important questions . . . without crossing the line that separates technical law from politics.”

158 Legal history can illuminate the socio-politico-economic reasons for broader centrifugal fashions such as the rise of post-revolutionary French interest in reflecting national identity and culture in their law, and a comparable concern in other Continental countries after the collapse of Napoleonic empire. See FRANZ WIEACKER, REINHARD ZIMMERMANN & TONY WEIR, A HISTORY OF PRIVATE LAW IN EUROPE WITH PARTICULAR REFERENCE TO GERMANY (1996); and infra note 163. Contrast the “top-down" politically motivated centripetal projects in the EU today, see infra.

159 The resultant state of disarray, set out in RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY 153–59 (2000), has been described by Tony Weir as “such a trackless morass, Dismal Swamp, and Desolation of Smaug that surely a very wrong turning must have been taken in order to reach them.” Tony Weir, All or Nothing?, 78 Tul. L. Rev. 511, 524 n.63 (2004).
jurisdictions: it allows academics to write for a national audience which activity is attractive both intellectually and because it enhances career prospects. In contrast, academics in English-speaking jurisdictions with unified tort law need only deal with a relatively small set of appellate cases before their doctrinal analysis can be attractive to a national academic, practitioner and judicial audience. Moreover it can directly influence the judicial development of a tort law that is national. 160

Three features of U.S. tort restatements are important in comparative perspective, especially in light of the moves to unification in the European Union. First, the Reporter’s Notes of the recent third round of torts restatements have a much increased citation of non-U.S. cases and secondary materials, virtually all of which refer to the law in other English-speaking jurisdictions. Second, non-U.S. tort lawyers should appreciate that the black-letter format of restatements provides an institutionalised way of crystallizing potential rules of law with which the judge can govern access to the jury. 161 This crystallization is not required in jury-free systems.

Third, non-U.S. tort lawyers should understand how a restatement might seem to encourage convergence. A restatement consists of three types of text: the black-letter section, comments on the black-letter, and Reporter’s Notes. In virtually all restatements the black-letter does not record divergences between jurisdictions; 162 this is discussed in the comments and actual cases are only recorded in the Reporter’s Notes. By elevating an approach which has only so far been taken by a few jurisdictions to the status of a black-letter “rule,” a Reporter can promote that approach across the nation: this is the story of the rule in §402A of the Second Restatement which was, subsequent to its publication, adopted by US courts in virtually all jurisdictions.

Conversely, by including within the black-letter a requirement the Reporter believes is imposed by a majority of jurisdictions, he can encourage the minority of states to follow suit: an example is the requirement of a reasonable alternative design in §2(b) of the Third Restatement on Products Liability. 163 However, this

160 Or in the case of England and Wales, and Scotland, can be if the decision on an appeal from one jurisdiction is stated to apply to or is later accepted in the other.
161 See text at notes 87–89, supra.
162 A notable exception is THE RESTATMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000).
163 RESTATMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998). Section 2(b) reads:
A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product: (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.
appearance that restatements promote convergence is highly deceptive: as U.S.
practitioners know only too well. State courts have, for example, interpreted the
special tort liability in §402A differently and so today State regimes of products
liability manifest considerable variations. This confirms that U.S. tort law, even
when it stems from a common text such as §402A, will diverge because there is
no single court of ultimate appeal on tort matters.

B. Inter-National Coordination by Harmonization/Codification of Tort Law

The European Union began to issue uniform laws relating to private law with the
1985 product liability Directive which, albeit described as a harmonization
measure, bizarrely introduced an additional layer of potential liability on product
suppliers across all Member States.164 Since then there has been increasing
interest in comparing private law regimes within the Union. For example, the
projects of the Trento Group165 seek to identify divergences as well as the
convergent “common core” of European private law: these projects have no
political goal. The Group has produced a number of works in English such as a
volume on economic loss in which Mauro Bussani and Vernon Palmer provide
profound insights into the divergences and convergences of the law in this field
across jurisdictions.166

A similar political agnosticism is manifest in recent comparative studies on
public authority liability167 and in the monograph on European tort law by Cees
van Dam168 who doubts, rightly in my view,169 that pro-active harmonization of
tort law across the Union is authorized by the Treaty of Rome. The EU has no
direct power as such to enforce harmonisation, let alone codification, across tort
law.170 There is simply no evidence that the real differences across tort systems
appreciably distort trade or competition, which according to the European Court
of Justice is a Treaty pre-requisite for any EU legislative initiative to harmonize
tort law. Moreover, such a move arguably offends the EU’s alleged commitment

164 For a list of the relevant measures see FUNDAMENTAL TEXTS ON EUROPEAN PRIVATE LAW
Sub. I (Oliver Radley-Gardner, Hugh Beale, Reinhard Zimmermann & Reiner Schulze eds.,
2003).

165 On which, see Mauro Bussani, Current trends in European Comparative Law: The

166 PURE ECONOMIC LOSS IN EUROPE (Mauro Bussani &Vernon Palmer eds., 2003)

167 See TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE (Duncan
Fairgrieve, Mads Andenas & John Bell eds., 2002); and DUNCAN FAIRGRIEVE, STATE LIABILITY
IN TORT: A COMPARATIVE LAW STUDY (2003) which is a French-English law comparison.
Contrast BASIL S. MARKS;MINIS ET AL., TORTIOUS LIABILITY OF STATUTORY BODIES: A
COMPARATIVE AND ECONOMIC ANALYSIS OF FIVE ENGLISH CASES (1999).


170 Jonathan Mance, Is Europe Aiming to Civilise the Common Law?, 7 EUR. BUS. LAW REV.
to “preserving diversity and ensuring that decisions are taken as close as possible to the citizens.”

Indeed there are profound philosophical arguments in favour of diversity of law as a source of enrichment of a community’s identity.

Nonetheless, there has been quite an embarrassing amount of work published that asserts, not merely that there is much harmony already between the tort law of European systems, but also that they are rapidly converging. Where “convergence” authors do not declare their political motivations, such work must be treated as deeply suspect. But there is also much recent material in English on European tort law that is more or less candid in its politically-motivated enthusiasm for pro-active harmonization across existing jurisdictions, a dynamic that can be assisted, albeit superficially, by appeal to the “common heritage” of civilian systems in Roman Law, the Corpus Juris Civilis and the European Ius Commune. Though we can expect “distortion as

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172 “At the end of the eighteenth century, in reaction against the rationalism of the Enlightenment, it was recognised that nations and peoples also had an individuality of their own, which found expression in, among other things, their laws, and that these national individualities were valuable, and ought to be cherished. Scots law is different from English law. Not only may it be none the worse for that . . . but it is a positive merit, contributing a further thread to the web of Scottish identity. Although there are advantages in a uniform Code Napoleon or Whitehall-drafted Statute Law, these are usually purchased at too high a price of impersonality and alienation. The diversity of peoples ought to be reflected in a diversity of laws, in order that we may all feel at home in our own laws; the anomalies of devolution are a small price to pay for our all being able collectively to do our own thing.” J.R. Lucas, The Nature of Law, 23 PHILOSOPHICA 37, 43 (1979).

173 Contrast the admirably explicit declaration of political motivation in his emphasis of similarities among EU jurisdictions by BASIL MARKESNIS, FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS 6 (1997).


175 See e.g. Fleming, Comparative Law, “True it certainly is that many of the still recalcitrant problems were already identified by the Roman jurists (omissions, economic loss, etc.), but the modern law of torts in Europe bears few discernible traces of that heritage.”

176 See e.g. Klaus Luig, The History of Roman Private Law and the Unification of European Law, 5 Z.E.U.P. 405 (1997). Roman Law, as it was systematized in the Corpus Juris Civilis (the collection of laws initiated by the Emperor Justinian I around 530), was rediscovered, interpreted and reshaped by medieval jurists with elements of canon law and of Germanic custom, especially feudal law. Some argue that by the middle of the 16th century, there had resulted a European Ius Commune that was common to all continental Europe (and Scotland). This era of apparent unity of legal system ended when national codifications were adopted beginning with the French Civil Code in 1804. For a strident critic of the notion of a “ius commune which previously existed,” see Pierre Legrand, Book Review of Torts Ed. by Walter van Gerven, CAMB. L.J. 439, 440 (1999). A more nuanced account is H. Patrick Glenn, On Common Laws 16–20 (2005).
the price of uniformity," support for full codification is also now fashionable among many academics. For example, Christian von Bar has published large volumes on the "common European law of torts" and heads the "Study Group on a European Civil Code" which is drafting common European principles for the most important aspects of the law of obligations and certain aspects of the law of property in movables. So far, however, only Helmut Koziol's group, the European Group on Tort Law, has published in hard copy its model tort rules, the 2005 "Principles of European Tort Law" (PETL).

Such principles may lead to a future EU Code and so they may be of some current value to the practitioner or judge in Eire, Scotland, England and Wales: so long as they clearly understand the political motivation and compromise nature of the Principles and take account of the large variation between Member States in how a common text will be perceived and applied. But are such principles of value for the non-EU practitioner or judge in, for example, the U.S., Canada,

180 The first volumes of this project began to appear in 2006.
182 For legal-cultural reasons it might be, for example, that French courts will read a common text as merely a broad guideline (requiring only "soft convergence") within which they can exercise considerable discretion (using devices such as the opaque French approach to causation. See note 123 supra), but English courts will read such a text in terms of hard convergence requiring a rigorous attempt to accommodate other member states' applications of the text. More generally there is a school of thought, prominently represented by Pierre Legrand that argues that harmonization is impossible because people from different legal cultures may understand the same legal text in quite different ways. See Pierre Legrand, The Same and the Different, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS (Pierre Legrand & Roderick Munday eds., 2003); Pierre Legrand, European Legal Systems Are Not Converging, 45 INT. COMP. L.Q. 52 (1996); Pierre Legrand, Against a European Civil Code, 60 MOD. L.REV. 44 (1997). Thus "even if there are identical legal rules, the legal cultures will still be different, a fact which may ultimately lead to different practical results." ERIK JAYME, MULTICULTURAL SOCIETY AND PRIVATE LAW: GERMAN EXPERIENCES 10 (1999). See also Stephen Weatherill, Why Object to the Harmonization of Private Law by the EC?, 12 EUR. REV. PRIV. LAW 633 (2004); Stephen Weatherill, Harmonisation: How Much, How Little?, [2005] EBLR 533; G. Teubner, Legal Irritans: Good Faith in British Law or How Unifying Law ends up in New Divergences, 61 M.L.R 11 (1998); and the Manifesto or Study Group on Social Justice in European Private Law (see Study Group on Social Justice in European Private Law, SOCIAL JUSTICE IN EUROPEAN CONTRACT LAW: A MANIFESTO, 10 EUR. L. J. 653 (2004)) which produces material that seeks to highlight the political dimensions of the effort to Europeanize private law and the cultural embeddedness of law which can produce divergences in the application of an identical legal rule.
Australia, and New Zealand? There are a number of reasons to suggest not. First, there are all the reasons why such lawyers would be wise to avoid a consideration of the law of individual foreign-language jurisdictions. Second, at least in relation to the 2005 PETL, the format of the text follows, understandably given the vast majority of EU members with civilian legal systems, the layout of civilian Codes and does not map easily onto the common law landscape. Third, the future standing of the black-letter articles is problematic. Even were an EU Code of tort principles to be adopted, it is unlikely to be accompanied by mechanisms sufficiently thorough to prevent the divergences of interpretations and development we see in common law systems. The reality seems to be that the European Court of Justice could never exercise the control of tort doctrines that is currently possible in domestic systems with tight adherence to precedent and a single court of final appeal on matters of judge-made common law such as Australia, Canada and, subject to reciprocal acceptance of House of Lords' decisions, the United Kingdom.

Finally, there is still some doubt about how stable the EU will prove in the long term as a political, as opposed to economic, union. Before its dissolution into 15 nations in 1991 the population of the USSR was 293 million: today the EU has 27 member states and 490 million people; and it uses 23 official languages. If tort law does manifest features that are culturally specific, how much might the social fabric of local jurisdictions be damaged by elimination of such features in a unifying "code"? For example, unlike French parents, British parents are not vicariously liable for their underage offspring who live with them: were a future EU Civil Code to impose such liability, would there be an outcry in Britain? Would this and similar frustrations contribute to a future collapse of the political union? It is a shame that we do not seem to know or care whether frustrations in the private law area played any part in the agitation that produced the collapse of the USSR, let alone the extent to which the private law systems of the resultant separate nations have diverged since that collapse.

But, whatever the fate of the EU, there is of course one use to which materials such as the 2005 PETL might fruitfully be put: namely, as yet another source of plausible arguments and legal concerns. The admirable commentaries on the Principles adopt a "flexible system" which allows a variety of differing concerns and arguments to be spelt out. Thus, in the unlikely event that a practitioner and judge in an English-speaking jurisdiction is in need of yet further

183 Compounded when, as here, the legal materials rely on translations from many languages.
184 There is an important parallel here with the divergences that past empires and monarchies had to tolerate. See H. PATRICK GLENN, ON COMMON LAWS (2005).
185 New York Times 1 January 2007. The United Nations has only 6 official languages.
misunderstands the core role of such courts: to determine the weight of arguments in a case and reach a reasoned decision. Legal reasoning can be incoherent, inconsistent or facile, and rightly attacked on those grounds. But even if an academic could identify all the relevant coherent, consistent and perceptive concerns in a case, she cannot claim that, by virtue of some objective “legal science,” she has deduced the correct “conclusions about the proper policy for the law to adopt,” or more generally the “best answer to [tort] problems,” let alone that the foreign idea is “superior.” Such claims seem more common among Continental comparativists than among common lawyers who accept that “in the nature of things, there is no ‘right’ answer.” In short, while the normative rhetoric of the “correct” or “best” or “superior” solution fits the accepted role of the Code commentator, the perceptive comparativist should, from his sensitivity to comparison and context, see that it is simply inappropriate usage in a common law system, unless he clearly acknowledges that it merely signifies his personal subjective preference.

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193 Alan Rodger, What are Appeal Courts For?, (2004) 10 OTAGO L. REV. 517, 535 (2004). “Whatever the decision and whatever the reasons, critics will always be able to question them if only because, in the nature of things, there is no ‘right’ answer. The court has simply got to choose and, when it does so, it puts forward the best set of reasons it can devise. Those reasons may not be compelling but that does not mean that the decision itself is incorrect.”