

**PRACTICAL GLOBAL TORT LITIGATION: US, GERMANY AND  
ARGENTINA**

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**ROADMAP TO A CONTEXTUAL COMPARATIVE LAW JOURNEY**

The book had its genesis at the Florida International University College of Law, South Florida's public law school, where McClurg taught as a member of the founding faculty from 2002-06. The FIU College of law is one of the most international of all U.S. law schools, drawing its students from many diverse cultures and nations. Uniquely, the FIU College of Law curriculum requires that all courses, including domestic law courses, include a comparative and/or international law component.

To satisfy the comparative/international law requirement for his Torts and Products Liability courses, McClurg searched long and hard for manageable, self-contained materials comparing the U.S. common law tort litigation system with tort systems in countries following the "civil law" tradition, which make up much of the world. While the search turned up a large body of outstanding comparative law scholarship, only a sliver of it addressed tort law and litigation, in part because extensively developed tort law is a relatively recent and still ongoing phenomenon in most of the world. Another discovery was that most comparative law literature is historical, theoretical or thematic in nature. Not many materials attempt to explain how tort litigation "really works" in civil law countries as compared to the U.S. common law system.

As a byproduct of this obstacle, comparative law coverage tends to be either very broad or very narrow. Survey-type materials offer wide geographic and subject matter coverage, but do not convey any sense of how law really functions in other countries. Analyses of specific topics give much greater depth, but the subject matter often has only narrow application.

Like many faculty members at the FIU College of Law, McClurg tried both the macro and micro approaches to teaching comparative/international law in Torts and Products Liability, with underwhelming success.

It occurred to us that one way to strike a breadth-depth equilibrium and also help bring comparative law to life would be to *contextualize* it by applying the substantive and procedural law of different nations to the same set of case facts. A case-based approach offers unique advantages. Foremost, it gives students a contextual foundation to which they can attach what they're learning. Legal principles mean little in isolation from facts, which is a principal reason U.S. law students learn most subject matter by the "case method." Applying law to facts promotes analysis that is not only more focused, precise, and accurate, but more accessible and retainable. It is one thing, for example, to recite a general rule about

the burden of proof in a given legal system, and quite another, as readers can see in this book, to unweave the intricacies of how proof burdens apply to a concrete set of facts. Applying the law of different nations to a consistent fact pattern highlights both similarities and differences more dramatically than a purely expository approach. A case approach would not intuitively occur to a civil law lawyer trained to think in terms of codes rather than cases, but a “problem approach”—which is essentially the same thing—probably would. Regardless of the system, litigating lawyers around the world are engaged in the same task: solving legal problems, many of them universal in nature.

McClurg drafted a set of facts about a fictional tort plaintiff named Silvia Winter injured by a shattering glass food container, a prototypical products liability case, then set out to find co-authors in Europe and Latin America, two major world regions where civil law systems predominate.

He then called co-authors Adem Koyuncu, from Cologne, Germany, and me, from Buenos Aires, Argentina.

Together, the three of us set out on a comparative law journey spanning three continents, using a hypothetical case as our instrument for exploration. None of us is an expert in comparative law, but that may have been an advantage for a project of this nature. “As every comparatist knows,” writes Mathias Reimann, “it is difficult, and sometimes outright impossible, for an outsider fully to understand the law of a foreign country.” We are each “insiders” with substantial backgrounds in the tort and products liability systems of our respective countries. Not being comparatists by background or training, we approached the project without preconceived notions, sharing the same kinds of questions about how tort litigation functions in other nations.

The book attempts to compare three different legal systems through the substantive and procedural analysis of a hypothetical case. The case facts were especially drafted to help enriching the discussion and facilitating the comparative approach.

The book was constructed around the hypothetical products liability case of Silvia Winter. Silvia was a university student studying to be a physical therapist when a glass jar of peanuts shattered as she attempted to place the lid on it, injuring her hand and wrist. Silvia exists in three incarnations in three countries on three continents. “U.S. Silvia”, “German Silvia” and “Argentine Silvia”. The book tracks Silvia’s hypothetical products liability lawsuit seeking to recover damages for her injuries as it progresses through the legal system of each country. We gave some background about the legal systems of the U.S., Germany, and Argentina and the sources of law in common law and civil law systems, both generally and as they pertain to products liability law.

The book was intended as a basic primer on comparative tort law and litigation in the U.S. common law system and a major civil law system from Europe (Germany) and Latin America (Argentina), using one common kind of products

liability case as the vehicle for exploration. The emphasis was on clear, concise explanation and analysis of topics such as:

- Sources of law in civil and common law countries, concentrating on sources of products liability law;
- Fact gathering and presentation procedures;
- Expert witnesses;
- Burdens of proof and causation;
- Theories of recovery in a products liability case involving a manufacturing defect;
- Defenses in such a case; and
- Damages and attorneys' fees.

Even though the focus was on a single set of facts, considerable generalizing was required in a book that attempted to concisely cover an entire litigated case in three countries.

The book attempted to deliver a big picture overview of a litigated tort case while at the same time not skimping on important details. We did not delve deeply into historical, cultural or other explanations on why legal rules developed the way they did.

To facilitate coherent side-by-side comparisons, we opted in most places for a compartmentalized format in which the law of our respective nations was set forth under separate subheadings. We considered and rejected as too unwieldy and confusing the alternative approach of trying to weave together the intricacies of the law in all three nations line by line.

We strived to construct a neutral comparative account. The purpose was to inform, not persuade. Except for brief editorial comments in the final chapter, we leave it to others, including readers, to pass judgment on the relative merits of any particular aspect of the legal systems studied.

We gave in to the temptation to make a direct monetary comparison of Silvia's estimated damages award in each country should she prevail on the merits. We recognized the limited value of attempting to estimate and compare damages in a hypothetical products liability case for three countries, but thought readers would want to know "the ending" to Silvia's story. More importantly, the projections provide a contextual basis for exploring some of the key explanations for disparities in tort damages awards between the U.S. and other nations. Numbers were offered only as rough comparative benchmarks.

The book is unique in its problem approach to comparative law. By contextualizing comparative law—that is, by applying the substantive and procedural law of different countries to a consistent set of facts—the intention is to showcase similarities and differences among the U.S. common law tort system and the civil law tort systems of Germany and Argentina in a way that is understandable, interesting, and digestible. We seek to *show* in addition to tell. So what are we

waiting for? To continue our journey metaphor, it's time to crank the ignition and begin the trip.

#### **REASONS FOR SELECTING THESE THREE COUNTRIES**

Most comparative law study, including this book, focuses on the two most influential worldwide legal traditions: common law and civil law.

Civil law is both much older and more widely distributed than the common law tradition. All of Western Europe and Latin America operate under civil law systems, as do parts of Africa and Asia. The legal systems of Eastern Europe also were built on a foundation of civil law. Following World War II, socialist law was overlaid on those systems by the former Soviet Union. With the fall of Soviet socialism, the civil law foundation of Eastern European countries is re-emerging.

It's not possible to differentiate common law and civil law systems in anything approaching black and white terms. The variations among the legal systems of different nations, even nations that fall under the same classification as "common law nations" or "civil law nations," are enormous. They include differences in both procedural and substantive rules of law, as well as fundamental structural differences such as the extent to which a system adheres to the principle of judicial review. Even in countries following similar legal traditions, social and economic differences dramatically impact how those rules are applied in practice and the results that flow from their application.

Complicating categorization further, many legal systems are mixed systems combining elements of both Anglo-American common law and European civil law, and in some cases Islamic law. U.S. law has been particularly influential. This is true in many Latin American countries, including Argentina.

With 192 nations on the planet, and so many variations among their legal traditions, selecting any three countries for comparative study is susceptible to criticism as being arbitrary. Nevertheless, the U.S., Germany, and Argentina are fitting subjects for a tri-continent "common law vs. civil law" comparative products liability study. The U.S. is the largest common law system in the world and the U.S. litigation system is the most intricately developed and oft-used, while Germany and Argentina are major civil law systems on their respective continents.

Germany boasts Europe's largest population and economy and the Germanic civil law tradition is rivaled only by France in terms of its world influence. Because Germany is a worldwide leader in producing consumer and industrial products, the country has a highly-developed products liability legal system. In light of the ongoing European legal harmonization process, German litigation procedures can be regarded as representative of many European communities. Substantively, all members of the European Union have now implemented the European Union Product Liability Directive of 1985, a statement of uniform products liability principles.

In Latin America, where litigation practice in general and personal injury law in particular are less well-developed than in the U.S. or Western Europe, Argentina is viewed as a progressive legal leader. This is particularly true in products liability

law, a fast-growing field of Argentine law and a good proxy to understand how law works in practice in Argentina. In addition to relevant code and other statutory provisions, a well-developed set of judicial precedent is available addressing the main issues in products liability, as well as a wealth of scholarly commentary. Argentine law has had the most impact on the other nations in its Region and is the most innovative and likely to adopt new theories.

Argentina's courts and legal profession function quite similarly to their Latin American counterparts. The country is part of a far-reaching trade and legal harmonization pact in South America known as Mercosur, a shortening of *Mercado Común del Sur* or Southern Common Market. Signed in 1994 by Argentina, Brazil, Paraguay, and Uruguay, Mercosur is intended to harmonize trade policies in all sectors to facilitate free trade among its members. Chile and Bolivia also have entered into agreements with Mercosur. The member countries have a combined population exceeding two hundred million people, more than two-thirds of the population of South America. Mercosur may ultimately lead to legal harmonization similar to what has occurred in the European Union. Already, Mercosur has proposed rules addressing consumer protection, although they have not been adopted.

Including a civil law nation from Europe and one from Latin America adds an extra comparative dimension. While both Germany and Argentina are civil law countries, large cultural and economic differences exist between them and between their continents that influence their legal traditions. Most comparative law analysis pertaining to products liability has focused on Europe and Great Britain. Even the U.S. hasn't received much attention, but Latin America has been largely ignored, which is not surprising given the link between products liability issues and economic development. That should change as Latin American markets continue to emerge. Although Latin American economies remain somewhat volatile, in 2004-05 Latin America posted its strongest economic growth in a quarter century. In today's global marketplace, the citizens of virtually all nations are actively involved in buying and selling mass-produced products, both from within and without their borders.

#### **ELEMENTS FOR THE JOURNEY**

Before attempting to understand how a tort case is handled in a particular legal system, one needs at least a snapshot of the overall system. So, we gave an overview of the court structures, judiciaries, and legal professions in the U.S., Germany, and Argentina.

We then turned to sources of law in common law versus civil law countries, as well as the specific sources of products liability law in the U.S., Germany, and Argentina. As we saw throughout the book, the answers in real life are quite different from popular perception.

Accessibility was a guiding principle in writing the book. The goal was to craft a text accessible to people, like us, without substantial prior expertise in comparative law, and which could be understood by readers lacking prior knowledge of any of the three legal systems discussed, including the U.S. The book is designed

for any reader, in or outside the U.S., interested in learning how one common variety of products liability case would be handled, both procedurally and substantively, in the U.S. common law system as compared to representative civil law systems in Europe and Latin America. As a law school text, the book's primary usefulness is as a supplemental text in basic torts and products liability courses for professors who want to expose their students to a comparative legal perspective, or as a primary or supplemental text in comparative law courses or advanced courses in torts, products liability, civil procedure or litigation.

### **LESSONS LEARNED**

The project that resulted in this book was an enlightening experience for us. We were surprised for the number of similarities in substantive products liability law among the three countries, as well as the marked dissimilarities in critical procedures. After studying law in the U.S. and working with U.S. clients, I believe that, while common law and civil law look very different in theory, the distances between the two traditions have narrowed in recent decades and probably will continue to do so. Because of the global marketplace in which we live, this is particularly true in the area of products liability law. Strict liability under common law is a matter of case-by-case construction, while in civil law systems it originates in code and other statutory provisions. But we've seen how case law has put meat on the barebones codifications of strict liability in both Argentina and Germany in a manner not unlike the way U.S. case law fleshes out rules one case at a time. As mentioned, there seems to be a universal sense of fairness that has moved judges, scholars, and legislators from very different regions and cultures to find similar solutions to the inevitable risks posed by defects in mass-produced products and the difficulties in proving those defects.

Procedural law does not follow that pattern. As I have taught students enrolled in my courses on civil procedure, substantive law can be a marvelous intellectual engagement, but it means nothing if the instruments to put the substantive principles into practice—procedure law—do not work properly. In my view, and that of many local scholars, Argentine civil procedure, although having improved in the last two decades, is ill-designed to accompany the evolution of products liability substantive law principles and is not in tune with the consumerist and globalized world we live in. U.S. scholars, judges, practitioners, and, increasingly, legislators may have a host of complaints against U.S. discovery and class actions, but from a foreign observer's perspective, I believe those devices account for a large part of the protection that consumers enjoy in the U.S. I believe these are devices other countries should borrow, at least in part and always taking into account the local culture and practice of the borrowing country.

The U.S. law students are one of the principal intended audiences. Many U.S. law students still may not be aware of the rapidly changing global situation with regard to the practice of transnational law. They are, whether they know it or not, preparing to practice law around the world. In my practice, I witness daily the cliché that "the world is shrinking." Many of the clients I work with are U.S. companies engaged in worldwide business. I often work closely with their in-house and outside

counsel. Coping with the challenges of the borderless marketplace will depend in part on one's ability to understand foreign law, culture, and legal traditions. All U.S. lawyers would benefit simply from having some clue about what their foreign colleagues and adversaries are talking about when, for example, they make references to basic procedures and principles of the civil law tradition. In other words, international training will pay dividends to today's law students.

Lawyers without some grounding in the legal systems of other nations increasingly will be at a competitive and intellectual disadvantage in a rapidly "flattening" world. In his bestselling book, Friedman presented a compelling case that the leveling effects of technology, particularly in computer software and networking, have moved us into a new era of globalization that "is shrinking the world from a size small to a size tiny."

While the Internet and other communications technology have transformed us into a borderless virtual world, a profusion of world trade agreements and regional cooperation pacts, either already in place or in progress, continue to dissolve physical borders. Visit the foreign trade statistics page on the U.S. Census Bureau's website and pick a country, any country. No matter how small or remote the nation, the chances are good that the U.S. is importing and exporting consumable goods and materials to and from it.

Given the vast global market in consumer goods, products liability is an area in urgent need of more comparative study. Silvia Winter's story is just one chapter in this study, but in one sense it is a paradigm of the universal complexities and uncertainties of allocating risk and assigning responsibility for product injuries in a modern commercial life in which a web of actors—raw materials sellers and fabricators, component part and final product manufacturers, packagers, transporters, wholesalers, retailers, and consumers—play intertwined but legally distinct roles.

In the end, navigating Silvia's products liability case through the legal systems of the U.S., Germany, and Argentina really was like a journey for us. Because we started out knowing little about each other's legal systems, the path of discovery often was confusing and maze-like. Like tourists driving for the first time, we proceeded tentatively at first, made frustrating wrong turns, and stumbled on unexpected local treasures. We made countless cost-benefit trade-offs along the way about which legal attractions to linger at and which ones to simply frame in a snapshot and move past. Eventually, the lines on the map became less blurry and the street markers more familiar. By the time we reached our destination, we felt comfortable navigating through all three legal systems, at least in the context of hypothetical case.

The ultimate goal was for readers to be able to close the book covers with a high level of confidence about "the basics" of how one common variety of products liability case would travel through the tort litigation systems of the U.S., Germany, and Argentina. We hope to have attained that objective. For the time being, the preliminary evaluations of students using the book (or parts of it as handouts) in the U.S. have been very supportive.

On the other hand, the “virus” of this comparative approach is extending to other law school subjects. Our book has led to the creation of an entire series, “The Contextual Approach Series”, being published by Carolina Academic Press. Books are already underway in the areas of: Administrative Law (U.S., China, Bulgaria); Civil Procedure (U.S., Germany, South Korea); Criminal Procedure (U.S., Argentina, Japan); Evidence (U.S., France, Scotland); Family Law (U.S., China, and Italy); Labor Law (U.S., Mexico, Belgium); and Professional Responsibility (U.S., Japan, Uruguay). The Series Editor, my co-author Prof. McClurg is still looking for other authors, especially for the first-year courses of Contracts and Property.

The book is out there for your enjoyment and qualified judgment.