Practical Global Tort Litigation

Contextual Approach Series
in Comparative Law

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Series Editor, Andrew J. McClurg

Practical Global Tort Litigation

United States, Germany and Argentina

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To Douglas P. McClurg, my mentor and hero.
We still miss you every day.
AJM

To my family.
AK

To my daughter Lucia and my son Juan,
hoping that they will live in a borderless world
that will still foster social awareness and transcendent values.
LES

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PREFACE

This book and the Contextual Approach Series (CAS) had their genesis at the Florida International University College of Law, South Florida's public law school, where I 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. Adopting a pervasive approach to teaching comparative and international law, the FIU College of Law curriculum uniquely requires that all courses, including domestic law courses, contain a comparative and/or international law component. Comparative law is the study of similarities and differences in the law and legal traditions of different nations. International law is the "law of nations." It covers the entire field of both public and private transnational relationships.

To satisfy the comparative/international law requirement in my Torts and Products Liability courses, I 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 small amount addressed tort law and litigation, in part because extensively developed tort law is a relatively recent and still ongoing phenomenon in most countries. Another discovery was that most comparative law literature is historical, theoretical or thematic in nature. Not many materials attempt to explain how law "really works" in other nations as compared to the U.S. common law system.

One obvious explanation for this gap is the sheer enormity of the task. To say that comparing legal systems is difficult is euphemistic. Think how impossible it would be, for example, to "compare the law" of New York and Wyoming, then consider the proportions of comparing different legal systems of different countries. As a byproduct of this obstacle, comparative law coverage tends to be either very broad or very narrow. Survey-type comparative materials offer wide geographic and subject matter coverage, but do not convey a sense of how law functions in practice. Comparative analyses of specific

topics provide much greater analytical depth, but the subject matter often has only narrow application.

Like many faculty members at the FIU College of Law, I tried both the macro and micro approaches to integrating comparative/international law in Torts and Products Liability, with underwhelming success. In Torts, I distributed a nifty chart attempting to compare common law and civil law systems in six pages, assigned a lengthy law review article about the Alien Tort Claims Act, and invited guest speakers such as the Chief Justice of the Costa Rica Supreme Court, a wonderful gentleman, and a distinguished lawyer from Argentina. I made my Products Liability students do presentations about Latin American products liability law. All of these endeavors were interesting, but my students weren't learning much about comparative or international law. There had to be a balance between "Today we're going to compare the law of the entire world," and "Today we're going to explore interpretations of article 1(c)(ii) of the Convention on International Liability for Damage Caused by Space Objects." Feedback from students at FIU affirmed that my difficulties in trying to integrate comparative and international law were not unique. Other professors were facing the same challenges.

It occurred to me 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 law of different nations to a set of case facts raising legal issues common and important to people in all nations. A case-based approach offers unique advantages. Foremost, it gives writers a foundation for *analyzing* (in addition to expositing) law and students a contextual anchor to which they can attach what they're learning. Legal principles mean little in isolation from facts, which is a principal reason why 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 accessible and retainable. It is one thing to recite a general rule about the burden of proof in a given legal system, and quite another, as readers will see, to unweave the intricacies of how proof burdens apply to a concrete set of facts. Seeing how different legal systems respond to the same facts highlights similarities and differences directly and in some instances dramatically. A case approach would not intuitively occur to lawyers in non-common law systems, who are trained to think in terms of codes rather than cases, but a "problem approach"—which is essentially the same thing—probably would. Regardless of their legal tradition, lawyers around the world are engaged in the same task: solving legal problems, many of them universal in nature.

I 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, major world regions where the civil law tradition predominates. I was most fortunate to meet up with co-authors Adem Koyuncu, in Cologne, Germany, and Luis Eduardo Sprovieri, in Buenos Aires, Argentina, whose outstanding credentials (see "About the Authors") speak for themselves. As discussed in chapter two, Germany and Argentina are good candidates for this comparative study. Both countries have well-developed products liability systems that function similarly to other nations in Europe and Latin America.

The three of us set out on a comparative law journey spanning three continents, using Silvia Winter's 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." Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard*, 51 Am. J. Comp. L. 751, 755 (2003). We are each "insiders" with substantial backgrounds in the tort and products liability systems of our respective countries. We approached the project without preconceived notions, sharing the same kinds of questions about how tort litigation functions in other nations.

I tested, unscientifically, the contextual comparative law approach on my Spring 2006 Products Liability students at the FIU College of Law, asking them to read and comment anonymously on sample chapters of this book. As the only U.S. law students exposed to comparative/international law in every course, they were well-qualified survey participants. Their thoughtful comments helped shape the final manuscript while also confirming the value of a problem-based methodology. The following student comment was typical:

> After several semesters of having professors try their hands at fulfilling the comparative component of a class, I think a hypothetical case study might be the most effective way to integrate a comparative component into class material. One of the difficulties that always arises seems to be integrating the comparative part into the whole of the class. Sometimes, a professor picks a very defined topic and hands out a law review article comparing the U.S. on that topic to the rest of the world. In other classes, the professor picks a country and we spend one class day looking at how that particular country deals with the body of law. Some nuggets are retained, but it doesn't seem to be the spirit that the comparative law component was meant to capture.… Taking the same set of facts, and keeping the structure of the

> analysis parallel while applying the law of a limited, defined set of countries, seems to me to be a very effective method for comparative study. First, it gives the student context when reading about foreign law. Instead of an expository discussion of what the law is somewhere else, this approach applies the law. I think the application portion is the most valuable component of this method. For example, instead of just reading about how Germany's Product Liability Act limits claims against retailers and distributors, we actually see how this impacts Silvia. …

Carolina Academic Press also saw the benefits of a problem-based approach to comparative law and started the CAS based on it. Each entry in the series, this being the first, will follow a consistent format of enlisting experts in three countries, the U.S. always being one of the countries, to analyze from a real world comparative perspective a set of problem facts raising universal legal issues in a particular subject area. The series will explore a rich array of legal topics in countries from all corners of the planet.

Accessibility is a guiding principle of the CAS. The goal is to craft texts accessible to people without prior expertise in either comparative law or any of the three legal systems under study. *Practical Global Tort Litigation* 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, 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 is intended 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.

We hope you enjoy reading it as much as we enjoyed writing and learning from it.

Andrew J. McClurg
Herbert Herff Chair of Excellence,
The University of Memphis
Cecil C. Humphreys School of Law

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