

Contents

<i>Foreword by Reinhard Zimmermann</i>	xv
<i>Foreword by Roscoe Pound</i>	xvii
<i>Foreword by André Tunc</i>	xxi
<i>Preface</i>	xxiii
<i>In memoriam</i>	xxv
<i>Acknowledgments</i>	xxvii
<i>Table of abbreviations</i>	xxix
<i>Table of cases</i>	xxxi
<i>Table of legislation</i>	xlvii
<i>Table of restatements and kindred sources</i>	liii
<i>Table of EU legislation and kindred sources</i>	lv
<i>Table of Roman and Canon law sources</i>	lvii

INTRODUCTORY READINGS 3

I. HISTORY: ENGLISH LAW AND ROMAN LAW 3

1. English law	3
a. The early English legal profession	3
John Dawson, <i>The Oracles of the Law</i> (1968), 1–6, 38–39.	3
b. The writ system	10
F. W. Maitland, <i>The Forms of Action at Common Law</i> (A.H. Chaytor & W.J. Whittaker ed. 1909), Lecture I.	10
2. Roman law	18
John Dawson, <i>The Oracles of the Law</i> (1968), 100–09.	18
Peter Stein, <i>Roman Law in European History</i> (1999), 16–21, 32–36, 43–54, 71–74.	25

II. CODIFICATION 46

1. Codification in France	46
a. The enactment of the French Civil Code	46
Arthur von Mehren & James R. Gordley, <i>The Civil Law System</i> (2d ed., 1977), 48–51.	46

b. The interpretation of the Code	50
The earlier understanding: Portalis	50
Portalis, "Discours préliminaire prononcé lors de la présentation du projet de la Commission du gouvernement" in P.A Fenet, <i>Recueil complet des travaux préparatoires du Code civil</i> 1 (1827), 461 at 467–72.	50
The later understanding: The exegetical school	
Charles Aubry & Charles Rau, <i>Cours de droit civil français</i> 1 (4th ed. 1869), §§ 1–2.	52
Charles Aubry & Charles Rau, <i>Cours de droit civil français</i> 1 (4th ed. 1869), § 40.	53
Charles Demolombe, <i>Traité publication, des effets et de l'application des lois en général</i> , preface (ed. 4, 1869).	54
2. Codification in Germany	54
a. The initial opposition	54
Friedrich Karl von Savigny, <i>The Vocation of our Age for Legislation and Jurisprudence</i> (trans. A. Hayward, 1831), 24, 28, 38–42.	54
b. The enactment of the German Civil Code	57
Arthur von Mehren & James R. Gordley, <i>The Civil Law System</i> (2d ed., 1977), 75–79.	57
c. The interpretation of the Code	61
<i>Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich</i> 1 (1888), 14–17.	61
d. A note on codification and 19th century will theories	63
III. INSTITUTIONS 65	
1. Germany and the United States	65
John H. Langbein, "The German Advantage in Civil Procedure," <i>University of Chicago Law Review</i> 52 (1985), 823–65.	65
2. France	99
Konrad Zweigert & Hein Kötz, <i>An Introduction to Comparative Law</i> (Tony Weir, trans., 3d ed., 1998), 119–31.	99
3. England	110
Konrad Zweigert & Hein Kötz, <i>An Introduction to Comparative Law</i> (Tony Weir, trans., 3d ed., 1998), 205–17.	110

4. The European Union	121
George A. Bermann, Roger J. Goebel, William J. Davey & Eleanor Fox, <i>Cases and Materials on European Union Law</i> (2d ed. 2002), 33–39, 42–51, 54, 58–59; <i>Supplement</i> (2004), 21.	121

**COMPARATIVE PRIVATE LAW:
PROPERTY, TORT, CONTRACT,
UNJUST ENRICHMENT 139**

PART ONE: PROPERTY LAW 141

I. POSSESSION 141

1. Possession as a means of acquiring rights	141
a. Wild animals	141
Roman law	141
Anglo-American law	141
French law	142
German law	143
b. Found objects	144
Roman law	144
Anglo-American law	144
French law	145
German law	146
c. Treasure	146
Roman law	146
Anglo-American law	147
French law	147
German law	147
d. Adverse possession and prescription	148
Roman law	148
English law	148
Law in the United States	149
French law	150
German law	151
2. The protection of possession against non-possessors	152
a. Legal remedies	152
Anglo-American law	152
Continental law	154
French law	154
German law	154

b. The debate over why possession should be protected	155
Savigny	155
Ihering	156
Pollock	156

II. OWNERSHIP 157

1. Rights to natural resources 157

a. Resources of value in their own right, and not merely complementary to the use of property: the case of minerals and gas	157
b. Resources complementary to the use of property: water rights	158
Anglo-American law	158
Law in the United States	164
English law	165
French law	165
German law	167

2. Interference with neighboring property 167

a. Origins	167
b. Activities that are intended to bother another	171
c. Activities that happen to bother another	172
Remedies	172
English law	172
Law in the United States	174
French law	175
German law	176
The character of the neighborhood	176
English law	176
Law in the United States	178
German law	179
French law	180
Priority in time	181
English law	181
Law in the United States	182
German law	183
French law	184
Height	184
English law	184
Law in the United States	185
German law	186
French law	187
Ugliness	188
Law in the United States	188
German law	189
French law	190

Offensive conduct	190
English law	190
Law in the United States	191
German law	192
French law	193
3. Voluntary changes in the scope of rights: easements, covenants, and servitudes	196
a. Overview	196
Anglo-American law: easements, covenants and equitable servitudes	196
Continental law: servitudes and kindred relationships	198
French law	198
German law	198
b. Burdens for the benefit of one who does not own land	199
Anglo-American law	199
French law	201
German law	203
c. Burdens that require a land owner to do an affirmative act	203
English law	203
Law in the United States	204
French law	205
German law	206
d. The problem of subdivisions	207
English law	207
Law in the United States	207
French law	210
German law	213
III. THE DOCTRINE OF NECESSITY 213	
1. Origins	213
2. The general principle	217
Law in the United States	217
English law	221
German law	223
French law	224
3. Necessity and land use	227
English law	227
Law in the United States	227
German law	228
4. Necessity and intent	229
Law in the United States	230
German law	230

PART TWO: TORT LAW		234
I. THE SCOPE OF THE RIGHTS PROTECTED		234
1. Introduction: the structure of tort law		234
a. Civil law		234
The Civil Codes		234
From Roman law to the modern code provisions		235
b. Common law		240
A list of torts		240
From the forms of action to the modern torts		242
2. Harm to dignity		246
a. Insult in general		246
Traditional common law		246
Modern English law		247
Modern law in the United States		251
French law		253
German law		254
b. Problems of free speech, group insult, and minority rights		258
Law in United States		258
French law		259
German law		261
3. Invasion of privacy		266
a. Dissemination of pictures		266
English law		266
Law in the United States		267
French law		269
German law		270
The European Convention on Human Rights		275
b. Dissemination of true information		280
About current events		280
English law		280
Law in the United States		286
French law		290
German law		291
About historical events		292
Law in the United States		292
French law		294
German law		294
Electronic collection and dissemination of information		295
4. Purely economic harm		306
a. Liability in principle for purely economic harm:		306
French law		

b. No liability in principle for purely economic harm	308
Origins	308
Physical harm to a third party's property	313
Anglo-American law	313
German law	315
Plaintiff's property made unusable	316
Law in the United States	316
German law	317
False information	317
English law	317
Law in the United States	319
German Law	321
5. Harm suffered because another is harmed	322
Traditional Anglo-American law	322
Modern law in the United States	324
Modern English law	326
French law	329
German law	333
II. THE CONDUCT FOR WHICH ONE IS LIABLE	335
1. Introduction	335
2. Intent	339
a. The intention to do harm or to do wrong	339
Civil law	339
Common law	339
b. The intent to cause a different harm or commit a different tort	342
Law in the United States	342
English law	344
German law	345
French law	347
c. Intent and knowledge	351
English law	351
Law in the United States	352
French law	353
German law	353
3. Negligence	353
a. The meaning of negligence	353
Introduction	353
The weighing of consequences	354
An English description	354
Some American descriptions	356
Some French descriptions	357
Some German descriptions	357

The reasonable person	359
The general principle	359
Children and the mentally ill	360
English law	360
Law in the United States	362
German law	362
French law	363
b. The duty to act	364
The general principle	364
English law	364
Law in the United States	366
French law	368
German law	368
Implications of recognizing a duty to rescue	369
Rescuing those who attempt suicide	369
French law	369
German law	369
Rescuing one's victims	370
French law	370
German law	371
Distinguishing failure to rescue from misdiagnosis	371
French law	371
German law	372
Failing to be in a fit state to rescue	373
German law	373
4. Strict liability	373
a. Liability for activities that cause physical harm	373
Liability for dangerous or "non-natural" activities	373
The general principle	373
English law	373
Law in the United States	380
German law	382
Liability to the abnormally or unexpectedly vulnerable	388
English law	388
Law in the United States	389
German law	390
Liability for harm caused by objects in one's custody: French law	391
Introduction	391
The rise of strict liability	392
The requirement of an "act of an object"	397
<i>Cas fortuit</i> and <i>force majeure</i>	400
"Guard"	401
The extent of liability	403
b. Liability for defective products	404
Law in the United States	404
Law in Europe	409

PART THREE: CONTRACT LAW 413**I. THE STRUCTURE OF CONTRACT LAW 413****1. Civil law 413****2. Common law 421****II. VOLUNTARY COMMITMENT 426****1. The moment at which a commitment is binding 426**

Common law 426

German law 429

French law 429

The "Lando Principles" 430

The Unidroit Principles 431

2. Liability before a final commitment is made 432

English law 432

Law in the United States 435

French law 440

German law 443

The "Lando Principles" 447

The Unidroit Principles 447

3. Mistake 448**a. When relief is granted 451**

English law 451

Law in the United States 452

French law 453

German law 454

The "Lando Principles" 454

The Unidroit Principles 455

b. When relief is denied 455

English law 455

Law in the United States 458

French law 460

German law 461

III. FAIRNESS 461**1. Fairness of the price term 461****a. Origins 461**

Civil law 461

Common law 466

b. Modern law 469

English law 469

Law in the United States 470

The "Lando Principles" 473

The Unidroit Principles	473
German law	474
French law	481
2. Fairness of the auxiliary terms	486
Law in the United States	486
Law in Europe	488
The "Lando Principles"	494
The Unidroit Principles	494
IV. EXCUSES FOR NON-PERFORMANCE	494
1. Impossibility and <i>force majeure</i>	494
Common law	496
French law	498
The "Lando Principles"	501
The Unidroit Principles	501
German law	502
2. Changed circumstances	503
a. Origins	503
b. Modern law	505
English law	505
Law in the United States	507
The "Lando Principles"	510
The Unidroit Principles	510
German law	511
French law	524
V. REMEDIES	527
1. Specific performance	527
a. Origins	527
b. Modern law	528
English law	528
Law in the United States	531
French law	532
German law	533
2. Damages	535
a. The general principle	535
b. Limitations on recovery	536
Recovery for non-economic harm	536
English law	536
Law in the United States	538
French law	538
German law	539

Recovery for unforeseeable harm	541
Origins	541
Modern law	543
French law	543
English law	545
Law in the United States	547
The "Lando Principles"	548
The Unidroit Principles	548
German law	549

PART FOUR: UNJUST ENRICHMENT 552

I. THE PRINCIPLE 552

Roman law	552
English law	552
Law in the United States	554
French law	554
German law	555

II. UNJUST ENRICHMENT WHEN THE PLAINTIFF DID NOT LOSE 557

1. The use or violation of another's property rights	557
English law	557
Law in the United States	558
French law	558
German law	559
2. The question of what the defendant should pay	559

III. UNJUST ENRICHMENT WHEN IT IS DOUBTFUL WHAT THE DEFENDANT GAINED 562

1. The problem of improvements	562
Anglo-American law	562
German law	563
2. Situations in which the defendant would not have paid the amount he is judged to have been enriched	564