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**HARMONIZING EUROPEAN TORT LAW AND
THE COMPARATIVE METHOD**

a Review of

**BASIC QUESTIONS OF TORT LAW FROM A COMPARATIVE
PERSPECTIVE (Helmut Koziol ed., Sramek 2015)**

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Keywords: tort law, European Union law, harmonization of EU tort law

This book is the second of two volumes on “Basic Questions of Tort Law.” In the first volume, Professor Helmut Koziol examined German, Austrian, and Swiss tort law.¹ In this volume, Professor Koziol has assembled essays by distinguished scholars from several European legal systems as well as the United States and Japan, each of whom follows the structure of Koziol’s earlier book and explains how those basic questions are handled in their own systems.² Throughout both volumes, Professor Koziol and his collaborators take a broad view of the topic under discussion, addressing not only the private law Americans call “tort” but also the role of insurance schemes in compensating injured persons. An advantage of the organizational scheme is that it facilitates issue-specific comparisons among the systems. Thus, Professor Koziol has also contributed a chapter, entitled “comparative conclusions,” in which he identifies similarities and differences among the various systems. Taken together, the system-specific chapters are a valuable resource for anyone interested in a concise introduction to a particular system or in direct access to comparisons and contrasts among systems. Koziol’s

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1. 1 BASIC QUESTIONS OF TORT LAW FROM A GERMANIC PERSPECTIVE (Helmut Koziol ed., Sramek 2012) [hereinafter GERMANIC PERSPECTIVE].

2. The nation-specific essays include Bjarte Askeland (Norway), W. Jonathan Cardi and Michael D. Green (United States), Katarzyna Ludwickska-Redo (Poland), Attila Menyhard (Hungary), Olivier Moréteau (France), Ken Oliphant (United Kingdom), and Keizo Yamamoto (Japan).

chapter on “comparative conclusions” is an incisive analysis of those comparisons and contrasts.

Professor Koziol’s goal is more ambitious than simply to provide a convenient and current source of information about similarities and differences in the way of personal injury, harm to property, and related problems are handled in a variety of legal systems. His overall aim, which he develops in his chapter on comparative conclusions, is to use the detailed comparative analyses contained in the two volumes as part of an effort to harmonize tort law across the member states of the European Union.³ Thus, the role of comparative law as part of the larger project is to identify areas of agreement and disagreement across systems, so that work can proceed on confirming the commonalities and resolving out the disputed issues.

This review focuses on Professor Koziol’s ultimate aim of harmonization, and on the contribution of these essays to that project. Harmonization of tort law across the member states is not just a matter of working out answers to such questions as the content of the liability rule or whether non-pecuniary harm should be recoverable. Harmonization raises an issue of European Union federalism. That question is not explicitly addressed in either volume, yet the value of the project, and prospects for its success, turn on the answer to it. I argue that Professor Koziol has not made a convincing case for EU displacement of member state tort law.

I.

Ever since the Treaty of Rome in 1957, the member states of the European Union have pursued the goal of “an ever closer union among the peoples of Europe.”⁴ The Union “shall promote eco-

3. Helmut Koziol, *Epilogue to 2 BASIC QUESTIONS OF TORT LAW FROM A COMPARATIVE PERSPECTIVE* 685 (Helmut Koziol ed., Fiona Salter Townshend trans., Sramek 2015) [hereinafter *COMPARATIVE PERSPECTIVE*].

4. ROGER J. GOEBEL ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 3 (4th ed. 2015); for the current treaty provision, see Consolidated Version

conomic, social, and territorial cohesion, and solidarity among Member States.”⁵ A central feature of this program is the development of a common market throughout the European Union, in order to facilitate the free movement of goods, persons, services, and capital.⁶ One means of achieving greater integration of European Union economies is the harmonization of laws.⁷ Professor Koziol is among those who hope to persuade the European Union to harmonize tort law, either through a directive that sets forth EU-wide standards and constraints on how far a member state may deviate from those norms, or by the enactment of EU regulations that would override current member state law entirely and impose a uniform body of tort law on the member states.⁸ With that goal in mind, in 2005 the European Group on Tort Law published its “Principles of European Tort Law.” A few years later, the Study Group on a European Civil Code and the Research Group on Existing EU Private Law “designed a Draft Common Frame of Reference, presented to the public in 2008.”⁹

The “main justification for harmonisation [is] ... that the differences between the legal systems are hindering commercial *cross-border transactions* in Europe.”¹⁰ Businesses that sell across national borders are disadvantaged because they must learn about and comply with many different tort systems. Diversity of laws “gives rise to transaction costs, which can prove to be obstacles to the market, especially for small and medium-sized businesses.”¹¹ In a related vein, harmonization would reduce uncertainty as to the content of the applicable law “and could thus lead to a noticeable reduction

of the Treaty on the European Union art. 1, Oct. 26, 2012, 2012 O.J. (C326) 13 [hereinafter TEU].

5. TEU, Article 3, para. 3.

6. See CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 3-33 (4th ed., Oxford Univ. Press 2013).

7. See GOEBEL ET AL., *supra* note 4, at 499.

8. The distinction between regulations and directives is discussed in *id.* at 154-55.

9. *COMPARATIVE PERSPECTIVE*, *supra* note 3, at 694.

10. *Id.* at 686 (italics in original).

11. *Id.* at 687.

of legal disputes and thus the consequential expenses of cases involving damage that have an international aspect.”¹² Furthermore, “European citizens—who are encouraged to move around in the European Union—cannot be expected to be very understanding that, in the case of an accident, they are treated very differently depending on which legal system is applicable.”¹³

For Professor Koziol, comparative analysis is a means to the end of greater harmonization of European tort law. The point of the two “Basic Questions” volumes, and of the comparative approach they take, is to provide information helpful to achieving the harmonization project. He argues that “we have to know even more about the fundamental ideas of other legal systems to better understand each other and to explore the different legal cultures and the ways of thinking in other countries.”¹⁴ Comparative study helps us to “recognize the common bases,” “discover new tools for solving problems, become more open-minded for different ideas and increase the understanding of fundamental perspectives.”¹⁵ Armed with this knowledge, we will determine just how far it is feasible to go with harmonization. Koziol is confident that “if all show good will and cooperate in a reasonable fashion, we will reach the goal, maybe not an ideal concept on the first go, but at least the basis for further improvement.”¹⁶

The project’s merit depends on the premise that greater uniformity is an especially valuable goal, so much so as to overcome competing considerations. Yet there are grounds to question the need for greater uniformity across the EU in the tort context and to doubt whether the costs of pursuing it are worth the benefits. In my view, the essays assembled here provide at least as much, if not more, support for the anti-harmonization view than for Professor

12. *Id.* at 688.

13. *Id.*

14. *Id.* at 695.

15. *Id.*

16. *Id.* at 704.

Koziol's project. With regard to the role of comparisons in answering the question of whether greater harmonization is called for, I believe that it is appropriate to compare the EU to the United States, and to focus the comparison on the question of whether variations among member state tort laws actually retard the growth of a federation-wide common market. The history of the United States and its economic success, suggests that a multiplicity of approaches to tort law does not stand in the way of a strong market economy. Just as the U.S. successfully copes with a variety of tort systems, so also may the EU manage to get along without systematic harmonization.

II.

Few would question the value of harmonization in the operation of a well-functioning market in the EU, including its role in providing greater variety and lower prices for goods and services, and easier movement of persons throughout Europe. It is widely agreed that the harmonization project over the past fifty years has contributed to the success of the EU. But merely pointing to the existence of benefits cannot make the case for greater harmonization in any given sphere because the benefits of harmonization come at a price. Rather, the strength of that case turns on whether the benefits are worth the costs. Since the costs and benefits vary depending on context, the question raised by the effort to harmonize tort law is not whether harmonization has benefits. Rather, the question is whether the specific benefits of this particular harmonization project is worth the costs.

Given the variety of factors that matter in making that assessment of costs and benefits, reasonable people will differ on whether the former outweigh the latter. This volume's comparisons between tort regimes may be helpful in making that assessment. In my view, however, a more illuminating comparison is available. I have in mind the experience of the United States, for each of the fifty states

has its own tort system. Nonetheless, the United States has succeeded at establishing and maintaining a national market. That experience seems to me to raise doubts about the claim that disuniformity is a serious impediment to a well-functioning market. There are nearly twice as many “member states” in the U.S. as in the EU, and the market is spread over a larger area. In some ways, these features of the U.S. system present greater hurdles to buyers and sellers than in the EU, yet market participants manage to cope well enough. Variations among legal regimes do not seem to unduly impede the free movement of goods, services, people, and capital.

Professor Koziol’s answer to the American counterexample is to assert that “the legal systems of the EU Member States *vary* a great deal more than the legal systems of the states in the USA.”¹⁷ Thus, “[t]here exists not only a fundamental difference between the common law in England and Ireland on the one hand and the Continental civil law on the other but also divergences between the civil law systems.”¹⁸ Much of the force of his argument turns on the former distinction, between common law and civil law systems. He notes that “the characteristic feature of the Continental legal systems is that they are *codified*, in contrast to English *case law*.”¹⁹ There are also differences in the way tort law is organized. Thus, “[c]ontinental laws of damages are somewhat homogenous legal areas... In contrast, *common law* proceeds on the basis of a multitude ... of individual ‘*torts*.’”²⁰ As for specific rules, he points out that “[t]he absence of any strict liability for motor vehicles is perhaps the most marked difference between English law and that of most European countries.”²¹ Punitive damages are more readily available in common law than in civil law jurisdictions.²² Styles of legal reasoning differ as well, in ways that are hardly limited to tort law. Common

17. *Id.* at 686.

18. *Id.*

19. *Id.* at 695.

20. *Id.* at 697.

21. *Id.* at 700.

22. *Id.* at 701.

law courts proceed case by case, while continental lawyers “begin with a general *abstract rule*, which has been formulated by the legislator.”²³

But Professor Koziol’s catalog of ways in which English and Continental law diverge may be largely moot, as his point has been overtaken by the UK’s upcoming secession from the EU. One consequence of the UK’s decision to leave the European Union is that these differences among EU member states will be far less important in practice after Brexit. There will no longer be a large EU member state with a different legal tradition from all the rest. One way to look at Brexit is that it facilitates harmonization by removing a large obstacle. On the other hand, the UK’s departure substantially reduces the disuniformity that, under basic EU principles, would justify intervention to protect the single market. By contrast, Ireland is a small nation whose distinctive legal system has little impact on the general effectiveness of the common market. It seems inappropriate to allow the disuniformity between its common law approach and the Continental approach to drive so consequential a decision as the harmonization of all of European tort law. As an American might put it, paying so much attention to Ireland would allow a small tail to wag a very large dog.

Ireland aside, it is not at all clear that the variations among continental legal systems are much greater than the variations among the fifty states that make up the United States. As examples of differences among EU member states, Professor Koziol cites “divergences . . . in respect of the notion of fault or wrongfulness, strict liability and vicarious liability, recoverable non-pecuniary loss and time limitations.”²⁴ One answer to this claim is that the existence of variations does not establish that the variations are unmanageable. The essays Koziol has collected in this volume provide little support

23. *Id.* at 702.

24. *Id.* at 695.

for the notion that the member states of the EU differ in radical ways in their approaches to tort law, nor does Koziol assert that they do.

The main point is that all of them favor compensation of the victim of an accident, whether through “tort” liability (as a common lawyer would call it) or through social insurance of some kind. Thus, according to Professor Moréteau, “the French are convinced that society works better when its members agree to share and equalize the burden on risk and adopt a solidarity model.”²⁵ In Norway, according to Bjarte Askeland, “it is important that the victim’s damage is remedied or the injury compensated in full,” by a combination of tort law and social insurance.²⁶ Katarzyna Ludwichowska-Redo states that “[a] tendency has been noted in Poland over the last decades to strengthen the protection of tort victims,” by “the growing significance of responsibility independent of fault” and by a “trend towards objectivizing fault liability.”²⁷ Attila Menyhard notes that “the structure, the basic principles and means of risk allocation in Hungarian law are in line with the main structures and principles of other jurisdictions,”²⁸ including a growing role for insurance rather than fault.²⁹ Across all of the systems surveyed in the study, “[t]here is consensus on the essential issue that the responsible injuring party must in principle pay full compensation—no less, but no more.”³⁰ Of course, in all of these systems there are limits on recovery. Professor Moréteau points out that in France, “much as in common law or Germanic jurisdictions, significant compensation of pure economic loss is mainly to be found in the contractual sphere.”³¹ Another common thread is that victims typically do not recover without a good reason (often, but not necessarily, fault) to hold the defendant

25. *Id.* at 4.

26. *Id.* at 99-100.

27. *Id.* at 165.

28. *Id.* at 254.

29. *Id.* at 255.

30. *Id.* at 825.

31. *Id.* at 76.

liable.³² Yet another is that a victim's own faulty conduct is relevant to the amount obtained, but is not an absolute bar.³³

Continental systems differ mainly on the particular means by which compensation is to be achieved. For example, Professor Koziol notes the difference between French and German approaches to accident law. The German Civil Code favors "firm, detailed rules,"³⁴ while the French Code (and the Austrian Code as well) "are formulated in a more general and elastic manner."³⁵ Despite these variations, the underlying aims of tort liability are similar throughout the Continental systems. As Professor Koziol notes in his treatment of the Germanic perspective in volume I, "[i]n Continental Europe, it is generally recognized that the primary aim of the law of tort is to *compensate* the victim for damage sustained."³⁶ He adds that "[i]t is widely recognized today that besides this compensatory function ... the law of tort serves a *deterrent function*."³⁷ Yet in his "comparative conclusions," Professor Koziol pays more attention to variation on matters of detail among EU member states than he does to their general agreement on basic principles.

Turning to the U.S. side of the comparison, Professor Koziol may not fully appreciate the level of variation among the fifty states of the U.S. For example, he notes differences among EU systems with regard to damages available to the family members of fatally injured accident victims.³⁸ In the U.S., this topic is covered by statutory law in each state because common law courts long ago rejected recovery for "wrongful death," as it is called.³⁹ As in the EU, there

32. See *id.* at 59-66 (France); *id.* at 131 (Norway); *id.* at 220 (Poland); *id.* at 307 (Hungary); see also GERMANIC PERSPECTIVE, *supra* note 1, at 171, 200.

33. COMPARATIVE PERSPECTIVE, *supra* note 3, at 67-68, 89 (France); *id.* at 145 (Norway); *id.* at 234 (Poland); *id.* at 327 (Hungary); see also GERMANIC PERSPECTIVE, *supra* note 1, at 256-57.

34. COMPARATIVE PERSPECTIVE, *supra* note 3, at 704.

35. *Id.* at 705.

36. GERMANIC PERSPECTIVE, *supra* note 1, at 47.

37. *Id.*

38. COMPARATIVE PERSPECTIVE, *supra* note 3, at 587.

39. See RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 783-86 (11th ed., Aspen Publ'g 2016).

are significant variations among those statutes. Some states only allow for survivors to recover for the amounts they would have received from the deceased, while others provide for recovery of the whole value of the life. Professor Koziol observes that “[t]he national rules on prescription offer a great diversity of different prescription periods.”⁴⁰ But the same is true in the U.S., where statutes of limitations (as they are called) vary from one state to another.⁴¹ On at least one issue there is more uniformity across EU legal systems than among the fifty states. In the EU the plaintiff’s fault generally reduces but does not preclude recovery. By contrast, Jonathan Cardi and Michael Green note, in their essay on U.S. law, that many of the American states allow no recovery if the plaintiff’s share of the fault is equal to or greater than the defendant’s, and a few treat any contributory negligence by the plaintiff as a complete bar.⁴²

Professor Koziol criticizes EU efforts to harmonize private law by directives on specific topics, such as products liability. Ironically, his objections belittle his claim that U.S. law features less variation than Continental Europe. Thus, the current EU approach of “*selective* harmonization leads ... to a *double shattering of the law*.” One kind of “shattering” occurs because “the national legal systems become infiltrated by foreign provisions.”⁴³ This is precisely what happens on a routine basis in the U.S., whenever the national government preempts state law on some specific topic, such as automobile safety⁴⁴ or liability for pharmaceuticals.⁴⁵ Indeed, a characteristic feature of any federal system in which sovereignty is divided

40. COMPARATIVE PERSPECTIVE, *supra* note 3, at 828.

41. *Id.* at 509.

42. *Id.* at 495-96.

43. *Id.* at 690.

44. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L.Ed.2d 914 (2000).

45. *See, e.g.*, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 131 S. Ct. 2567, 180 L.Ed.2d 580 (2011).

between the center and the periphery is the presence in a given domain of some issues governed by member state law and other issues governed by the central authority.⁴⁶

The other “shattering of the law” Koziol references here is that “the EU’s directives and regulations are not based on a consistent and overall concept and therefore are very often not in accordance with one another.”⁴⁷ His complaint here is that “[e]very directive of the European Union is a compromise between the varying national views and the outcome depends on national interests as well as the nationality and personality of the members of the Commission.”⁴⁸ The same is true of the law making process of the U.S. Congress when it displaces state tort law. For that matter, the same would be true if the EU were to undertake the general harmonization of tort law favored by Professor Koziol. With particular regard to product liability, Koziol criticizes the EU’s products liability directive for failure “to attain a consistent and thus fair overall system.”⁴⁹ But the U.S. has done no better. For example, businesses that sell products across state lines must take account of three different definitions of “design defect,” including a “consumer’s expectations” test, a “risk utility” test, and a “reasonable alternative design” test.⁵⁰ Again, U.S. (and EU) manufacturers have managed to cope with the variety and uncertainty that is generated by such an untidy system.

III.

Professor Koziol focuses all of his attention on reasons to support EU harmonization of tort law. But his argument is incomplete, as the Treaty on the European Union does not authorize EU intervention just because there are reasons in its favor. Rather, “[t]he use of union competences is governed by the principles of subsidiarity

46. See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 488-89 (7th ed., Foundation Press 2015).

47. *COMPARATIVE PERSPECTIVE*, *supra* note 3, at 690.

48. *Id.*

49. *Id.* at 691.

50. See EPSTEIN & SHARKEY, *supra* note 39, at 704-07.

and proportionality.”⁵¹ The principle of subsidiarity is that, unless a topic is within the exclusive competence of the EU, “the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.”⁵² The principle of proportionality holds that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”⁵³ These constraints on EU intervention are directly relevant to the question of whether to harmonize tort and accident law. Since these areas are traditionally handled at the member state level, the principle to subsidiarity seems to place a significant burden on the advocates for intervention to show why it is not better to leave well enough alone. Showing that varying legal regimes, and attendant costs, may justify an intervention on a particular topic such as products liability, but wholesale intervention across all of tort and accident law may not be a proportionate response.

Despite their presence in the Treaty on the European Union, these proportionality and subsidiarity provisions are not in most instances strong *legal* constraints on EU legislation.⁵⁴ The Court of Justice of the European Union has generally taken an expansive view of EU legislative authority. If EU legislators decide that the norms of subsidiarity and proportionality are satisfied, these norms may well be sufficiently supple to permit Professor Koziol’s proposal to withstand a challenge in the Court of Justice. In any event, it is useless to try to assess the legal viability of a harmonization directive or regulation until one is enacted, or at least a concrete proposal is advanced.

Even so, the proportionality and subsidiarity constraints are highly relevant to the *legislative policy* issue of whether EU intervention is called for, all the more so in an era when the enthusiasts of closer EU integration meet with ever greater resistance from some

51. TEU, *supra* note 4, at art. 5, para. 1.

52. *Id.* at art. 5, para. 3.

53. *Id.* at art. 5, para. 4.

54. See GOEBEL ET AL., *supra* note 4, at 173 (discussing subsidiarity); *id.* at 201-08 (discussing the somewhat stronger principle of proportionality).

of the member states. Accordingly, it is not premature to suggest that, in deciding whether and how far to go forward with this harmonization project, EU legislators must take account not only of the benefits of harmonization, but also of the costs of displacing member state law. If the benefits of disuniformity are sufficiently great, EU legislators may find that they outweigh the arguments favoring an EU-wide system of tort law. Thus, the case for EU intervention is not complete without asking whether the costs of displacing member state control are worth the benefits of uniformity.

General costs of any EU displacement of member state law, in this or any other context, are the loss of local autonomy and a lesser role for democratic decision making, as unelected officials in Brussels override local office holders who are directly accountable to voters.⁵⁵ In the specific context of tort law, member states may differ among themselves on the precise mix of policy objectives, such that a “one-size-fits-all” rule would necessarily deprive at least some of them of the opportunity to pursue their goals. For example, the Norwegian approach to accident law puts considerable weight on the compensation of victims and spreading of losses through insurance. This policy is followed so intently that tortfeasors may escape liability entirely when insurance is available.⁵⁶ As a result, such goals as corrective justice and deterrence may be sacrificed. Other member states may put more weight on the latter set of goals. While the current approach permits this kind of variety, the harmonization of European tort law would threaten it. Similarly, some member states are more receptive than others to the recovery of non-pecuniary damages. Professor Koziol sees this divergence as a tough problem that raises “fundamental questions,”⁵⁷ which he addresses at some

55. For a summary of the values promoted by state autonomy in the U.S. context, see KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 110-11 (19th ed., Foundation Press 2016). It may not be appropriate to draw a close analogy between the U.S. and the EU, as the member states of the EU have considerably more autonomy than the fifty states of the U.S.

56. *COMPARATIVE PERSPECTIVE*, *supra* note 3, at 100.

57. *Id.* at 768.

length. From a perspective that values the diversity that comes with federalism, the variety of approaches is not a problem. In fact, we may over time gather valuable information from observing the effects of one approach over another.⁵⁸

The diversity one currently observes may not be fully explained by divergent values. Different approaches to a given problem may be due to variations in the level of one or another type of dangerous conduct. If drivers in one member state take greater risks than in another, it may be appropriate to impose greater personal tort liability in the former than the latter in order to induce drivers to be more careful. Without unduly disparaging the skills of French drivers, it is worth noting that in France, if not in Norway, “reckless drivers end up paying significantly higher premiums, whilst a careful driver with no accident liability on record may see his or her premium reduced by half.”⁵⁹

Legal culture may differ from one member state to another, such that judges will be more familiar with one style of reasoning than another. Professor Koziol distinguishes between two approaches. On the one hand, German tort law is characterized by *firm, detailed rules*.⁶⁰ On the other, the Austrian and French principles “are formulated in a more general and elastic manner.”⁶¹ As for himself, Professor Koziol prefers “a middle course” between the two.⁶² But the relevant question is not “what is the optimal approach?” as an abstract proposition. The German approach may work well in the German context and the French approach in the French context. The issue for EU legislators is whether the project of integrating the economies of EU member states is significantly hindered by simply

58. See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

59. COMPARATIVE PERSPECTIVE, *supra* note 3, at 5 (Olivier Moréteau discussing French law).

60. *Id.* at 704.

61. *Id.* at 705.

62. *Id.* at 707.

allowing each member state to formulate the law as it sees fit. In resolving that question it is important to keep in mind that a given legal system may work differently in its actual operation than is apparent to an outsider. For example, Professor Koziol finds that “[t]he French legislator and the Cour de Cassation almost never give sufficient reasons and therefore one never knows why a case is solved in a particular way and one never knows beforehand how the next case will be solved.”⁶³ Yet it appears that lawyers and scholars trained in the French system are able to surmount the difficulties.⁶⁴

IV.

My reservations relate solely to the strength of the case for harmonizing European tort law. The research, analysis, and exposition of the issues in both volumes of “Basic Questions” are exemplary. A close study of Professor Koziol’s chapter on “comparative conclusions” will repay anyone interested in the comparative study of tort and accident law. This is an essential volume—as is Professor Koziol’s volume on the Germanic perspective—for anyone interested in the comparative perspective on these topics.

63. *Id.* at 704.

64. See MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 38-61, 303-05, 307-11 (Oxford Univ. Press 2009).