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Introduction

[R]emedies and procedures are best left to the law which is familiar to the country in which the right must be enforced. The good sense of that recognition can no doubt be shown in any number of different ways, but here it is enough to state the obvious, namely that the European Community is an economic and not a political community. Political systems and traditions vary, in some cases significantly, from member state to member state . . . What then can be the interest of Community law in endangering the continuation of this system?

(Lord Justice Nourse).¹

Whatever then emerges will be a synthesis, a merging of the different national rivers, not an inundation. Common lawyers have proved as least as good as other European lawyers elsewhere in interpreting and applying European principles where they have already developed . . . Endless reiteration of hostility to such moves is likely only to be counter-productive.

(Lord Mance).²

We see above two judicial statements and two different attitudes displayed by the English judiciary to the potential impact of European law on traditional common law principles. Lord Justice Nourse seeks to preserve the identity and culture of the common law. His faith is therefore placed in the common law legal tradition and its principles developed over centuries of practice. Europe is therefore a matter of economics or trade with limited impact on national law. Lord Mance, speaking 20 years later, is the more positive, seeking to diminish the perception of Europe as a threat to the common law and to highlight the possible benefits from a more proactive involvement in the interpretation and application of European Union (EU) law. And yet the title of his article – ‘Is Europe Aiming to Civilise the Common Law?’ – identifies the key issue which this book seeks to address: to what extent are European influences changing the nature of the common law legal tradition? As we shall see, in the last 40 years, the combined impact of the European Communities Act 1972, the Human Rights Act 1998 and increased contact between European scholars, lawyers and judges has resulted in what Lord Cooke

¹ *Bourgoin SA v Ministry of Agriculture* [1986] QB 716, 789–90.

² J Mance, ‘Is Europe Aiming to Civilise the Common Law?’ (2007) 18 *European Business Law Review* 77, 99.

has described as the diminishing Englishness of the common law.³ In identifying the road ahead for English tort law, this book will examine the extent to which an area of law, traditionally a bastion of English case law methodology and practice, is changing both in terms of substantive law and how the courts reason. While a number of books have already addressed the Europeanisation of contract law⁴ or consumer law,⁵ tort law has received less attention and yet the factors which have encouraged interest in contract law – intervention at EU level, harmonisation proposals, European interaction at scholarly, professional and judicial level – apply equally to tort law. Further, the European Convention of Human Rights, brought into English law via the HRA 1998, has had greater impact on tort law than the law of contract, providing, as it does, a remedy for breaches of Convention rights by public authorities. This chapter will explain why tort law has been chosen as a particularly revealing example of the impact of European influences on English private law and what insights this study can bring to English common lawyers who continue to regard Europeanisation as introducing alien and ‘un-British’ concepts into the English legal system. It will start, however, with a key initial question: what do we mean by ‘Europeanisation’?

I. The ‘Europeanisation’ of English Tort Law: What do we mean by ‘Europeanisation’?

Miller has noted that in common with the term ‘globalisation’,⁶ the term ‘Europeanisation’ is used frequently, but often with little definitional care.⁷ There is no single grand theory of Europeanisation.⁸ She notes that the term indicates a process of transformation, but gives little guidance as to its content, mechanisms and the extent of its influence. Miller identifies three possible meanings: (i) the

³ R Cooke, ‘The Road Ahead for the Common Law’ (2004) 53 *International & Comparative Law Quarterly* 273.

⁴ See, eg, L Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford, Oxford University Press, 2011), R Schulze and J Stuyck (eds), *Towards a European Contract Law* (Munich, Sellier, 2011), C Twigg-Flesner, *The Europeanisation of Contract Law*, 2nd edn (Abingdon, Routledge-Cavendish, 2013), K Boele-Woelki and W Grosheide (eds), *The Future of European Contract Law* (The Hague, Kluwer, 2007), J Smits (ed), *The Need for a European Contract Law* (Groningen, Europa Law Publishing, 2005).

⁵ eg, S Leible, *European Consumer Law* (Oxford, Hart Publishing, forthcoming), I Benohr, *EU Consumer Law and Human Rights* (Oxford, Oxford University Press, 2013), H Schulte-Nölke and L Tichy (eds), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich, Sellier, 2010), S Weatherill, *EU Consumer Law and Policy* (Cheltenham, Edward Elgar, 2005).

⁶ W Twining, *Globalisation and Legal Theory* (Cambridge, Cambridge University Press, 2000); W Twining, ‘Globalisation and Comparative Law’ in E Özücü and D Nelken (eds), *Comparative Law: A Handbook* (Oxford, Hart Publishing, 2007) 69–75.

⁷ Miller, *The Emergence of EU Contract Law* (n 4) 3.

⁸ JP Olsen, ‘The Many Faces of Europeanisation’ (2002) 40 *Journal of Common Market Studies* 921, 944, who argues that Europeanisation may be less useful as an explanatory concept than as an attention-directing device and a starting point for further exploration.

development of transnational law at European level, (ii) the entrance of European-derived rules at national level and (iii) the process of harmonisation itself. In contrast, Michaels and Jansen have favoured a broader threefold division, which covers not only the instrumental (EU law), but also the academic (transnational legal science) and the regulatory (competition between legal rules governed by the inner rationality of the market).⁹ Other authors have preferred a narrower focus, for example on the harmonisation of European private law,¹⁰ on the impact of EU legislation on domestic private law,¹¹ or in terms of European integration including its indirect and sometimes unintended consequences with regard to national, EU or international law.¹²

In this book, 'Europeanisation' is taken in a broader sense. It will examine the impact of European Union law on domestic English law, but will also consider the relevance of the case law of the European Court of Human Rights and the degree to which cross-fertilisation with tort law generally has taken place. There is surprisingly little literature on this topic taken as a whole. The perspective is that of an English tort lawyer, who, by virtue of her training as a comparative and European private lawyer, is seeking to identify European influences which may affect the traditional common law approach to English tort law. 'Europeanisation' is not, however, simply a question of substantive law. It must also be taken as a cultural phenomenon, changing our outlook on law and its development. The book will thus consider to what extent English lawyers may now be said to possess a 'European' legal perspective. It will also examine cross-jurisdictional European dialogue. Professional bodies such as the International Association of Judges,¹³ the Council of Bars and Law Societies of Europe (CCBE)¹⁴ and the Council of the Notariats of the European Union (CNUE)¹⁵ bring practitioners from European Member States together. Institutions have been established for the dissemination and development of European law such as the Academy of European Law (ERA), which provides a centre for the continuing education of lawyers in order to improve the application

⁹ R Michaels and N Jansen, 'Private Law Beyond the State? Europeanization, Globalisation, Privatization' (2006) 54 *American Journal of Comparative Law* 843, 861–64.

¹⁰ O Lando, 'Optional or Mandatory Europeanization of Contract Law' (2000) 8 *European Review of Private Law* 59: 'The term to "Europeanise" the law . . . means to unify or harmonise European law i.e. the law of the countries which are, or will, become members of the European Union.' Lando also distinguishes between optional Europeanisation (left to national courts to determine whether to bring laws of Europe closer together) and the more controversial mandatory Europeanisation by which unification is imposed by the legislators in the European Union or Member States.

¹¹ Twigg-Flesner, *The Europeanisation of Contract Law* (n 4). See also J Engstrom, *Europeanisation of Remedies and Procedures Through Judge-Made Law* (Oxford, Hart Publishing, forthcoming).

¹² FG Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Oxford, Hart Publishing, 2000).

¹³ www.iaj-uim.org/, including the regional group of the European Association of Judges (43 countries).

¹⁴ The CCBE is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

¹⁵ The CNUE is the official body representing the notarial profession in dealings with the European institutions. Speaking for the profession, it negotiates and makes decisions for the European Union's notariats.

of European law,¹⁶ and, more recently, the European Law Institute, founded in June 2011 as an entirely independent organisation to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal development.¹⁷ Academic projects such as the Trento Common Core project¹⁸ and the work of the European Centre of Tort and Insurance Law¹⁹ bring together academics and legal professionals from across Europe by hosting annual conferences and engaging in ongoing research on European private law. Information exchange, facilitated by electronic resources and greater internet access and promoted by, for example, the European Commission has led to greater awareness of European principles and case law. Tort law is not immune from these influences. The two main reasons for focusing on tort law in this study will be set out below.

II. Why Tort Law?

A. A Key Exemplar of Common Law Values

Tort law is generally regarded as a clear example of common law methodology. It is largely case-based and as an area of law where the legal rules have been developed by judges with limited statutory intervention, it provides a good illustration of how English judges reason.²⁰ It also highlights the ongoing importance to common lawyers of legal procedure (the system of nominate torts representing the legacy of the writ system) and its focus on remedies rather than principle.²¹ MacCormick, for example, used the leading tort case of *Donoghue v Stevenson*²² as a running example in his work *Legal Reasoning and Legal Theory*.²³ In stating the

¹⁶ See www.era.int.

¹⁷ www.europeanlawinstitute.eu/home/. See R Zimmermann, 'Challenges for the European Law Institute' (2012) 16 *Edinburgh Law Review* 5.

¹⁸ www.common-core.org/ (which has a distinct tort section) and whose stated aim is to seek 'to unearth the common core of the bulk of European private law, i.e., of what is already common, if anything, among the different legal systems of European Union member states.'

¹⁹ www.ectil.org/.

²⁰ See J Bell, *Policy Arguments in Judicial Decisions* (Oxford, Clarendon Press, 1983) 41.

²¹ Rudden, for example, has noted the extraordinary level of intellectual energy which common lawyers devote to identifying whether the conduct in question amounts to a nominate tort in contrast to their civil law counterparts: B Rudden, 'Torticles' (1991–92) 6/7 *Tulane Civil Law Forum* 105, 109.

²² *Donoghue v Stevenson* [1932] AC 562, described by Lord Rodger as 'probably the most famous case in the whole Commonwealth world of the common law': A Rodger, 'Mrs Donoghue and Alfenus Varus' (1988) 41 *Current Legal Problems* 1, 2. An international conference was held in May 2012 to mark the 80th anniversary of this case, demonstrating the continued reverence with which the common law community holds this particular case: 'The Paisley Snail: *Donoghue v Stevenson*, International Conference on the Law of Negligence', held naturally in Paisley where the facts of the case took place.

²³ N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1978). See also N MacCormick, 'Donoghue v Stevenson and Legal Reasoning' in PT Burns (ed), *Donoghue v Stevenson and the Modern Law of Negligence* (Vancouver, Continuing Legal Education of British Columbia, 1991) 191–213.

‘neighbour principle’, Lord Atkin established the test for the duty of care in negligence.²⁴ While such a general statement of principle may be compared with the general clauses found in civil law codes,²⁵ the reality, as known to all common lawyers, is different. Case law development post *Donoghue v Stevenson* did not proceed on the basis of broad principle,²⁶ but developed categories of liability, echoing Lord Macmillan’s comment in *Donoghue* that ‘the categories of negligence are never closed’.²⁷ The gradual development of the tort of negligence into the twenty-first century illustrates both how the common law courts reason and the importance placed on the doctrine of precedent, giving legal certainty and predictability to the law.²⁸

For English lawyers, therefore, tort law epitomises the ‘Englishness’ of the common law and this is emphasised by the fact that its definition is classically linked to its place in society itself: it is the law of *civil* wrongs, that is, conduct deemed wrongful in our society. Lord Denning, for example, emphasised that the province of tort law is to allocate responsibility in our society for injurious conduct.²⁹ *Street on Torts* also finds it helpful to focus on tort law as a means of remedying breach of a relevant norm of conduct which infringes the claimant’s interest.³⁰ McBride and Bagshaw express similar views, albeit more pragmatically: ‘the function of tort law is to determine what legal rights we have against other people, free of charge and without our having to make special arrangements for them, and what remedies will be available when those rights are violated’.³¹ Whichever definition one prefers,³² all commentators highlight the connection between tort law and domestic values, giving rise to right of reparation to specific individuals. Tort law is thus about citizens within our society and the duties (and rights) they owe to each other. It establishes when (legally) we must take care, when we are permitted to defend ourselves, to what extent we can act freely on our own land even if it

²⁴ *Donoghue* (n 22) 580: ‘Who then in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.’

²⁵ See, eg, the French Civil Code, art 1382: ‘Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it’: translation: www.legifrance.gouv.fr.

²⁶ See R Heuston, ‘*Donoghue v Stevenson* in Retrospect’ (1957) 20 *Modern Law Review* 1; D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 1999) 190–91. Note the rejection of the ‘Anns’ test in *Anns v Merton LBC* [1978] AC 728 by the House of Lords in *Murphy v Brentwood DC* [1991] 1 AC 398.

²⁷ *Donoghue* (n 22) 619.

²⁸ K Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty-first Century’ (2006) 22 *Journal of Professional Negligence* 134; J Morgan, ‘The Rise and Fall of the General Duty of Care’ (2006) 22 *Journal of Professional Negligence* 206.

²⁹ Review of Winfield (3rd edn) (1947) 63 *Law Quarterly Review* 517. Winfield had famously defined tort law as a ‘breach of a duty primarily fixed by law’, but this is accepted to be too vague: PH Winfield, *The Province of the Law of Tort* (Cambridge, Cambridge University Press, 1931) 32.

³⁰ J Murphy and C Witting (eds), *Street on Torts*, 13th edn (Oxford, Oxford University Press, 2012) 4.

³¹ NJ McBride and R Bagshaw, *Tort Law*, 4th edn (Harlow, Pearson, 2012) 1.

³² K Oliphant (ed), *The Law of Tort*, Butterworths Common Law Series, 2nd edn (London, Butterworths, 2007) para 1.2 comments that ‘Attempts at more precise definition may give something of the flavour of tort law, or some aspect of it, but they are inevitably over- or under-inclusive, or otherwise inaccurate in one respect or another’.

may be to the detriment of other citizens. It determines when and to what extent a NHS doctor owes a duty to take reasonable care for my welfare,³³ a newspaper can accuse me of criminal activities,³⁴ a freelance photographer can take pictures of my children³⁵ and when the blood transfusion service will be held responsible for supplying me with infected blood in circumstances where the virus in question was incapable of detection.³⁶ The decision of what exactly constitutes a civil wrong remains primarily a matter for the courts, drawn from centuries of judicial decision-making, although increasingly legislation is having some impact.³⁷

English tort law also reflects the divide between the common law countries of Europe (England and Wales; Ireland) and the majority of states whose legal system are based on civil law or mixed common and civil law legal traditions.³⁸ Although it inevitably shares certain values, solutions³⁹ and practices with other continental systems, it also bears the imprint of its own historical development and legal culture, which may be identified as the values, practices and concepts which are integrated into the operation of legal institutions and the interpretation of legal texts.⁴⁰ Most notably, English law stood outside the wave of codification in the eighteenth and nineteenth century, which marked the displacement of the *ius commune* based on canon law and the law of Rome⁴¹ in favour of the unification of national law through codification and the growth of the modern nation-state in Continental Europe.⁴²

This has led to a common/civil law divide which goes beyond the mere difference in terminology of tort law or delict. Zimmermann comments that 'It is just about out of the question that the House of Lords would refer to the textbooks of Medicus or Flume; likewise the German Federal Supreme Court does not normally consult Treitel on Contract or Fleming on Torts'.⁴³ Nevertheless scholars such as Zimmermann have sought to highlight that this division is far from

³³ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583.

³⁴ *Loutchansky v Times Newspapers Ltd and others* (Nos. 2–5) [2001] EWCA Civ 1805; [2002] QB 783.

³⁵ *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446; [2009] Ch 481.

³⁶ *A and others v National Blood Authority and another* [2001] 3 All ER 289.

³⁷ P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (Oxford, Oxford University Press, 2008) 1171.

³⁸ Some authors would go further and suggest that common and civil law paths are irreconcilable: P Legrand, 'European Legal Systems are not Converging' (1996) 45 *International & Comparative Law Quarterly* 52. As will be seen in ch 2, the author does not go this far, but notes that there are differences which go beyond black-letter law and affect the culture within which law operates.

³⁹ R Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford, Oxford University Press, 1998) 34, BS Markesinis, 'The Not So Dissimilar Tort and Delict' (1977) 93 *Law Quarterly Review* 78.

⁴⁰ See J Bell, 'English Law and French Law: Not So Different?' (1995) 48(2) *Current Legal Problems* 63.

⁴¹ See R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, Oxford University Press, 1996).

⁴² See P Stein, 'The *ius commune* and Its Demise' (2004) 25 *Journal of Legal History* 161.

⁴³ R Zimmermann, 'Civil Code and Civil Law: The "Europeanization" of Private Law within the European Community and the Re-emergence of a European Legal Science' (1994–95) 1 *Columbia Journal of European Law* 63, 66.

watertight,⁴⁴ and the influence of civil law was particularly evident in the English ecclesiastical courts and the Court of Admiralty.⁴⁵ Indeed, it would be unlikely that a country where Roman law had been taught in its universities from the Middle Ages⁴⁶ and whose commercial law, notably in relation to maritime law, inevitably came into contact with civil law scholastic thinking and procedures⁴⁷ would bear no imprint of Roman law influences. Ibbetson identifies at the beginning of the eighteenth century the ‘stirrings of theorization’ in tort law, and the influence of natural lawyers such as Grotius and Pufendorf whose work brought continental ideas into English law,⁴⁸ although such principles were largely developed indigenously from the 18th-century natural law base.⁴⁹ He observes, however, that although English law undoubtedly received ‘injections’ of Roman law, these were immediately assimilated into the specifically English legal framework and cut off from their Roman roots.⁵⁰ English tort law has thus remained distinctive in many ways from its civil law counterparts. Baker notes that the common law withstood two waves of Romanist influence which swept across the Continent in the wake of the rediscovery of Justinian’s *Digest* and Renaissance humanism which drove out older methods of proof and encouraged the application of rational legal principles based on civil law.⁵¹ Tort law remains the law of the courts, with limited intervention by legislature, uncodified and – as a law of social wrongs – reflective of changes in society, be they political or socio-economic. It also bears the imprint of the distinct procedures of the English courts, notably the writ system, its legal profession and the centralised court system of England and Wales.

It is inevitable, therefore, that new European sources, be they EU law or European human rights law, will challenge the common law/civil law divide. More fundamentally, if tort law is about society, are we moving towards a European society in which the civil wrongs in question are those contrary to the societal values of Europe, not

⁴⁴ Zimmermann, argues that, in reality, English law was never entirely isolated from Continental legal culture: see R Zimmermann, ‘Der europäische Charakter des englischen Rechts’ [1993] *Zeitschrift für Europäisches Privatrecht* 4.

⁴⁵ JH Baker, *An Introduction to English Legal History*, 4th edn (London, Butterworths, 2002) 123–24, 126–34.

⁴⁶ P Stein, *The Teaching of Roman Law in England around 1200* (London, Selden Society, 1990), Supplementary Volume 8, Introduction. Zimmermann has noted that up until the nineteenth century, the two universities of England and Wales (Oxford and Cambridge) followed the Continental model of study and leading Roman law works, such as German jurist Heineccius’ *Elementa iuris civilis*, were used as textbooks in universities ranging from Cracow to Oxford: R Zimmermann, ‘Roman Law and the Harmonization of Private Law in Europe’ in AS Hartkamp et al (eds), *Towards a European Civil Code*, 4th edn (The Hague, Kluwer Law International, 2011) 33, 45.

⁴⁷ As noted by the great commercial judge, Lord Mansfield: see T Lowry, ‘Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century’ (1973) 7 *Journal of Economic Issues* 605, CP Rodgers, ‘Continental Literature and the Development of the Common Law by the King’s Bench, c. 1750–1800’ in V Piergiovanni (ed), *The Courts and the Development of Commercial Law* (Berlin, Duncker & Humblot, 1987).

⁴⁸ And whose work had been translated into English by the mid eighteenth century, Zimmermann, *The Law of Obligations* (n 41) 46–47.

⁴⁹ Ibbetson, *A Historical Introduction to the Law of Obligations* (n 26) 153–54.

⁵⁰ DJ Ibbetson, ‘A Reply to Professor Zimmermann’ in TG Watkin, *The Europeanisation of Law* (London, UKNCCL, 1998) 229.

⁵¹ Baker, *An Introduction to English Legal History* (n 45) 28.

simply England and Wales? Europeanisation is therefore not simply a question of introducing new legal rules, but bringing in new forms of policy and remedial frameworks, threatening the autonomy of the common law to develop its own law of tort and for English lawyers to make policy judgements at a localised level. The challenge for the common law legal community is self-evident.⁵²

B. Lack of Awareness of European Influences on English Tort Law

i. Isn't It Public, Not Private, Law?

There is, however, a second reason for focusing on tort law. Until recently, tort law has been seen as immune to or, at best, relatively unaffected by Europeanisation. European Union law and the European Convention on Human Rights have been seen as matters for public and human rights lawyers. The Law Society and the General Council of the Bar's list of 'The Foundations of Legal Knowledge', required for completion of the academic stage of training in an undergraduate law degree, provides for the following key elements and general principles of legal study:

- i. Public Law, including Constitutional Law, Administrative Law and Human Rights;
- ii. Law of the European Union;
- iii. Criminal Law;
- iv. Obligations including Contract, Restitution and Tort;
- v. Property Law; and
- vi. Equity and the Law of Trusts.⁵³

Human rights, it will be noted, are expressly considered as an element of public law, while EU law remains distinct from other elements of private law. Indeed, a glance at the syllabi of UK universities will generally serve to emphasise this subject division. Tort law, often taught as a first-year subject, preceding study of EU law and distinct from the public law coverage of human rights law, is seen as part of the private law brand and often, as stated above, used as a means for demonstrating the methodology of common law reasoning. One of the aims of this book is to dispel the myth that Europeanisation is solely of interest to public lawyers. It also impacts on private law and private lawyers continue to ignore changes to their legal system at their peril. Admittedly, it may take private lawyers out of their comfort zone to consider new sources of law and unfamiliar concepts 'foreign' to the traditional

⁵² For a perspective of the challenges of Europeanisation to civil law systems, see JM Smits, 'The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries' in M Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Oxford, Hart Publishing, 2004) 229.

⁵³ This applies to all law degrees commenced after 1 September 2001 and was prepared jointly by the Law Society and the Bar Standards Board, setting out the conditions a law degree course must meet in order to be termed a 'qualifying law degree': see www.sra.org.uk/students/academic-stage.page.

common law system. However, subsequent chapters will highlight that a failure to recognise Europeanisation may lead to incorrect application of the law and the danger of a conflict between the UK courts and the Court of Justice of the European Union (CJEU) or European Court of Human Rights (ECtHR). Further, lawyers commencing a law degree after September 2001 have no excuse for ignorance, having studied EU law as part of their qualifying degree programme.

ii. What Has EU Law to Do with English Private Law?

On 1 January 1973 the United Kingdom became a Member State of the then European Communities. The European Communities Act 1972 marked the necessary step⁵⁴ to make European law applicable within the national legal system. Section 2(1) of the 1972 Act provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies.

On this basis, provisions of EU law that are directly applicable or have direct effect are automatically enforceable in the United Kingdom without the need for any further enactment. Section 2(2) applies to measures that are neither directly applicable nor have direct effect and which may be introduced into national law by means of delegated legislation.⁵⁵ EU law is thus capable of giving rise to rights and liabilities which must be recognised by the English courts. Nevertheless, as the statement from Lord Justice Nourse indicates, in 1973 most UK lawyers thought about the European Union primarily in economic terms. Indeed, it may be questioned whether a common market promoting trade between Member States would have been expected to impact on domestic principles of private law. As Caruso explains, the six European nations that signed the Treaty of Rome in 1957 each had a functioning civil code dealing with private law⁵⁶ and, therefore,

⁵⁴ In relation to international treaties, the UK is a dualist system.

⁵⁵ European Communities Act 1972, s 2(2):

Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision – (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.

⁵⁶ West Germany, France, Italy, Belgium, the Netherlands and Luxembourg; the French Civil Code dating back to 1804.

the Treaty of Rome was exclusively public in inspiration and scope. However, as the EU expanded and became more politically active, this ‘reassuring breakwater’ could not hold for long.⁵⁷ The initial policy goal of removing barriers to trade came to be interpreted broadly to encompass measures dealing with issues such as health, environmental protection and the protection of consumer rights. This has led inevitably to an increase in litigation in private law. While in 1995, the number of cases before the ECJ on substantive private law legislation and civil procedure numbered no more than six,⁵⁸ by 2007, this had risen to 29.⁵⁹

At present, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) create a wide framework of powers, duties and individual rights.⁶⁰ The national court is expected to provide a remedial framework to ensure that the rights granted to individuals are respected and thus give citizens effective protection. Perhaps most well known is the development of the doctrine of direct effect by which the national courts are expected to provide a remedial response to the breach of EU legal provisions which are sufficiently clear, precise and unconditional to be considered justiciable.⁶¹ While national courts are, with some exceptions,⁶² given considerable remedial autonomy, the remedy awarded must comply with the principles of effectiveness⁶³ and equivalence (or non-discrimination).⁶⁴ Further, the doctrine of indirect effect states that national courts now have duties to interpret existing legislation in line

⁵⁷ D Caruso, ‘The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration’ (1997) 3 *European Law Journal* 3, 8–9. This does not signify, however, that the domestic courts were ready to accept such an extension: for a discussion of the response of the English, French and German Supreme Courts, see J Bell, *Judiciaries within Europe* (Cambridge, Cambridge University Press, 2006) 378–80.

⁵⁸ Not counting cases in which private law was a side issue.

⁵⁹ E Hondius, ‘The Impact of Community Law on Domestic Private Law’ (2010) 18 *European Review of Private Law* 425.

⁶⁰ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C83 of 30 March 2010.

⁶¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105 and Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. Generally, P Craig and G de Búrca, *EU Law: Text, Cases and Materials*, 5th edn (Oxford, Oxford University Press, 2011) ch 7. Note that the rule remains that the direct effect of a directive may only be pleaded against the State and not against an individual (vertical not horizontal effect): Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723. This rule is mitigated to a certain extent by the doctrine of incidental horizontal effects, permitting the use of unimplemented directives in certain cases between private parties: Craig and de Búrca, *EU Law*, 207 (who also describe it as complex and confusing); Case C-194/94 *CIA Security International SA v Signalson SA* [1996] ECR I-2201; Case C 443/98 *Unilever Italia v Central Food* [2000] ECR I-7535.

⁶² eg, the right of restitution under the San Giorgio principle for illegally levied taxes (Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595). Note also the willingness to set aside national restrictions on remedies, as seen in *Factortame* below.

⁶³ The principle of effectiveness requires that it should not be practically impossible to exercise EU rights in the national law: see Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433 (full effectiveness of EU law impaired if rule of national law prevented court from granting interim relief against the Crown, thereby setting aside a rule of national law).

⁶⁴ The principle of equivalence means that the remedies and procedures for dealing with such claims in domestic law must give rise to remedies which are no less favourable than those available in domestic law: see Case 14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891.

with EU law.⁶⁵ English courts are thus expected to respond positively to EU law and give priority to establishing the meaning of the relevant legal provision when determining how it should apply at national level.⁶⁶ Article 19 TEU⁶⁷ re-iterates that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.⁶⁸

EU law is thus a significant source of English law. Commentators now acknowledge that ‘A major proportion of the law in the United Kingdom is in fact made by or through the EU’.⁶⁹ English judges are also more willing to utilise ‘European’ concepts such as legitimate expectation and proportionality in shaping rules of domestic law.⁷⁰ It would be surprising, therefore, if tort law remained unaffected. As will be discussed in chapter 3, EU law has affected areas of tort law as diverse as product liability, health and safety law, road accidents and defamation. The impact of EU law may be seen most clearly by returning to tort law’s most iconic case: *Donoghue v Stevenson*.⁷¹ As tort lawyers know, the fault-based liability established by this case now exists side-by-side with the strict liability provisions found in Part 1 of the Consumer Protection Act 1987.⁷² Yet, this notable piece of consumer legislation derives not from a Law Commission report or government White Paper, but from European Union Directive 85/374/EEC, commonly known as the Product Liability Directive.⁷³ The 1987 Act thus creates a new head of liability in English tort law whose origin is European. As such, it provides an excellent example of the influence of European law striking at the heart of English tort law.

Further, the European Court of Justice in *Francovich*⁷⁴ created a new head of tort liability that would be applied by the domestic courts of Member States: State liability for breach of EU law. The key challenges of *Francovich* liability, as set out in chapter four, are as follows: it is a head of tortious liability in which the English

⁶⁵ Case 14/83 *Von Colson* (n 64); Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135; Cases C-397–403/01 *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835. This follows from art 4(3) TEU: ‘The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.’

⁶⁶ C van Dam, *European Tort Law*, 2nd edn (Oxford, Oxford University Press, 2013) para 204–3.

⁶⁷ Introduced following the Lisbon Treaty.

⁶⁸ See also Charter of Fundamental Rights, art 47: ‘[e]veryone whose rights and freedoms guaranteed by the law of the union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’

⁶⁹ R Ward and A Akhtar, *Walker & Walker’s English Legal System*, 11th edn (Oxford, Oxford University Press, 2011) 110.

⁷⁰ M Hunt, ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’ (1999) 26 *Journal of Law and Society* 86, 101.

⁷¹ *Donoghue* (n 22). The House of Lords determined that the manufacturer would owe the ultimate consumer a duty to take reasonable care in the production of the item in question.

⁷² Consumer Protection Act 1987, pt 1, s 3(1).

⁷³ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products: [1985] OJ L210, 29. Part I of the Consumer Protection Act 1987 marked the first occasion on which the UK government had implemented an EU Directive by means of an Act of Parliament rather than by means of delegated legislation, as permitted by s 2(2) of the European Communities Act 1972.

⁷⁴ *Francovich v Italian Republic* (C6/90) [1991] ECR I-5357; [1993] 2 CMLR 66.

courts are applying a test for liability established by the CJEU not the English courts⁷⁵ and potential defendants (the ‘State’) may include the UK government⁷⁶ or even the national court itself.⁷⁷ As will be discussed in chapter four, *Francovich* liability may be seen as a threat to the autonomy of the national courts on matters of tort law development and yet remains surprisingly under-analysed by tort lawyers (although not EU lawyers) despite its recent 20-year anniversary.

iii. Do Tort Lawyers Need to Know about Human Rights?

For many tort lawyers, Europeanisation will be equated with the introduction of the Human Rights Act 1998 (HRA 1998). Although the European Convention on Human Rights had been signed in Rome in 1950 and ratified by the UK in 1951, it had limited impact on the English legal system and indeed it was not until 1966 that the UK government permitted British citizens to petition the ECtHR in Strasbourg. As an international agreement, the Convention’s impact was naturally limited. The ECtHR may find a Contracting State in breach of one or more of the Convention rights and guarantees, but its judgments are only binding on the countries concerned.⁷⁸ Further, litigants are required to exhaust all domestic remedies and bring the complaint within six months of the final decision of the domestic court.⁷⁹ Bringing a case to Strasbourg was therefore a time-consuming and expensive process. While commentators had noted that even prior to the 1998 Act the English courts had at times been influenced by the Convention, for example, in seeking to interpret statutes or the common law in a Convention-compliant way when the relevant law was ambiguous or the law undeveloped or uncertain,⁸⁰ it was the introduction of the 1998 Act by the then Labour government⁸¹ which enabled individual litigants to enforce Convention rights in the domestic courts without having to travel to Strasbourg.⁸² In permitting actions against public authorities,⁸³ where tort law traditionally adopted a restrictive

⁷⁵ See C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany*; *R v Secretary of State for Transport, ex p Factortame (No.4)* (also known as ‘*Factortame III*’) [1996] ECR I-1029; [1996] QB 404, paras 28 and 29.

⁷⁶ *R v Secretary of State for Transport, ex p Factortame (No 5)* [2000] 1 AC 524.

⁷⁷ *Köbler v Austria* (C224/01), [2003] ECR I-239; [2004] QB 848. For a recent application of *Köbler* liability in the UK courts, see *Cooper v Attorney General* [2010] EWCA Civ 464; [2011] 2 WLR 448.

⁷⁸ ECHR, art 46: Binding force and execution of judgments.

⁷⁹ ECHR, art 35: Admissibility criteria.

⁸⁰ A Lester, ‘Human Rights and the British Constitution’ in J Jowell and D Oliver, *The Changing Constitution*, 7th edn (Oxford, Oxford University Press, 2011) 76–77. Steele also notes that the influence of the Convention was apparent prior to 2000, for example in relation to the treatment of freedom of expression in the tort of defamation: J Steele, ‘(Dis)owning the Convention in the Law of Tort’ in J Lee (ed), *From House of Lords to Supreme Court* (Oxford, Hart Publishing, 2011) 104.

⁸¹ Labour Party, *Bringing Rights Home: Labour’s Plans to Incorporate the European Convention on Human Rights into UK Law* (London, Labour Party, 1996).

⁸² It is important to note that litigants may still complain to Strasbourg if, for example, they disagree with the ruling of the English courts that their rights have not been violated. See M Amos, ‘The Impact of the HRA on the UK’s Performance before the European Court of Human Rights’ [2007] *Public Law* 655.

⁸³ HRA 1998, ss 6–8. Section 6 of the Act, which permits claims against local authorities which have acted in a way which was incompatible with a Convention right, thus provides an alternative to negligence claims.

approach towards liability⁸⁴ and potentially impacting on the judgments of ordinary courts (classified as public authorities under the Act) in private litigation,⁸⁵ the Act required tort lawyers at least to consider how it would relate to existing tort law principle.

However, it was the *Osman* effect, that is, a ruling of the ECtHR in 1998 that the application of the duty of care test in the tort of negligence had been contrary to Article 6 of the European Convention on Human Rights (ECHR), which awakened tort lawyers to the potential impact of the Act.⁸⁶ As will be detailed in chapter five, the fact that this ruling was delivered in 1998 – the same year as the Act – was particularly significant. The government had delayed implementation to permit the legal profession to come to terms with the new provisions and *Osman v United Kingdom* indicated that private lawyers would not be immune from this process. Wright in 2001 argued that tort lawyers needed to both consider the impact of the Act and develop tort law from a human rights perspective.⁸⁷ *Osman* had indicated the potential of the HRA 1998 to change fundamental principles of tort law. The response of the English courts to this case will be analysed in chapter five.

Yet, the most challenging area for tort lawyers has perhaps been the development of privacy law. This has led to a succession of cases seeking to protect private information ranging from the infidelity of various footballers to photographs of Princess Caroline of Monaco tripping over at her beach club. The abundant literature in this field tends to derive from public lawyers such as Phillipson, Fenwick and Masterman at the University of Durham, and yet, as is discussed in chapter six, one key question is whether the courts are developing a new tort of misuse of private information. The input of tort lawyers in this debate is of obvious value, but requires, naturally, an understanding of the human rights framework.

More broadly, to participate in these debates tort lawyers need to understand the new rights-based framework and to determine the relationship between damages claims for breach of Convention rights and traditional claims for compensation in tort. This may give rise to issues on the cusp of private and public law, but human rights can no longer be dismissed as solely the remit for public and international lawyers. Chapters five and six will examine the extent to which the English tort law community – judges, lawyers and academics – has embraced the possibilities for legal development presented by the 1998 Act.

⁸⁴ See *X v Bedfordshire CC* [1995] 2 AC 633.

⁸⁵ See, eg, G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 *Modern Law Review* 824.

⁸⁶ *Osman v United Kingdom* (23452/94) (1998) 29 EHRR 245, criticising the Court of Appeal's ruling in *Osman v Ferguson* [1993] 4 All ER 344.

⁸⁷ J Wright, *Tort Law & Human Rights: The Impact of the ECHR on English Law* (Oxford, Hart Publishing, 2001). Mullender, in contrast, argued Wright's view of the limitations of common law culture is unduly negative: R Mullender, 'Tort, Human Rights and Common Law Culture' (2003) 23 *Oxford Journal of Legal Studies* 301.

iv. Does It Really Make Any Difference in Terms of Legal Reasoning?

The first part of this book will deal, however, with a different topic. The application of European sources in terms of substantive law will be examined in chapters three to six, but chapter two will set out the legal framework for interpretation of EU and European human rights law and consider the difficulties involved in ‘transplanting’ sources of law which primarily reflect the civil law tradition into English private law. While European Treaties and the European Convention on Human Rights may be considered more imprecise and less detailed than Continental Codes, for example the notoriously complex and abstract German Civil Code, these sources are far closer to the civil law tradition than that of the common law in terms of structure, judicial style and, particularly troubling for common lawyers, the absence of any strict doctrine of precedent.⁸⁸ As will be detailed in chapter two, this raises problems in terms of different methods of statutory interpretation, understanding judgments written in a different legal style and comprehending legal language, which may technically be in English, but utilises concepts unfamiliar to a common law audience. This is a challenge which, not only judges, but the whole legal community must address in order to understand the changes detailed in this book.

Conclusion

This book will argue that ‘Europeanisation’ is something which tort lawyers *need* to understand if they are to participate fully in the debate regarding European influences on English tort law. ‘Europeanisation’ requires not only an awareness of the HRA 1998, but also that European law generally (EU and ECHR) impacts on core elements of tort law. Further, following the Lisbon Treaty, the division between EU and ECHR law is less distinct; Article 6(1) of the Treaty on European Union providing that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union⁸⁹ and Article 6(3) that the fundamental rights of the ECHR, together with the constitutional traditions common to Member States, constitute general principles of EU law.⁹⁰ Article 6(2) also provides for the EU to accede to the ECHR in due course, although negotiations on this point continue.⁹¹

⁸⁸ Although the CJEU and ECtHR in practice will often follow leading judgments.

⁸⁹ The Charter itself provides that when its provisions overlap with the ECHR, the meaning and scope of such rights should be the same as that laid down by the Convention; the Charter extending beyond the civil and political rights of the ECHR to include social and economic rights: ECHR, art 52(3). See Case C-540/03 *Parliament v Council (family reunification)* [2006] ECR I-5769.

⁹⁰ This has led Hugh Collins to argue that national courts, when applying EU law, should interpret the relevant provision in a manner which is compatible with the Charter: ‘On the (In)compatibility of Human Rights Discourse and Private Law’ (2012) 7 *LSE Working Paper*, 8 (www.lse.ac.uk/collections/law/wps/WPS2012-07_Collins.pdf).

⁹¹ See C Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaption’ (2013) 76 *Modern Law Review* 254; S Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’

Inevitably, inherent in this discussion are different policy views on the merits or otherwise of Europeanisation. It may be seen as having a positive influence on legal development in terms of political and economic goals, protecting both consumers and individual rights. Alternatively, it may be viewed as diminishing national autonomy, disrupting traditional practices and limiting the role of both the domestic judiciary and legislator in the creation and development of legal norms. Dehousse has remarked on the tensions between institutions operating at different levels, for example the EU with its emphasis on market integration and ensuring a free market by the removal of factors distorting competition, and the domestic concerns of the national court.⁹² Doctrinal discomfort, combined with pressure to engage in debates and apply legal rules on subjects once the prerogative of the national courts, has led, Caruso has noted, to resistance at national level: 'In the legal culture of Europe, private law is perceived as and may actually function as a bulwark against the flood of European regulation, a sort of antidote to the dilution of regional identities'.⁹³ In examining signs of Europeanisation, therefore, this book will simultaneously analyse the receptivity of English tort law to these new influences and the extent to which, explicitly or implicitly, signs of opposition continue to exist. In so doing, it will consider whether Europeanisation has led to a change in English legal culture and how English judges reason. Fundamentally, this book will question whether the English tort law community is ready to welcome Europeanisation, or whether the common law legal culture has proven more resistant to change than might have been expected.

(2011) 11 *Human Rights Law Review* 645; P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford, Hart Publishing, 2013). If this occurs, CJEU decisions concerning Convention rights will be open to review in Strasbourg.

⁹² R Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis' (1994) 42 *American Journal of Comparative Law* 761. See also C Joerges, 'Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example' (2000) 1 *European Review of Private Law* 1, who argues that the only way these tensions may be overcome is by an active European judiciary.

⁹³ Caruso, 'The Missing View' (n 57) 4.