

**ANDREW J. MCCLURG ET AL.,
PRACTICAL GLOBAL TORT LITIGATION:
UNITED STATES, GERMANY AND ARGENTINA**

ANDREW HAMMEL

Reprinted from
The American Journal of Comparative Law
Volume LVI, Winter 2008, Number 1
Copyright © 2008 by the American Society of Comparative Law, Inc.

ANDREW J. McCLURG, ADEM KOYUNCU, AND LUIS EDUARDO SPROVIERI, *PRACTICAL GLOBAL TORT LITIGATION: UNITED STATES, GERMANY AND ARGENTINA* (Carolina Academic Press, 2007)

*Reviewed by Andrew Hammel**

Practical Global Tort Litigation, the first book in Carolina Academic Press' Contextual Approach Series, is a joint endeavor by three authors on three continents: Andrew J. McClurg, who teaches at the University of Memphis Cecil C. Humphreys School of Law; Adem Koyuncu, a German physician and lawyer who works at the Cologne offices of Mayer Brown; and Luis Eduardo Sprovieri, a partner in the Buenos Aires office of Baker & McKenzie. Together, they present a hypothetical products-liability case and track its progress through the courts in Miami, Florida; Cologne, Germany; and Buenos Aires, Argentina.

Their case is modeled on *Welge v. Planters Lifesavers Co.*¹ Richard Welge, the plaintiff, suffered permanent hand injuries when a jar of peanuts shattered as he closed it. Before the accident, his landlady had removed a promotional coupon from the jar label with an Exacto knife. The District Court granted summary judgment against Welge because Welge could not rule out the possibility that the peanut jar had become defective sometime after leaving the K-Mart store where it had been bought. Judge Richard Posner, writing for the United States Court of Appeals for the Seventh Circuit, rejected that standard as too demanding. The District Court had essentially required Welge to prove a negative by ruling out any possibility that the defect emerged post-purchase (perhaps, Posner observed mischievously, when "elves . . . played ninepins" with the bottle). The landlady's removal of the coupon was irrelevant, Posner ruled, since a bottle too weak to resist this (invited) "abuse" would, by definition, be defective.

The authors of *Practical Global Tort Litigation* adapt the facts slightly. Their heroine is thirty-year-old Silvia Winter, an amateur pianist who is studying to become a physical therapist—until a shattered peanut jar permanently injures the nerves in her right wrist. She also uses an Exacto knife to remove a coupon from the jar, but, unlike Welge, does not preserve the glass shards after her bloody accident. The co-authors track Winter's case from initial contact with a lawyer to post-verdict appeal in Germany, Argentina, and the United States. In the book's preface, McClurg describes his motive in spearheading this collaborative effort: the scarcity of accessible comparative-law materials that show day-to-day justice in different nations. Library shelves groan with treatises that compare legal systems at a general level, but surprisingly few analyze specific cases or examples: "Applying law to facts," argues McClurg, "promotes

* Lecturer in Anglo-American Law, Heinrich-Heine-Universität Düsseldorf, Düsseldorf, Germany.

1. 17 F.3d 209 (7th Cir. 1994).

analysis that is not only more focused, precise, and accurate, but accessible and retainable" (p. xii).

The hypothetical is ideal, since bottle-defect cases have shaped tort law in each country under discussion. McClurg assembles a panel of experts with academic credentials and practice experience in products liability law in their home countries. Together, they examine both practical and theoretical issues: finding a lawyer, framing the complaint, pretrial fact-finding procedures, settlement negotiations, the structure and importance of the trial, substantive burden-shifting provisions and defenses, and damage awards if liability is found. Each chapter incorporates the perspective of all three legal systems. The chapters are generally between fifteen and twenty pages long—enough to permit a concise comparative exploration without excessive detail. The discussions of German and Argentine law should be easy to follow for students who are familiar with U.S. tort law. The experience and credentials of the foreign authors inspire confidence; their contributions betray all of the worldly wisdom (but none of the cynicism) of experienced litigators. Particularly valuable is the exploration of Argentine law. Not only does Sprovieri's contribution shed light on a legal system that is not a frequent subject of comparative analysis, it also highlights the diversity in institutions and approaches hidden behind the "civil law jurisdiction" label.

Many of the authors' conclusions will not surprise comparative-law scholars. All three jurisdictions have eased the plaintiff's burden of proof in cases involving defects in mass-produced goods. Courts in the United States apply the Second Restatement of Torts § 402A (which, with regard to manufacturing defects, was not significantly changed by the Third Restatement). Germany has a specific products-liability statute, but German courts still mainly apply doctrines developed in a line of precedent started with the *Fowl Pest* decision of 1968.² The *Fowl Pest* line of cases, which interprets the language of the famous Section 823(1) of the German Civil Code, technically requires the plaintiff to prove negligence. However, liability is presumed once a defect is proven, subject to the manufacturer's rebuttal by careful documentation of its quality-control and "product observation" duties. Article 40 of Argentina's Consumer Protection Law also establishes strict products liability. However, even before that law was passed in 1993, lawyers and judges used a complex doctrine derived from Article 1113 of the Argentine Civil Code, which imposes liability for damages caused by "risky things" on the "owner or guardian of the thing." Although the "owner or guardian" would usually be the end user under a literal interpretation of the statute, "[t]he clear modern trend . . . is for courts to broadly interpret article 1113 to include manufacturers on the theory that they are the 'guardian of the structure' with regard to the overall process of manufacturing and distributing their products" (p. 133).

For all the broad agreement in the trend toward imposing strict liability on manufacturers, differences in the scope of liability re-

2. BGH Decision of Nov. 26 1968, BGHZ 51, 91.

main. Both Argentina and the United States have embraced joint and several liability, which allows Silvia to sue everyone in the distribution chain. German law, however, still generally limits joint and several liability. Retailers can escape judgment by showing that their practices were unlikely to have contributed to the danger posed by the product. On October 31, 2006, for instance, the German Federal Court of Justice rejected a complaint of liability against a beverage store owner who, it was claimed, should have air-conditioned his store to reduce the risk that glass bottles of carbonated drinks would explode. The court held that the retailer had satisfied his duty of maintaining a safe premises (*Verkehrssicherungspflicht*). The expense of air-conditioning the store, the court held, was not justified by the additional margin of safety.³

In all three jurisdictions, the authors estimate Silvia's chances of winning at less than fifty percent. Silvia's problem is that she did not save the pieces of the broken bottle. (Welge did, and won.) This departure from the facts in *Welge* was intended to make the case more realistic; most plaintiffs do not preserve evidence after a household accident. Without the shards, a plaintiff in an exploding-bottle case will be hard-pressed to prove defect. Even if Silvia can prove a prima facie case, courts in all three countries may well find for a responsible manufacturer with a good safety record when, as here, the proof of defect is merely inferential. Had Silvia kept the glass shards, she would have had a much easier time of it; among expert communities in all three nations, analysis of broken glass containers is a science unto itself. Here, judicial and jury fact-finding converge: judges, no less than juries, seem to need official expert confirmation of a defect in order to tip their judgment toward the plaintiff.

Larger differences emerge in the areas of pretrial procedure, expert witness practice, and trial structure. In contrast to the United States, an initial complaint in a German civil proceeding is "the crucial blueprint on which the entire lawsuit will depend" (p. 65). Pretrial discovery as it is known in the United States does not exist in Germany and Argentina. Thus, the fact that Silvia cut the label from the glass bottle might well remain undiscovered in the non-U.S. jurisdictions: the plaintiff's lawyer would not be obliged to reveal it, and the defendant would have no way to force its disclosure. Although expert witness evidence would be vital in each legal system, the judge has much more control over the selection and payment of the expert in Argentina and Germany. And, of course, neither German nor Argentine law provides for anything similar to an American jury trial. In those systems, facts are developed and theories applied or abandoned during a months-long series of pleadings and hearings. A unique feature of the German legal system is the *prozessleitender richterlicher Hinweis* (which Koyuncu translates as "action-leading judicial hint" (pp. 62-63)), in which the judge regularly informs the parties of her developing view of the case as it evolves. The judge uses this institution to focus the parties' attention on crucial issues

3. BGH Decision of Oct. 31 2006, NJW 2007, 762.

and nudge them towards settlement, when appropriate. In Argentina, by contrast, the judge's involvement is much less active—generally, judicial clerks prepare summaries of relevant hearing testimony and present them to the judge.

After discussing theories of recovery and defenses, the authors estimate the damage amounts in each country should Silvia win. This chapter sheds light on methodological differences in assessing conventional damages, an aspect of comparative civil procedure less frequently addressed by scholars (who are often more interested in the discrete issue of punitive damages). The authors confirm the common assumption abroad, which is that American tort damage verdicts are much larger than similar verdicts in other countries. Using an analysis provided by an American jury verdict research firm, the authors estimate Silvia's award in the United States at \$131,000, net of attorneys' fees, costs, and past medical expenses. (Punitive damages would not come into play in a case like Silvia's.) Holding exchange values equal, the award in Germany would be \$23,700, and in Argentina \$11,833 (p. 187). The latter two figures are less speculative than the American amount, because both Germany and Argentina require judges to align each damage award with published results in similar cases. The authors note the irony that this "case law" guides damages decision in these civil-law countries, while American juries are ignorant of what other juries have done in similar cases. Among the authors' explanations for this huge difference in damages: the higher cost of living in the United States, the need to compensate an uninsured litigant such as Silvia for past and ongoing medical care, and, of course, the fact that a jury, not a judge, will decide the damages question (pp. 187-194).

In the final chapter, each author conveys his comparative impressions in the first person, discussing not only doctrinal and procedural differences, but also practical questions: whether a plaintiff in Silvia's position would seek redress in the first place, whether she would find a capable lawyer, and whether she would win the case. The authors' informed reflections are perhaps the high point of the book. Their preconceptions about other nations' legal systems, they report, changed as the project progressed. The civil lawyers are impressed by some features of American civil procedure. "Without discovery," Sprovieri notes, "there is no way for Argentine consumers to unearth the truth about an alleged damaging product. This would seem to hold true in most other civil law countries, which also do not allow discovery. Thus, in one sense, the entire search for objective truth is doomed before it ever starts" (pp. 216-17). Koyuncu notes that a movement is afoot in Germany to increase standardized award levels for pain and suffering damages, which will strike American lawyers as quite low. Pointing to the highly regulated German legal profession, "where we have statutes that, among other things, restrictively regulate lawyer advertising, set attorneys' fees, and prohibit contingency fees," he also urges German lawyers to keep an open mind toward appropriate use of contingency fees: "The dangers attributed to contingency fees in Germany, usually accompanied by om-

inous comparisons to 'American conditions,' seem overstated" (p. 209).

Other aspects of American jury practice and damages awards, however, come in for skeptical scrutiny. Unlike in Germany, where parties can file an *Abänderungsklage* to ask the judge to modify existing damage awards to adapt to changing circumstances (a point which impresses McClurg), American jurors have only one chance to set compensation. The process is fraught with uncertainty, since jurors may have heard wildly different estimates from partisan experts, and have no information about other verdicts in similar cases. This black-box procedure leads to divergent results in similar cases, a breach of the principle of legal certainty which is a basic value (or, as John Henry Merryman once put it, sometimes an "unquestioned dogma"⁴) in civil-law thinking. The civil lawyers also make a powerful case for the advantages that flow from the judge's central role in guiding the case's development. Assuming the judge is competent and experienced, giving him a leading role increases the reliability and consistency of verdicts across cases, obviates courtroom theatrics and complex rules of evidence (since he will ignore trivial or inflammatory comments), and permits him to guide fact development efficiently.

Although *Practical Global Tort Litigation* is not conceived as a contribution to theory, the book does offer contributions to broader theoretical discussions, especially in the area of comparative civil procedure. First, it provides yet more examples that confound simple schematic distinctions between common-law and civil-law systems. For one thing, court decisions build the primary legal framework for products-liability law in both Argentina and Germany, whereas the U.S. Restatements can read like the work of a civil-law drafter and—at least in the area of strict liability—have a similar level of influence. The use of the phrase "objective truth" by Sprovieri in the above quotation also brings to mind the characterization of civilian procedure as driven by a disinterested judge whose goal is to form a complete picture of all relevant circumstances⁵ (as contrasted, by commentators such as William Pizzi, with America's lawyer-driven procedural gamesmanship⁶). Judge-led investigations in countries such as Germany and Argentina can, under ideal circumstances, create a thorough picture of the case. However, adversarial discovery is unquestionably more effective in uncovering relevant facts against the will of one of the parties. It also often uncovers irrelevant and

4. John Henry Merryman, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 48 (2nd ed. 1985).

5. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI L. REV. 823, 823 (1985) (suggesting "that German experience shows that we would do better if we were greatly to restrict the adversaries' role in fact-gathering").

6. See WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* 23 (1999) ("[European lawyers] do not have tight control over what occurs at trial and their role at trial is de-emphasized, unlike American lawyers who are permitted to dominate the courtroom.").

private facts along the way, which is why some scholars see the lack of American-style discovery in civilian jurisdictions less as a structural deficiency than as a reflection of the fact that civil-law procedure privileges values other than full disclosure—such as privacy, efficiency, and the principle that litigants not be forced to give evidence against themselves.⁷

Hein Kötz recently noted the crucial role of discovery in high-impact public-interest litigation in the United States, a kind of litigation unknown in Europe. However, he also cautioned that discovery is part of a system which places a much higher premium on aggressive lawyering. This emphasis “raises concerns about access to justice for the poor and procedural equality of litigants with disparate economic resources.”⁸ Here, *Practical Global Tort Litigation* also provides welcome insight. In Germany, Koyuncu argues, Silvia would likely seek representation, since middle-class Germans tend to be quite rights-conscious, and information about the legal system is widely available. Though she has a modest chance of winning, she would nevertheless likely qualify for legal-aid sponsorship. A lawyer would have an incentive not only to take her case but to try to win: if he loses, he is paid at the legal-aid rate, but if he wins, “the losing defendants would have to pay Silvia’s attorney the regular, higher statutory attorney fees” (p. 206). In Argentina, Silvia would certainly be able to find representation for mandatory pre-filing mediation, in which the chances of obtaining a quick settlement are high. However, if the case does not settle, she may not find an attorney willing to mount a full-dress lawsuit, since “most plaintiffs’ lawyers lack the resources, expertise, or doggedness to pursue challenging cases” (p. 215). Her chance of being referred to the small coterie of specialist products-liability lawyers might be reduced by the fact that Argentina prohibits lawyer advertising.

Practical Global Tort Litigation’s beginning-to-end focus on one case also highlights background structural difference between the United States and the civilian jurisdictions, especially Germany. The greatest difference, of course, is the “concentrated” American trial (to use Arthur von Mehren’s term⁹), which influences almost every aspect of practice. Another difference is the role of the judge. In Germany, judicial authority often intervenes in a typical tort action long

7. James Q. Whitman has recently argued that European mistrust of aggressive discovery fits in with broader, long-standing cultural patterns which privilege a citizen’s ability to manage the amount of private information he must reveal to others. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151 (2004). These patterns help explain the “seething little war over discovery” being fought between the United States and European jurisdictions—mostly over discovery orders issued by American courts that require companies to disclose information they would not have to reveal under European law. *Id.* at 1157.

8. Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. OF COMP. & INT’L LAW 61, 76 (2003).

9. Arthur von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART, FESTSCHRIFT FÜR HELMUT COING 361, 361 (München 1982).

before it would in the United States (during the decision whether an indigent plaintiff will receive legal aid), stays involved long after (in the form of potential post-verdict modification of the damages award), and exerts a much greater influence over the shape and structure of the proceeding (through interim orders directing the parties to focus on particular issues). Both in Germany and in Argentina, damages are awarded according to detailed calculations based on published and carefully monitored indices of awards in similar cases—Argentina even has an innovative Internet database which judges can use for this purpose (p. 185-86).

These procedures serve goals that go beyond the custom-tailored resolution of the individual case, which most American lawyers would likely cite as the primary object of an individual tort action. Justice in the particular case is obviously central in civilian jurisdictions, but is still conditioned by the judge's responsibility to ensure that outcomes are integrated into a framework shaped by policy judgments taken at a higher level. One is reminded of Mirjan R. Damaška's description of the proactive, "policy-implementing" procedural characteristics of some legal orders,¹⁰ in which individual lawsuits are seen as occasions not only to do justice between the parties but also affirmatively to enact and reproduce government policy. Policies that are given much clearer expression in the civil-law jurisdictions than in American courtrooms include insulating the decision-making process as far as possible from arbitrary factors (such as the plaintiffs' "likability" or financial resources); ensuring that damage awards are predictable and relatively consistent; and protecting litigants' privacy against intrusive court-mandated disclosure. The one common external goal often cited by American tort lawyers—"sending a message" to delinquent manufacturers—is completely absent in the non-American jurisdictions, since singling out a defendant for a "message-sending" verdict would threaten civilian principles of equal justice.

As befits a book with the word "practical" in its title, *Practical Global Tort Litigation* highlights again and again the tension between formal law and legal practice. The most carefully calibrated burden-shifting doctrine may be of no use to plaintiffs who have no power to subpoena documents or compel testimony from reluctant defendants. Nor will any Restatement come to Silvia's aid if factors unrelated to her legal claims make her appear "unsympathetic" to an American lay jury. McClurg relates the unsettling, if unsurprising, fact that every one of the American plaintiffs' lawyers he interviewed for the book identified "how Silvia would play to a jury [to] be the single most important consideration in deciding whether to take the case" (p. 199). These lessons from practice routinely leaven the

10. See MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 91 (1986) (citing "a difference in ingrained Continental and Anglo-American attitudes toward the adaptation of procedural form to perceived objectives of the legal process"). In context, Damaška was not referring to the specific policy objectives I have identified, but I believe the deeper point holds.

book's comparative analysis, and deliver "beyond the black-letter" insights for students and teachers alike.

PABLO DE GREIFF, ED., *THE HANDBOOK OF REPARATIONS* (Oxford and New York, Oxford University Press, 2006)