

Book Review

G Dannemann/R Schulze, *German Civil Code – Bürgerliches Gesetzbuch (BGB)* Volume I (CH Beck 2020). xxviii + 2322 pp. ISBN 978-3-406-70035-4. € 250 (hardback)

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The commentary is a specific form of legal literature reflecting a specific form of intellectual inquiry. An authoritative text is subjected to step-by-step scrutiny with one of a number of aims. It may be practical, it may be pedagogical, it may be persuasive. It may be potage of all three. This journal does not ordinarily review commentaries. In part, this reflects the long-running nature of the settled commentaries across European legal systems, the novelty, such as it is, is disaggregated out across too many updates to be easily captured in the rather blunt instrument of a book review. In many commentaries, intended as aides-de-camp for busy practitioners, there is no argument, as such, to critique in the pages of a scholarly journal. Yet the selected work has been reviewed nevertheless as it stands apart in both the breadth of its ambition and, crucially, its intended audience: an English language commentary on the German *Bürgerliches Gesetzbuch* (German Civil Code, BGB).

As a genre, the civilian-style commentary is not unknown in the common law tradition. The US Restatements are in style and authoritative value a strong analogue, and Lord Burrows, a recent appointee to the UK Supreme Court, has spearheaded, in his previous academic career, an attempt to apply at least some of the cohesive, structuring gravity of a commentary to swathes of English law.¹ But these are internally-oriented affairs, as in the civilian tradition. What the team behind the volume under review have undertaken is the, at first glance, rather odd challenge of making their system accessible to foreign practitioners, students and academics through the medium of a commentary written entirely in English. Whilst other English-language texts are available, some prestigious in their own authority,² such an effort is without peer, and there is much on offer here to pre-

¹ See, in its most recent edition, *A Burrows* (ed), *English Private Law* (3rd edn 2013).

² *B Markesinis/J Bell/A Janssen* (eds), *Markesinis's German Law of Tort* (5th edn 2019).

sent an engaging, functional tool for those interested in engaging with one of the world's great legal traditions.

This volume covers Books one, two and three of the BGB (for those keeping score, the first 1,296 paragraphs of the 2,385 in the Code). Thus, whilst devotees of family law and succession will have to look for satisfaction to the accompanying second volume, currently scheduled for arrival towards the end of 2021, there is plenty here for a tort law audience, indeed, for any obligations lawyer more generally, to enjoy now. Whilst two scholars, each senior and respected members of the professoriate, are given nominate recognition as editors, 35 further authors, drawn from both practice and the academy, provide the substantive commentary on each paragraph, dividing the task sensibly between complete respective Titles and Subtitles as appropriate. The name of the respective author or team of authors appears at the bottom of each page allowing the reader to quickly locate and contextualise the expertise at hand. An economical introduction by the editors provides a solid grounding in the creation, evolution and mechanical idiosyncrasies of the BGB and German legal thought respectively as well as the scope of the Books covered in the volume; this amuse-bouche consumed, the main meal begins. Respective paragraphs are then given in their German original, alongside an English translation, with translations of provisions dating from before 2013 drawn from the well-known online versions provided by the Federal Ministry of Justice (<<https://www.gesetze-im-internet.de/>>). As anyone who uses that resource will understand, whilst it is generally excellent, there are points where improvement is possible (see the persistently disappointing choice in § 276 (2), retained in the volume under review, of 'reasonable care' over the more challenging ambiguity of the original German),³ and, as the editors note, (p 15) individual authors do suggest more apt terms in English where needed. There is no expectation, how could there be, that the same term in German is reflected in identical English throughout. The translation adapts as appropriate to the context of the relevant paragraph, but for a tort audience this is seldom problematic.

The format will be largely familiar to those who have used commentaries in the past with the respective author offering commentary on paragraphs taken individually or collectively and varying in length and complexity as appropriate. Commentary is consistently presented in three sections, 'Function', 'Context' and 'Explanation', with the second omitted for less involved or more straightforward paragraphs. Nevertheless, where it does appear, including such context provides a valuable way of situating the provision historically, comparatively and institu-

³ For a more detailed explanation see *E Deutsch*, *Fahrlässigkeit und erforderliche Sorgfalt: Eine privatrechtliche Untersuchung* (2nd edn 1995).

tionally and allows a reader coming to text without a broader knowledge of German law, either in substance or its administration, to better grasp the import of the rule under discussion. ‘Function’ is not intended as a space for normative claims about the application or interpretation of a given paragraph, but, rather, as a means of situating the provision *within* the Code itself, offering an initial, internal grounding before the outward looking focus of ‘Context’. For readers aiming to use the volume to help discover the solution adopted in German law, the focus will naturally be on the ‘Explanation’, although ‘Analysis’ may have better captured what goes on under this heading given, predictably, the law in practice seldom, even in Germany, leaves no dangling threads or open questions. This repeating tripartite structure provides a clear and familiar spine for the reader throughout, which is particularly important given, as anyone already familiar with German private law will attest, flicking between provisions is a feature, not a bug of the BGB. Such jumping about between provisions is, of course, part of the endearing frustration of the BGB and is given a laudable degree of practical support by the decision to publish this volume with two differently coloured ribbons.

So, the project is fundamentally sound, and the choices of how to go about it are sensible and robust: it is a book to be used primarily by a foreign audience and it is both user-friendly and sensitive to the needs and interests of its intended audience. But for any reviewer the volume, of course, provides a challenge. How does one assess the content? There is no argument to critique, at least not in the fashion of an article, or a monograph. The point is not to convince the reader of a given position or path of development for the law. Rather, what is offered is, as the editors describe it (p 2), an *authentic* statement of the law, largely as it stands. In this then, the suggested measurement is utility, which here resolves to two issues. Does the text itself facilitate the reader’s interest? Does it provide a suitable foundation for further investigation into the relevant German rules? On this latter front, it clearly succeeds admirably. Throughout, footnotes are closer to an English model, in that they are evidence of what is asserted in the text rather than extensive, rather didactic works in and of themselves as is common in Germanic literature. Nevertheless, the welcome focus on case law and the key German-language texts and commentaries bolster the practical value of the volume. More and different sources may be required to truly bottom out an issue, but one is seldom left without a good trail of breadcrumbs to follow.

To assess the former issue, we turn to the hundred pages or so considering Title 27 of the eighth Division of the second Book: *Unerlaubte Handlungen*. That our guide to the span from §§ 823–853, well-familiar to readers of this journal, is Prof Magnus inspires confidence. Discussion of the key provisions in §§ 823 (1) (2), 826 and §§ 839 and 839a is well contextualised with a broad range of key considerations and relevant categories of case unpacked into examples of the law in

practice. There is brief consideration of the relationship with and place of product liability, but detailed discussion lies beyond the scope of the relevant provisions. Throughout, the reader is given insight into how the law in practice has diminished or expanded the rule as boldly presented at the start of each block of commentary, whether the minimal role in reality of § 825 (perhaps surprising in the #metoo era), the steady erosion of the ostensible exculpation for the acts of one's employees that the text of § 831 suggests (and that earlier generations enjoyed), or the fact that no matter how much one adapts to semi-aquatic living, a crocodile kept at home will not be regarded as a domestic animal for the purposes of § 833. That Magnus also provides the commentary on the closely related provisions in the General Part concerning damages (§§ 249–253) and, in Book 3, on injunctive relief (§§ 1004–1007) provides a welcome consistency of thought, not least as detailed consideration of the key theories of causation which underpin so much of the law of tort is, in fact (if not predictably), to be found in the commentary on § 249. Nevertheless, as the commentary on § 249 is particularly thorough (indeed, the same could be said of almost any part of Book 1, which in many ways tells you more about Germanic legal thought than the following Books combined), providing the reader with an excellent basis for approaching the later, specific contexts – not simply, of course, in tort – which might ground a claim elsewhere in the Code, it would be churlish to grumble. Indeed, taken together, Magnus' contributions to this volume must now represent one of the best foundational texts on the German law of tort presently available in English, either for student or practitioner. Rounding out this journal's interests, as Magnus briefly notes in discussing § 823, § 630a–h, introduced by the Patients' Rights Act 2013,⁴ (and albeit straying into territory that is technically contractual) now deal primarily with matters of medical malpractice. These provisions receive less detailed scrutiny from their respective author, with much more left to the reader by way of further study. Perhaps this is to be expected of what was, traditionally, an area (d)riven by developments in the case law and it would have been too voluminous to do the topic better justice, but this is a pity given the excellent, efficient signposting through the thickets of case law demonstrated in other sections.

Whilst the editors and team of authors deserve hearty praise for their execution of this ground-breaking publication, the preface appropriately tips its hat to Dr Wilhelm Warth at the publisher, for the idea's inception. A foreword from the Federal Minister for Justice and Consumer Affairs and the editors' own claim clarify that this project is, in part, 'an effort to make German law attractive to interna-

⁴ M Stauch, The 2013 German Patients' Rights Act – Codifying Medical Malpractice Compensation, 6 *Journal of European Tort Law* (JETL) 85.

tional audiences' (p 2). Whether publishers, or governments in other leading jurisdictions would be so bold or so confident in an audience for analysis of their leading sources of law in a foreign language is an increasingly interesting question. Certainly, the mirror publication – a compilation of leading English decisions (surely?) with commentary – rendered in German seems implausible, not least as suitable authors are thin on the ground and the linguistic barrier is sadly less formidable in that direction. Time will tell if the larger plan bears fruit, but with this volume, the intended audience has already been gifted a rich and comprehensive map through which German law can be meaningfully explored and brought to bear in enriching legal analysis the world over.