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Basil Markesinis

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FOREIGN LAW INSPIRING NATIONAL LAW. LESSONS FROM *GREATOREX V. GREATOREX*

BASIL MARKESINIS*

I. INTRODUCTION

HERE we are not talking of recourse to foreign law because the parties chose it, or because it has to be applied because it is so decreed by the rules of private international law. Nor are we referring to the law coming from such courts as that of Strasbourg or Luxembourg; not least because, nowadays, this cannot be properly called “foreign” law. Here we are focusing only on the voluntary use by judge or counsel of foreign law and foreign legal ideas as a means of shaping national law when this is unclear, contradictory, or otherwise in need of reform. The number of instances in which this kind of borrowing may happen must, of necessity, be limited, though in intellectual terms such conscious transplants must always be exciting to attempt. Yet in a shrinking world in which increased movement of people and ideas is making the convergence of tastes, habits, practices and, even, the law more and more pronounced, this phenomenon can only increase in significance not decrease.

For a long time the present author has tried to encourage this trend of planned judicial borrowings.¹ An open mind must, surely, be a pre-requisite for any academic; an ability to borrow solutions—“ready made” so to speak—must also be attractive to practitioners when faced with novel issues. The problem is that foreign law is unlikely to come in a simple form, attractively packaged; and language is by no means the only or even major problem in such attempts to be inspired by a foreign idea if not transplant the actual solution. That is how one was led to the idea of advocating a more co-ordinated use of the different talents that judges, practitioners, and academics bring to the process of creating and interpreting law.²

* Professor of Common Law and Civil Law at University College London; Jamail Regents Chair, University of Texas at Austin.

¹ A Collection of Essays published in two volumes, entitled *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Oxford 1997) and *Always on the Same Path, Essays on Foreign Law and Comparative Methodology* (Oxford 2001) have striven to construct a workable approach.

² A beautifully phrased but not entirely convincing formulation can be found in Sir Robert Megarry’s judgment in *Cordell v. Second Clanfield Properties* [1969] 2 Ch. 9, 16ff.

Three decades of teaching foreign law and trying to develop a workable theory of comparative methodology has had its ups and downs. Many of the difficulties are, I think, linked to the attitude adopted by my fellow-comparatists who have tried to shape wider theories about legal transplants or their impossibility. Great names have contributed to this debate: Alan Watson is one; and he brings to bear on the subject his knowledge of history as well as many cultures. More sceptical, Pierre Legrand has flourished amidst the controversy he has skilfully generated around his theories. My approach has steered clear from such grand schemes. It has been pragmatic and judge and practitioner oriented rather than tried to capture the imagination of fellow academics. This is only partly because I am working in a Common law environment where the judge is, as it was once said, the “senior partner in the law creating process.” But my methodology has also been shaped by the visible decline experienced by the subject in the classrooms. If one could only get judges interested in foreign law, practitioners would have to use it. And they could not use it without some help and preparation from academics. The subject would thus be revived; and its revival would also stimulate another favourite cause of mine: the greater collaboration between academics and practitioners.

The approach I have been advocating seems to have found an excellent practical illustration in the judgment of the High Court in *Greatorex v. Greatorex*.³ The facts of the case were relatively simple. For in that case a young man, whom, as note eight below explains, we shall henceforth call D2, was injured in an accident caused by his own grossly negligent driving. P, his father, a professional fire officer stationed nearby, suffered serious post-traumatic stress disorder as a result of attending his unconscious son at the scene of the accident. The question was whether the father could claim damages for his harm from the driver/injured son or, since he was uninsured, from the Motor Insurance Bureau, which stepped into the gap and became the second defendants in the action. In his judgment for the defendants Mr. Justice Cazalet made bold, even interesting, use of foreign law. Yet thus far his judgment has been only the subject of one case note;⁴ and from a comparative point of view, it has not received anywhere near the attention given to Lord Goff’s opinion in *White v. Jones*.⁵ Why this is so can, for the time being, be left open to speculation. But without any disrespect to Mr. Justice Cazalet it might be legitimate

³ [2000] 1 W.L.R. 1976.

⁴ Peter Handford, “Psychiatric Damage Where the Defendant is the Immediate Victim” (2001) 117 L.Q.R. 397, comparing the result with the more generous Australian law.

⁵ [1995] 2 A.C. 207, 252ff.

to ponder whether in law, as in other activities in life, the importance attached to a pronouncement can depend more on the status and profile of its maker than on its own intrinsic value. This is unfortunate, for it means that valuable ideas may be ignored until they are considered or adopted by an appellate court. Whatever the answer to this wider question, the fact remains that in terms of comparative law and methodology Mr. Justice Cazalet's judgment is, in some respects, more significant than Lord Goff's obiter dicta ruminations in *White v. Jones*. For, unlike *White*, where foreign law embellished an opinion of a high-profile judge but did not influence it directly,⁶ in *Greatorex* foreign law formed an important part of the argument of both counsels' submissions as well as the decision of the judge. The outcome is as interesting as the way it came about. For this decision can be seen as the result of a de facto collaboration between the three sides of the legal profession.

The discussion will be undertaken under four headings: (a) the German model; (b) its application to the English case; (c) unresolved questions; (d) further ideas from America. The four sub-headings or themes will then be brought together in the form of some tentative conclusions of wider import.

II. THE GERMAN MODEL

The case that figured prominently in *Greatorex* was the decision of the German Federal Supreme Court of 11 May 1971.⁷ The facts of the case were simple. On 6 March 1965, when he was sixty-four years old, the plaintiff's husband (henceforth referred to as D2⁸) was fatally injured in a collision with the defendant's motor vehicle caused partly by his fault and partly by that of the defendant. (Henceforth we shall refer to this "primary" defendant as D1.) The

⁶ For doubts about the practical utility of the foreign law references in Lord Goff's judgment, see Lord Rodger of Earlsferry, "Savigny in the Strand", in *The Maurice Kelly Memorial Lecture 1995*, esp. pp. 24–25; Neil Duxbury, *Jurists and Judges* (Oxford 2001), p. 107.

⁷ BGHZ 56, 163 = NJW 1971, 1883 = VersR 1971, 905, 1140, taken from the third edition of Markesinis, *The German Law of Torts: A Comparative Introduction* (1994) (translation by Tony Weir). The German decision is still the subject of controversy not so much for its result but for the way it chose to justify it. Its status as "good law" has also been thrown into doubt after the decision of the Federal Court of 1 March 1988, BGHZ 103, 338, which is mentioned several times in the discussion that follows. For a summary of the academic views, see Staudinger/Hager, *Kommentar zum BGB, Unerlaubte Handlungen*, B39.

⁸ D2 is the primary victim of the accident; but because he may, through his own negligence, also have contributed to his hurt and the loss of P (secondary victim), he may be sued by the main tortfeasor (D1) for a contribution or an indemnity. In Germany D2 can also be referred to as the "privileged defendant", for he may benefit from an exemption clause arising from his relations with the plaintiff or he may enjoy an immunity *ex lege* because of his family relationship with P. As we shall note later, one of the questions that may arise in such cases is whether D2's "immunity" from action by P can also protect him against an action brought by D1—the joint tortfeasor.

plaintiff in this case (henceforth P) was the fifty-year old wife of D2 (the primary victim of the accident). In her suit against the tortfeasor, she claimed damages for the injury to her health, which she suffered when *told*⁹ of the death of her husband, D2. The *Landgericht* allowed the claim in full, the *Oberlandesgericht* in part. P appealed with permission to the Federal Supreme Court, and her appeal was allowed. The judgments below were vacated, and the case remanded to the *Oberlandesgericht*.

The case involved a claim for what we, in England, now call psychiatric damage.¹⁰ Naturally, one is inclined to say, it also touched upon some of the usual questions that we, too, have encountered in this part of the law and, it seems, are unable to solve through the courts.¹¹ How German law handled the shock aspect of the claim is not the subject of discussion in this essay since the matter has been discussed in detail elsewhere.¹² But the second part of the German case addressed the question of D2's contributory negligence and how this would/should affect P's claim. The German court's approach need only be reported in its bare essentials and to the extent that it bears on what is the main theme of this article. Understandably, D1's contention was that P's claim should be reduced to take into account D2's contributory fault. One way to do this was to attempt to rely upon § 846 BGB, which states that

If, in the cases provided by §§ 844, 845, some fault of the injured party had contributed to cause the damage which the third party has sustained, the provision of § 254 BGB [about contributory negligence] applies to the claim of the third party.

The problem with such an approach, however, lies in the italicised section of this paragraph which refers to what is, in essence, the German equivalent to our Fatal Accident Acts as amended in 1982. In fact, § 846 BGB provides precisely the same kind of answer that

⁹ In principle, German law allows recovery for "distant" psychiatric injury. In practice, however, such claims are kept under control by judges—no juries exist in German law—rigorously checking their standard requirement that the "shock be an appropriate and understandable consequence" of the accident that befell the primary victim. In practice a close relationship (*Schicksalsgemeinschaft*) between the plaintiff's shock and the primary victim is of paramount importance. A further restriction can be seen from the reasoning of the court given below.

¹⁰ *Attia v. British Gas Plc* [1988] Q.B. 304, 317 per Bingham L.J. (as he then was).

¹¹ This, at least, seems to be the view of Lord Steyn who argued that the subject might have now passed the stage of redemption by the courts and needs legislative intervention. See his opinion in *Frost v. Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455, 500. It is submitted that *W v. Essex County Council* [2001] 2 A.C. 592, has compounded the uncertainty.

¹² Markesinis, *The German Law of Torts: A Comparative Treatise*, 4th ed. by Basil Markesinis and Hannes Unberath, (Oxford 2002), pp. 45ff. Note, however, that this was a case of "distant shock" which would thus not be compensated by English and (most) American courts.

we accept in fatal accident claims: the deceased's negligence affects the claims of the dependants. But in this case, so far as the wife's claim for psychiatric injury was concerned, it was *not* a fatal accidents claim but a direct personal claim based on § 823 I BGB, not on the fatal accidents legislation. This was a crucial twist. The German court thus took the view—rightly it is suggested—that the application of § 846 BGB was not available, even for an analogical extension.

With the wife (P) claiming not as dependant but in her own right, for her own psychiatric damage as injury to her health under § 823 I BGB, D1's attempt to mitigate the extent of his liability seemed optimistic. For, if P's claim was original and not derivative—terms hinted at by the German decision but, as we shall note later, excessively relied upon by American cases—her demand that her damages remain undiminished by her husband's (D2's) negligence looked unshakeable. Yet the German court, invoking the catch-all clause of good faith contained in the celebrated § 242 BGB, decided to reduce her damages in proportion to D2's fault. Thus, for our purposes, the relevant part of the judgment reads as follows:

Here the accident to her husband was only able to cause the harm supposedly suffered by the plaintiff because as a result of their close personal relationship his tragedy became hers. One cannot imagine a person suffering in this manner on hearing a fatal accident to a total stranger; indeed, if it happened, it would be so unusual that one would decline to impute it to the defendant on the ground that it was unforeseeable. But if the critical reason of the plaintiff's suffering this injury to her health was her close personal relationship to her husband it was thus only fair that her claim should be affected by his fault in contributing to the accident.

This reasoning was further reinforced by (what we would call) an *obiter dictum* that was to prove crucial in the *Greatorex* litigation.¹³ For the German court added that:

If the husband's death had been solely attributable to his failure to take care of himself, the plaintiff would have had no

¹³ In such factual situations the court can normally rely on § 1359 BGB to bar any action by the wife against her husband (or, in this case, his estate). This is because § 1359 states that one spouse is liable to the other only if he (or she) failed to attain "the degree of care which they are accustomed to exercise in their own affairs". So the spouse sued can avoid liability if he can show that in his own affairs he would have displayed a lower standard of care than that required by ordinary negligence. (A similar rule can be found in § 1664 I BGB dealing with the parent/child relations). The rationale of both provisions is to avoid legal disputes between persons who are in such close family relationships and in many respects draws on the policy reasons, which were also touched upon by Cazalet J. in *Greatorex*. The immunity rule just described does not, however, apply where D2's fault amounted to gross negligence. Another limitation on this rule is that it is not applicable in car accident cases. For these points and the effect they may have had on the reasoning of the German court see section VI below.

claim whatever for compensation for the consequent injury to herself. A person is under no legal duty, whatever the moral position may be, to look after his own life and limb simply in order to save the dependants from the likely psychical effects on them if he is killed or maimed. To impose such a legal duty, except in very peculiar cases, for instance, wherever a person commits suicide in a deliberately shocking manner, would be to restrict a person's self-determination in a manner inconsistent with our legal system.

To the above rule the only exception that some authors¹⁴ are prepared to make is in the context of suicide. Suicide may provoke rescue, especially in a system where the duty to rescue others is recognised by law.¹⁵ Thus they have argued that a person wishing to commit suicide may be under a duty to carry out the suicide in a way which does not "provoke" any rescue by third parties; otherwise he *may* be liable for any damage suffered during the rescue. But the point does not appear to have been settled by the courts and the above amounts to little more than academic speculation.¹⁶

III. THE APPLICATION OF THE GERMAN IDEAS TO *GREATOREX*

Prior to *Greatorex* common law courts do not appear to have faced the problem squarely of contributory negligence *in the context of nervous shock*—at any rate in England—though in his judgment Cazalet J. alluded to some inconclusive Commonwealth authority.¹⁷ In the context of nervous shock, the picture in the United States may not be much clearer, though *Dillon v. Legg* contains some seemingly confused views on the subject.¹⁸ However, the same point about contributory negligence has also arisen in "rescue" cases, and in those US States which recognise actions for "loss of consortium

¹⁴ See Medicus, *Schuldrecht, Besonderer Teil*, 9th ed. (Munich 1999) p. 302.

¹⁵ So long as the rescue can be rendered without any danger to the rescuer: § 323c StGB.

¹⁶ Presumably, the same argument could be advanced in other systems (such as the French) which also recognise affirmative duties of rescue but, to my knowledge, the point has not been settled by their courts. The Scottish case of *A v. B's Trustees* (1906) 13 S.L.T. 830 allowed a claim in very similar circumstances but the successful claim has been generally seen to be based on breach of contract. See Lord Johnston's words at p. 831, apparently thus interpreted by Lord Porter in *Bourhill v. Young* [1943] A.C. 92 at p. 120. In *Reg. v. Criminal Injuries Compensation Board, Ex parte Webb* [1986] Q.B. 184, 196, Watkins L.J. also appeared to take the view that a "person attempting to commit suicide may well be in breach of a duty of care owed to [others]". But the observation was obiter; and in *Greatorex* Cazalet J. brushed the point aside as irrelevant on the facts before him. An American case has, however, held that a mentally distressed man who tried to commit suicide in his garage is under a duty towards his son who came to his rescue and was, in the process, *physically* injured: *Talbert v. Talbert* 199 N.Y.S. 2d 212 (1960).

¹⁷ But see Handford's note, cited in footnote 4 above. In English law, the most interesting obiter dicta come from Lord Oliver's opinion in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310, 418.

¹⁸ 441 P. 2d 912 (1968). In *Dillon* the majority, at p. 916, asked the question whether the contributory negligence of the victim *and* the plaintiffs should affect their claims; whereas the minority, at p. 928, asked the very different question whether the deceased child's negligence can affect the living plaintiffs' claims.

or companionship” or loss of “parental or children’s companionship”.¹⁹ In all these triangular situations the same range of legal suits is possible and the abbreviations adopted in this paper (P, D1, D2) are equally appropriate to them, as well. The lessons that can be drawn from the many consortium cases are not insignificant and we shall return to them later, especially in the light of the paucity of the existing English material and the complexity of the German.

Since all negligence reasoning starts with a discussion of the notion of duty of care, *Greator* naturally had to grapple with the question whether a victim of self-inflicted injuries owes a duty of care to a third party not to cause him psychiatric injury. As stated, Cazalet J. acknowledged that there was no binding authority on the question of duty. For guidance he was thus directed to German law, among other systems; and his conclusion was, undoubtedly, influenced by the decision of the German Federal Supreme Court of 11 May 1971,²⁰ cited to him by counsel for the Motor Insurers’ Bureau, which had been joined as second defendants since D2 was not insured while driving the car.²¹ It will be recalled that to the question now asked by Cazalet J. the BGH had given a negative reply. In the opinion of the Federal Court the imposition of such a duty would unduly restrict the person’s (D2’s) right to self-determination (though we have noted that an exception might have to be considered where the suicide was committed in a “deliberately shocking manner”). Cazalet J. expressly followed the reasoning of the BGH and regarded the argument derived from the right to self-determination as enunciated in the German case as “powerful”.²² Matters would be different where, by harming himself, D2 causes damage other than nervous shock to another person. It would thus seem that in German²³ as well as Scottish²⁴ and possibly English law, the ethical duty not to harm oneself becomes a legal duty as soon as the self-harming activity also causes *physical* harm to another person. From this perspective D2’s immunity from liability

¹⁹ In Germany, we have noted that the rescue variant has been considered in the context of suicide. Since loss of consortium claims are not known in German law, the most litigated type of American case finds no parallel in Germany.

²⁰ BGHZ 56, 163.

²¹ The owner of the car was also joined as a defendant by the second defendants—the MIB—on the grounds that he had allowed his friend, the first defendant (D2), to drive the car without insurance. But neither the owner of the car nor the first defendant appeared in court or were represented by counsel.

²² See also the Law Commission’s report on *Liability for Psychiatric Illness* (1998) (Law Com No. 249) para. [5.34]–[5.44].

²³ Similarly, in BGH ZIP 1990, 1485, the court held that as a general rule a lessor did not owe a contractual duty to the lessee not to commit suicide and as a result the estate was not answerable for the termination of the lease. To impose such a duty would have amounted to an unjustifiable intrusion upon the right to self-determination of the lessor.

²⁴ See *A v. B’s Trustees* (1906) 13 S.L.T. 830.

for nervous shock (suffered by others) constitutes an exception. In other words, D2's right to self-determination prevails only if we regard this injury as special. Cazalet J.'s constant reference to "policy" lends credence to this view and illustrates, once again, our legal system's difficulty to cope with the ramification of nervous shock and emotional injuries.

IV. UNRESOLVED QUESTIONS

In the German decision one of the issues that had to be decided by the court was whether the contributory negligence of D2 could be imputed to P and her claim for damages against D1 accordingly reduced. At this stage it is helpful to reconsider the argument in favour of imputing D2's contributory negligence to P in the light of Cazalet J.'s analysis of the "primary victim's" (i.e. D2's) limited or non-existent liability to others for causing harm to himself. For the two issues are interrelated.

The rationale seems to be this. If, generally speaking, a person (D2) does not owe to others (P) a duty of care not to harm himself, then it would appear to be fair that, if a third person (D1) causes physical injury to D2, then D2 should bear his, the primary victim's, causal contribution to the accident. As in America so in Germany, this problem has occurred also in other contexts of adjustment among multiple "debtors" and the BGH has (not always consistently) applied similar considerations.²⁵ Because of special circumstances, characteristic of the relationship between D2 and P, P does not have a cause of action against D2 (all other conditions of liability being fulfilled). In the nervous shock case this is because such a cause of action would be contrary to D2's right to self-determination.²⁶ The result is that D2 is no longer seen as a *Mitschuldner* (joint debtor) with D1 since he is immune to any action by P. This immunity (or privilege) enjoyed by D2 by virtue of his relationship with P "distorts" the normal rules which apply to the internal relationship between joint tortfeasors and which in general law largely follows the pattern of our own law.²⁷ The Germans thus refer to this problem as *gestörter Gesamtschuldnerausgleich*, a sentence that could be rendered into English as "disturbed internal settlement between joint debtors". The composite word is typically Germanic, and even awkward; but its emphasis on "distortion" and the "internal adjustment that has to take place between two (possible) debtors" makes it clear what

²⁵ Thus see BGH JR 1989, 60, and cf. BGHZ 12, 213.

²⁶ Approximately the same considerations apply easily if we replace the legal immunity with an exclusion clause contained in a contract between D2 and P.

²⁷ See § 421 BGB.

it is trying to address. This “distortion” of the internal relationship between the possible two joint debtors (D1 and D2) because of the rules that govern the relationship between D2 and P can, in terms of contribution rules, be addressed in one of three ways. First, we could say that P can sue D1 and D1 can then claim contribution from D2. Alternatively, we can take the view that P can sue D1 for all his loss but D1 cannot claim anything back from D2 because of his privileged position. (That is why D2 is, in German law, often referred as the privileged debtor). Finally we could adopt an altogether different rule namely say that P can sue D1 but only for his share of P’s loss.

We see this unfolding in our case as P is forced to sue D1. If D1 could subsequently claim contribution from the primary victim (D2) then, *in the end*, D2 would be held liable for his causal contribution to the accident.²⁸ But this result of holding D2 liable was, as we saw in the German judgment seen to be undesirable (because of D2’s right to self-determination). So this avenue seems to be blocked. Therefore, it is held that D1 cannot claim contribution from D2 even if the latter was primarily responsible for the accident.²⁹ This result may follow logically the reasoning just expounded. Nonetheless, many would regard it as unsatisfactory. For it does not seem fair in such circumstances to impose full liability on D1, especially if his contribution to the harm was in terms of causation and fault very low and that of D2 very high.³⁰ So in such circumstances why should D1 (rather than P) bear D2’s causal contribution to the accident? After all, it is because of special circumstances arising out of the relationship between D2 and P, that D2 cannot be made liable for causing nervous shock. It is therefore plausible to argue that the rationale of § 846 BGB should also be applied to claims of secondary victims (those we have called P’s) in respect of nervous shock and to reduce, accordingly, P’s claim against D1. This implies that where the D2 is solely answerable for the accident, P cannot recover at all. We are thus back to our point of departure! Given the special—one might say unusual—facts of *Greatorex* (for D2, the primary victim, was solely responsible for his hurt) the point did not have to be resolved in that case. But it could arise in other contexts where the personal autonomy argument is not at play. That is where the German ideas, complex though they are, could, once again serve as a source of inspiration.

²⁸ Albeit the risk of insolvency of the primary victim (D2) would be transferred from P to D1.

²⁹ Cf. *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310, 418 *per* Lord Oliver.

³⁰ The point made by Lord Oliver, note 29 above, but rejected (*obiter*) by Cazalet J. in *Greatorex*.

So what will happen where the reason why D2 is not liable to P is due to a family immunity rule such as that found in §§ 1359 or 1664 I BGB which applies to all cases other than motor car accidents?³¹ D1's liability towards P is not in doubt. But will he (D1) then be able to claim a contribution from D2? Or will D2's immunity, which protects him from actions by P, also shield him from a contribution claim brought by D1? To this last question, some fourteen years ago, the German Federal Court gave a positive reply,³² reversing earlier case law³³ and leaving German academic opinion reeling with the unfairness of a result which means that D1 has to carry all the loss. This solution is even more confusing if one bears in mind that the German courts take a different view if the reason of the immunity given to D2 is the result of a *contractual* exemption clause that regulates his relationship with P. For here, the courts allow P to claim his full loss from D1 and then allow the latter to claim a contribution from D2 as a result of an analogical application of § 426 BGB. To this variety of answers we must add one more: German academics, almost in their entirety, prefer a liability rule that limits D1's liability to the amount of the loss due to his fault and avoids all further actions. But in English common law terms such a solution would be contrary to our joint tortfeasors rule, which renders each joint tortfeasor liable for the entire harm of the plaintiff.³⁴

This last-mentioned position does not seem to be the position currently taken by most American courts. The loss of consortium claims, frequently litigated in the United States, suggest another approach very similar to that preferred by German *academics* (but not German courts). Thus, the current tendency in the United States seems to treat the claims of P (usually the wife) against D1 as being "independent", but to reduce them to take into account the contributory negligence of the physically injured spouse (D2).³⁵

³¹ As already stated, it is here that we find an abundance of cases in the United States.

³² BGH 1 March 1988, BGHZ 103, 338, 346ff. Palandt, *Bürgerliches Gesetzbuch*, 60th ed. Munich 2001, no. 426.

³³ BGH 27 June 1961, BGHZ 35, 317, 323–324 (though this earlier case law may still apply to other factual instances).

³⁴ This may be the reason why, in the context of psychiatric injury the Law Commission took a somewhat negative position. See Law Commission Report on *Liability for Psychiatric Illness* (1998) (Law Com No. 249) para. [5.39]. But the Law Commission does not appear to have considered the various alternatives canvassed in Germany on this point.

³⁵ For a review of the case law, see *Blagg v. Illinois F.W.D. Truck and Equipment Company* 572 NE 2d, 920 (1991), with references at p. 925. See, also, *Mallett v. Dunn* [1949] 2 K.B. 180 (England); *Felch v. General Rental Co.*, 383 Mass. 603, 421 NE 2d 67 (1981), reviewing the contradictory American case law, and *Handeland v. Brown*, 216 NW 2d 574 (Iowa, 1974) where the conflicting views of the majority and the dissent repay careful reading and reveal that many of the problems in US law may be linked with the differing views adopted towards contributory and comparative negligence. Imputed contributory negligence is discussed in detail in Gregory, Kalven, and Epstein, 716ff., especially 730ff., and Harper, Fleming James Jr and Gray, vol. II, ch. 8.8 and 8.9.

Since the familial immunities—wherever they are recognised—mean that P cannot sue D2 for his share to the accident, and since the American courts have now, in their majority, come to accept that the action against D1 is limited to his share of the loss, contribution claims between D1 and D2 do not appear to be prevalent.³⁶ In practice this means that the usual rules of joint tortfeasors (which entail that each of them is liable for the full amount of the plaintiff's loss) are never brought into play—a condition which would probably not be condoned by English law.

V. THE AMERICAN DIMENSION

The American dimension is interesting for a number of reasons. To begin with the paucity of the English material has been noted. This means that if we need guidance from within the common law we must turn to the law in the United States since it is well known for its richness. Strangely, the richness is there, though not in the context of nervous shock claims such as the one we have been considering in this essay. Nor, indeed, do we find much guidance within the context of rescue situations where, again, the same issues may arise. (Rescuer/P in our example sues tortfeasor (D1) whose fault caused rescuee's (D2) injuries: can the rescuee's fault (D2) be put forward to reduce the damages due to the rescuer (P)?) But the number of decisions found in consortium litigation is so numerous that more than guidance can be found from the study of their many pages. More precisely, what can be found are two things. First is the lesson mentioned above, namely, that D1 pays but pays only for his contribution to the plaintiff's loss. As stated, this is different from making him liable for everything and then leaving him to assume the risk of obtaining a contribution from D2—the other cause of the P's loss. The American solution is thus not just different from the one adopted by German courts; it is also quite close to that advocated by German academics. Clearly, future English courts have a choice; and it is important to know the pros and cons of each alternative. Once again, we will gain if we look abroad for arguments on points, which we have not yet fully

³⁶ For references see note 47 below. But like all such statements about American law this, too, has to be qualified by mentioning the fact that decisions do exist suggesting that the tortfeasor (main defendant) can sue the primary victim for his share of the plaintiff's harm. See, for instance, *American Motorcycle Assn. v. Superior Court* 20 Cal. 3r 578, 591, 578 P. 2d 899 (1978); *Lantis v. Condon* 95 Cal. App. 3r 152, 157 Cal. Rptr. 22 (1979). The *Lantis* facts, with the primary victim being 80 per cent. responsible for his injuries, illustrate the need to shield the tortfeasor from the risk of carrying the entire loss. But as stated in the text, the solution of sharing the cost with the primary victim may not be the best since it, essentially, defeats any immunity that the law (or contract) may have given him towards the secondary victim. For an American case that makes precisely this point see: *Felch v. General Rental Co.* 421 NE 2d 67, 92 (1981, Mass).

addressed. And they should be that much easier to evaluate now that we have tried to set the *Greator* discussion against a wider canvass. Bit by bit the puzzle pieces fall into place.

But the American cases also hold a further lesson for the foreign observer. Quite simply, they illustrate that the law is a seamless web. In the United States the answer given to our question is to a large extent determined by the rules that obtain in other parts of the law of torts. In our type of cases what type of rule any particular State adopts towards (a) contributory negligence, (b) joint tortfeasors, and (c) family immunities will influence the solution adopted. The realisation that the law is a seamless web is a valuable one for both the student and the practitioner. The difficulties the coincidence of these rules gives rise to, however, also provide a salutary warning about the dangers of comparative law.

Take the well-known case of *Handeland v. Brown*.³⁷ It's a decision of the Supreme Court of Iowa dated 27 March 1974. The *main* action involved the loss of consortium claims brought by the father (P) of a young motorcyclist (D2) injured in a traffic accident as a result of a collision with a motor vehicle (D1) at a road intersection. The jury entered a verdict for D1, rejecting the young man's (D2) claim because of his own negligence. The plaintiff father requested an instruction to the effect that his son's (D2's) negligence could not be imputed to him, P, but the jury again found for D1. The father (P) appealed and the Supreme Court of Iowa was thus concerned only with this claim. The appeal was successful.

What strikes the reader of this decision is how focused was the majority judgment in its attempts to reject the argument that the father's (P) action was derivative. Like other courts before it, the Iowa court was keen to show that "the gist of the parental action ... is a wrong done to the parent [P] in consequence of injury to his child [D2] by the actionable negligence of another [D1]."³⁸ The result was that the damages claimable would not/should not be reduced to take into account the child's (D2's) fault. An interesting dissent questioned this view to the extent that it would allow a parent (P) of a child (D2) injured largely by its own fault to claim full damages from the tortfeasor (D1) whose fault had, say, contributed, only 10 per cent. to the child's harm. It is only here, in a mere three lines,³⁹ that we find any reference to contributory

³⁷ 216 NW 2d 574 (1974).

³⁸ *Ibid.*, at p. 578.

³⁹ "Such a result seems unjust. Application of comparative negligence would most adequately rectify the injustice, but we do not have comparative negligence *in such cases*." I have deliberately italicised the last few words of the quotation because to a foreign reader they

negligence rule as a possible reason for this construction. But this sentence, almost a throwaway line, made my American students and me review the judgment and the law in Iowa at the time of the *Handeland* decision. And the prevailing rule then was the old rule of contributory negligence. If that had been applied without more in *Handeland* the court would have been compelled to reject the father's claim as being contaminated by his son's fault.

Seen in this light, the decision is thus not really about whether the parents' claim is independent (which it is) or derivative, but how one can ensure that it be not defeated by the child's fault and the old rule about contributory negligence. The problem with such an interpretation, however, is that (a) though it is arguably the true reason for the judgment, it finds few clues in the majority opinion to support it, and (b) if few students or practitioners—at any rate foreigners—notice this, much effort will be diverted towards arguing whether the claim is independent or derivative. This is an arid attempt to define an essentially meaningless term. Yet the size of the American literature and the pages found in American decisional law on this subject,⁴⁰ suggest that even American lawyers have fallen into this trap and carried out the definitional debate.

Another case that had proceeded in precisely the same manner had been *Rollins v. General American Transportation Corp.*⁴¹ There, too, the court was confronted by two actions: one by a physically injured man (D2), who had contributed through his negligence to his hurt; and the other a consortium claim by his spouse (P). Both were rejected, because of the fault of the primary victim (D2). In that case also the discussion had centred on the independent or derivative nature of the spouses (P's) claim, saying little of the real issue that must have worried the court. The reasoning was, yet again, essentially adopted in *Plocar v. Dunkin's Donuts of America Inc.*,⁴² another loss of consortium case. But by now Illinois, as most States in the late 1970s and 1980s, was moving towards the comparative negligence rule.⁴³ But our cases missed the significance of the shift, perhaps because the consortium rule had never been openly linked to the contributory negligence rule but had, instead,

seem to be confusing insofar as they imply that in the early 1970s Iowa knew the rule of comparative negligence in other types of cases. So far as I know, this was not the case, so the end of the judicial dictum seems unfortunately phrased.

⁴⁰ Conveniently collected in ALR 4th, vol 25. Michael DiSabatino, the author of the annotation, thus remarks on page 9: "The reason *most often advanced* for denying a spouse or parent recovery for loss of consortium where the physically injured spouse or child has been contributorily negligent is that the consortium action is derived from the physically injured spouse or child's cause of action..." (Italics supplied.) The ALR annotation is up to date to September 2000.

⁴¹ 46 Ill App. 2d 266, 197 NE 2d 68 (1964).

⁴² 103 Ill. App. 3rd 740, 748, 431 NE 2d 1175.

⁴³ *Alvis v. Ribar* 85 Ill. 2d 1, 421 NE 2d 886 (1981).

been obscured by the debate over the independent or derivative nature of the claim. Then, ten years later, came *Blagg v. Illinois F.W.D. Truck and Equipment Company*;⁴⁴ and the court had to revisit the consortium rule. Happily it did; and did so in an open way when it said:

The aforementioned cases [*Rollins* and *Plocar*] ... were decided prior to *Alvis* and thus were based on contributory negligence principles. Today the absolute bar to recovery for loss of consortium that formerly existed must be reviewed under comparative negligence principles...

The result of the change, however, was obvious; and in line with the bulk of American States⁴⁵ where “the loss of consortium award [is] reduced by the comparative negligence of the physically injured spouse.” To re-assert what had thus far been kept (almost) under wraps, the court concluded with the statement:

The *Alvis* decision, and the advent of comparative negligence principles, has subsequently reduced the harsh effects of contributory negligence by the physically injured spouse, as the loss-of-consortium plaintiff is no longer barred from recovery.⁴⁶

The discussion about independent or derivative claims is thus now for all intents and purposes dépassé. So, if this were the only lesson to be derived from these American decisions, it would be of limited value. On the educational front, its interest would lie in the need to remind students (and sometimes practitioners) that the answer in one part of the law (consortium claims) is determined by the position adopted in another (joint tortfeasors rules). On the practical front, however, the lesson derived from these decisions remains valid if definitively unresolved. And it consists in the decision de facto to set aside the rules about joint tortfeasors and, as already stated, reduce P’s entitlement against D1 by the comparative negligence of D2.⁴⁷ To English (and Continental European) eyes this may look like a replacement of the “full liability” that applies to joint tortfeasors by a “proportionality rule”. But, given that in this case there is a special relationship

⁴⁴ 143 Ill. 2d 188, 572 NE 2d 920 (1991).

⁴⁵ Conveniently collected by the court at page 925 of its judgment.

⁴⁶ *Ibid.*, at p. 926. A similar statement, significantly tucked away in a footnote, can be found in the judgment of the Supreme Court of Colorado in *Lee v. Colorado Department of Health* 718 P. 2d 221, 231, text and note 8. (Colo. 1986).

⁴⁷ See, for instance: *Eggert v. Working* 599 P. 2d. 1389 (Alaska 1979); *Turnbow v. Wasden* 608 F. Supp. 237 (D. Nev. 1985); *Lee v. Colorado Department of Health* 718 P. 2d 221 (Colo. 1986); *Quadrone v. Pasco Petroleum Co.* 156 Ariz. 415, 752 P. 2d 504. (1988); *Blagg v. Illinois F.W.D. Truck and Equipment Company* 572 NE 2d 920 (Ill. 1991). But cf. the cases cited in note 36 above.

between plaintiff and primary victim, the departure from the rule may be justified.⁴⁸

VI. SOME TENTATIVE CONCLUSIONS

Some academics in this country—notably Sir Roy Goode—have preached all their lives the case for a closer co-operation between judges, practitioners, and academics. I was converted to this creed some twenty years ago, and have since tried to apply it to the study and comparison of legal systems. How well it can work can be seen by *Greatorex*; and this for a number of reasons. Here are eight.

First, German law influenced the English decision because a practitioner—counsel for the MIB—used its ideas to construct his own argument before the English court. The practitioner was, in turn, able to access and evaluate positively this foreign material because it was made available to him by an academic lawyer in a form that was useable on this side of the Channel. This, incidentally, may also explain why German (instead of French or Italian law) served here as a model: no French or Italian material on the subject is available in English so the experience of neither of these systems could be used as a source of ideas.

Secondly, German law became attractive because it was served to the English “consumers” in an easily digestible way. For the material came in the form of a judicial decision which had litigated facts that bore considerable resemblance to those of the English litigation and thus cried out for comparison to all but the most narrow-minded. Luck determines the outcome of every human enterprise; and as luck would have it, the protagonists in the *Greatorex* case were willing to take ideas irrespective of their national origin. But there is no denying the fact that another counsel or another judge might not have been so diligent in his research or open-minded towards foreign products.

Thirdly, in *Greatorex* luck favoured the comparatist in yet another way. The inspiration or transplantation of the foreign thinking was not hindered by one of those Germanic terms that are untranslatable and thus so off-putting to those unaccustomed to the demands that the Germanic culture makes on the intellect of the potential borrower! To be sure, as the theory of “transferred loss” shows (in German: *Schadensverlagerung*), even such notions, provided that they are intrinsically valuable, can penetrate a foreign

⁴⁸ The shift from the full liability to a “proportional liability” rule was considered and rejected by the Law Commission in a paper it did in 1966 for the DTI entitled *Feasibility Investigation of Joint and Several Liability*.

legal system. Some help from academic quarters can, again, help overcome problems associated with their abstract nature. If another illustration is needed, think of *Drittwirkung*. Ten years ago there was hardly an English lawyer who was alive to the problem let alone the concept. Now, the literature it is generating is almost excessive. But let us return to the German decision. There the Federal Court had refused to hold that a person was under a duty not to injure or kill himself since such a duty would infringe his autonomy.⁴⁹ Such language could easily slide into the English legal reasoning as it began its search for a duty of care as a basis for a tortious obligation to make amends. Indeed, reading *Greatorex* one is left with the feeling that it did so without any jarring—linguistic or conceptual. This is an immensely significant observation for anyone translating foreign legal documents and then hoping to use them in our courts.

Yet, fourthly, the English court looked only at one side of German law; indeed, it could not have done more since counsel drew the judge's attention to the German decision but nothing more. The English court was thus not made aware that the German result might, in some instances, have also been reached by utilising the immunity conferred by § 1359 BGB.⁵⁰ This alludes to the policy reasons, which also weighed heavily in Cazalet J.'s mind (family relationships) and militate against allowing a legal action. Why did the German court refuse to go down that path? We can only speculate; but at least three reasons spring to the mind of an outside observer. First, as already stated, § 1359 BGB does not apply to car accident cases for the reasons that we know from our law as well. Secondly, the accident in the 1971 nervous shock case was caused by D2's gross negligence and this would have defeated the immunity given by § 1359 BGB. Finally, the court might have wished to create in such cases an immunity that went beyond the family relationships covered by § 1359 BGB.⁵¹ If it did, the result would be that facts such as those encountered in the Australian

⁴⁹ It will be remembered from note 13 above that § 1359 BGB could, in some instances, have served as another way of ensuring the immunity of D2 towards P, this immunity being based on the policy reasons appropriate to the D2/P relationship. These reasons figured in Cazalet J.'s judgment; but not in the German judgment, which chose to justify the non-liability rule by reference to human autonomy. One (further) consequence of this justification is that it ensures that the non-liability rule applies even where there is no family relationship between D2 and P. This is exactly what happened in the Australian case of *FAI General Insurance Co. v. Lucre* [2000] N.S.W.C.A. 346; and the verdict there was for the plaintiff.

⁵⁰ See note 13 above. There is a problem, however, with the immunity rule contained in § 1359 BGB: its application depends on the status of marriage and not the closeness of the relationship between P and D2.

⁵¹ My German friends, however, warn me that this is not the kind of reasoning that would appeal to a German judge.

case *FAI General Insurance Co. Ltd. v. Lucre*⁵² would receive the same answer: no duty and hence no liability. Since *Greatorex* followed the (wider) court reasoning, does the same result now hold true for English law? Would a claim by P, who was unrelated to D2, likewise fail? On the other hand, would the outcome be affected by the fact that Cazalet J.'s policy points would be inapplicable to my hypothetical? *Greatorex*, as we keep saying, has left a number of points open, even though it has done a good job in alerting us to new ways of looking at them. If the Germans have discovered too many (subtly different) ways of solving this problem we, in England, have not even addressed it!

Fifthly, all of the above could not have been undertaken, and the chances of the German ideas influencing the case would have been slim, had the attempt at legal borrowing gone through Codes or academic writings. For even the briefest consultation of the German treatises reveals the discussion in Germany to be theoretical and conceptual in the extreme.⁵³ Had English counsel chosen that course he would have found it bewildering both to himself and to the court. The fact that parts of German law were still left unused and unexplored does not matter. Further research may produce even more fruits next time around.

Sixthly, the above would not, of course, preclude recourse to American law as an alternative source of inspiration. But here, again, without appropriate academic preparation, the American material might reveal only part of the picture and thus make suitable inspiration dubious. If the hint that our highest courts can manage American law without the occasional assistance of academics were to be seen as disrespectful towards them, one must remind the reader how the House of Lords in *Murphy*⁵⁴ "misunderstood" the law in the United States. It was a cosmopolitan judge⁵⁵ who pointed this out in no uncertain terms in an academic article; and, as fate would have it, he was later to join their lordships as a judge. The moral of this is that the fact that foreign legal material is accessible to us in linguistic terms does not mean that it can be transplanted into our system without thought, caution, and preparation. In my view we are on the verge of

⁵² [2000] N.S.W.C.A. 346 (decision of 29 November 2000). In the Australian case the car accident between D1 and D2 was, again, entirely due to D2's fault. In this case, however, there was no family or other relationship between P and D2; P's claim for his post-traumatic stress disorder succeeded.

⁵³ For instance Larenz *Lehrbuch des Schuldrechts*, I, 13th edn. (Munich 1982) § 37; Thiele, *Gesamtschuld und Gesamtschuldnerausgleich*, *JuS* 68, 149; Medicus, *Haftungsbefreiung und Gesamtschuldnerausgleich*, *JZ* 67, 398; Medicus, *Schuldrecht I, Allgemeiner Teil*, 10th ed. (Munich 1998), Rn. 793.

⁵⁴ [1991] 1 A.C. 398.

⁵⁵ Sir Robin (now Lord) Cooke in his "An Impossible Distinction" (1991) 107 L.Q.R. 46ff.

forgetting this warning if we go on looking at the theology of the First Amendment in an uncritical manner. But that is for another day!

The seventh point places the case against the wider contemporary discussions about comparative law. Its literature is growing; and Europe, one way or another, is the greatest stimulus. Directives, case law from Luxembourg and Strasbourg, private initiatives to formulate general principles (or soft law as it is sometimes called): we have it all these days. And yet at the lowest level of a single case that could arise in any country of the so-called western world, we find an illustration which shows how types of reasoning can travel easily if they are packaged in user-friendly ways to those that matter and solve practical problems. Our example also shows that some systems have studied the underlying issues more deeply than others. In this instance, the Germans were ahead of the English (though their thought processes are highly complex). On a different matter, for instance a problem of commercial law such as securitisation, English law might be seen to be more flexible than, say, its French counterpart. The borrowing at specific, pragmatic levels might not have the allure that comes with grand theories; but *Greatorex* suggests that the methodology here advocated not only works: it works well enough to offer an efficient springboard for further study and understanding of foreign law. And at this stage the endeavour is not only a practical one; it also acquires a worthwhile intellectual component.

Finally, has the work started by *Greatorex* come to a conclusion? We have already alluded to the fact that the point seems to be open if in the next case P and D2 are not related. German academics also seem to be divided as to ambit of the 1988 decision⁵⁶ which decided the contribution claim between tortfeasors and, it will be remembered, held that D1 had to carry all the cost to P.⁵⁷ The successful completion of the work started by Cazalet J. might, once again, be aided by the proper consideration of foreign law. This is the eighth and last point that emerges from *Greatorex*. For though the case made a good start in addressing the complex kind of legal problems that arise in these triangular situations, it did not completely finish the job it started. The tail end of the judgment, where the extent of liability of the potential defendant is considered, is thus notably “hurried” and the only legitimate and convincing explanation one can offer for this is that the resolution

⁵⁶ BGHZ 103, 338.

⁵⁷ Contrary to the early decision of BGHZ 35, 317 which had allowed D1 to claim a contribution against D2. It must be remembered that BGHZ 56, 163—the 1971 nervous shock case that guided the English decision—was decided against the background of BGHZ 35, 317 decided in 1961.

of this problem was not necessary to the facts of *Greatorex*. Future courts will thus have to consider whether the same rules apply to cases where D2 is, for other reasons, immune to an action from the secondary victim or, alternatively, protected by an exemption clause.⁵⁸ More importantly, our courts will also have to mull over the question whether it is better to allow P to sue D1 for all the loss (and then leave it to D1 to obtain contribution from D2 if he can) or only obtain from D1 the amount which is due to his share of the blame. This writer's preference is for the second option, which is also favoured by German academe and many of the more recent American decisions, *i.e.* "proportional liability." But the study of German and American law also suggests that there are other solutions (though the theoretical merits of each option seem to have been studied only by German academics). In the light of the above, the English practitioner can only benefit by dwelling further on foreign, especially German, law. And if this time the dip is into complex German theory and not just case law, it can at least be done with greater confidence since *Greatorex* has successfully broken new ground in the area of comparative law in English courts. To put it differently and in wider terms, the comparative approach to common problems rarely if ever runs out of interesting variations, disproving the narrow-minded conviction of many national lawyers that theirs is the only way of doing things. But if one translated case can give rise to so much thought, imagine what could happen if the other one hundred and fifty decisions found in the same book were subjected to the same kind of scrutiny in search for new ideas and directions. The author of the book, if no one else, must surely be allowed the hope that this may happen.

⁵⁸ Which was not the case in *Greatorex* but was considered by the German Federal Court in BGHZ 12, 213; NJW 1972, 942.