(Nachlassspaltung) en plusieurs masses sera inévitable pour la succession d'un Allemand comprenant des biens situés en France, en Belgique et au Royaume Uni.

A propos du droit de l'époux survivant au paiement d'un forfait au cas où la communauté différée n'est pas liquidée, l'éminent auteur s'attache à démêler les problèmes concernant les liens entre la loi du régime matrimonial et la loi successorale. Le forfait qui est d'un quart de la succession du prémourant (§ 1371 B.G.B), relève-t-il de la loi successorale ou de la loi du régime matrimonial? Considérer cette question comme du ressort du droit successoral est de nature à provoquer une distorsion entre les diverses lois internes, car selon le droit interne allemand le quart de l'époux survivant est toujours lié au régime matrimonial légal allemand. L'auteur est d'avis que le forfait ne peut être pris en compte en face d'une situation où le statut successoral allemand entre en conflit avec le statut du régime matrimonal étranger. La raison du refus est simple: le forfait est lié au régime matrimonial allemand. En outre, si le défunt de nationalité allemande était marié sous un régime de séparation de biens emprunté au droit étranger, la doctrine allemande considère que le forfait est toujours exclu, mais qu'en revanche l'époux pourra faire valoir sa vocation héréditaire et exiger la part que lui alloue le droit allemand (§ 1931, 4 B.G.B.).

Une lacune que l'on pourrait regretter est que l'ouvrage laisse de côté le droit international des sociétés. Si l'absence d'intérêt pour les sociétes se conçoit en d.i.p. français où le rôle du notaire a été réduit à une peau de chagrin, en revanche l'absence est moins justifiée en d.i.p. allemand, le notaire allemand étant en matière de droit des sociétés incontournable.

Ceci dit, l'ouvrage de Schotten est un chef d'oeuvre de précision et de systématique. Chaque règle du code de d.i.p. est d'abord analysée et expliquée de manière exhaustive, ensuite illustrée d'exemples où le lecteur trouve facilement son compte (à condition qu'il connaisse la langue allemande). On félicitera l'auteur pour avoir annexé à son livre une documentation très fouillée; elle concerne l'âge de la majorité telle qu'elle est fixée par la plupart des pays du monde et contient une description sommaire mais utile des systèmes de d.i.p. des pays d'Europe et des E.U. Bref, il s'agit d'un ouvrage que tout notaire feru de d.i.p. devrait avoir dans sa biblothèque.

FRANS BOUCKAERT

Christian von Bar, *Gemeineuropäisches Deliktsrecht* vol. 1 (C. H. Beck Verlag, Munich, 1996).

When the Giant Panda was on a visit to London Zoo, Sir Winston Churchill went to see it. On the way back his chauffeur asked what he thought of the animal. 'It exceeded all my expectations' was the reply – 'and they were *very* great'. Scholars throughout Europe may say the same of this giant book from Christian von Bar: we have been waiting for it, and we are not disappointed. Quite the reverse: it is a splendid and monumental masterpiece, and it will have the world-wide resonance it deserves when, before long, it appears from Oxford in English translation.

Despite the series title *Ius Commune Europaeum*, the author says in his magisterial

but modest Preface that the primary purpose of this huge enterprise was not to draft or even to lay the foundations of rules of liability to apply throughout the EU, but rather to produce a quite ordinary textbook of tort law, distinguished only by covering such a large number of systems. Whereas it was a problem to produce a structure which permitted the inclusion and control of such very abundant material, the task of coping with the differences between numerous legal systems was not, we are assured, qualitatively different from that of taking into account the differences of juristic opinion within a single system. As to the former, the solution was to divide the subject-matter into liability for one's own act and then liability for other people and things, and to separate the treatment of the codified systems from that of those lacking a code. One wonders whether this latter solution may not emphasise a distinction which certainly exists but which it is modish to downplay.

Important issues are reserved for the second and final volume, due to appear (d.v.) in time for the millennium; they include, before the summing-up, matters of liability and causation, defences and the relationship between liability and insurance. After a brief introduction which emphasises the fundamental division into liability for one's own conduct and liability for harm done by other people and things, the present volume portrays and considers the basic rules of tort in the codified systems (239 pages) and in the Nordic and Common Law systems (112 pages) before proceeding to discuss the unification and harmonisation of tort law in the EU (42 pages), the place of tort in private law (142 pages) and finally its relation to constitutional and criminal law (151 pages).

In view of such ample coverage, it may seem eccentric to focus on that part of the work which concerns liability for damage done by animals, since many people, including, I fancy, the author, would regard this as a very minor part of the whole. But as Jacques Bernoulli said when shown a mere fragment of a proof by Isaac Newton, '*ex ungue leonem*' – you can recognise a lion from a claw.

For the lawyer, animals are things. Things are significant to tort lawyers because they are characteristically the immediate cause of physical injuries to people and other things, physical harm being the Newtonian reaction to impact from a physical thing. Indeed, there is no reference here to the question of liability for pure economic loss due to an animal, such as the cost of tracking down a leopard which has escaped, or indeed the gambler who loses his stake because the horse he backed was prevented from winning by a kick or a bite from an equine competitor.

Things vary a good deal. Some are built, some are made, some are energised, some are accumulated, some are dangerous. Lawyers distinguish. Late twentieth century ideology may require us to deem all people to be essentially the same, but surely not all things.

Not all systems have special rules for all things, but they all have special rules for animals, animate things, and if they have codes, these rules are incorporated in them, whereas rules about inanimate things tend not to be, even if they are automotive, as animals are. The only inanimate things normally included in Codes are buildings whose collapse causes harm, a provision lacking in Northern systems. The fact that animals and buildings ('*zeitlose Risiken*' (p. 216) – *das Ewigtierische?*) are the only things to figure in the codes is of course due to Roman law (not that Roman law rates much of

a mention in this work though it is the cause of its structure). Because they are in the Codes, unlike the special liabilities for motor vehicles and trains and stocks of energy and nasty rays and the biogenetic products of modern Frankensteins, they are dealt with in this volume, other things being left to the next (p. 114).

Animals do not at first sight form a very homogeneous class of thing. William Blake felt impelled to ask the tiger (burning bright in the forests of the night) 'Did He who made the lamb make thee?', and another great English poet, Lewis Carroll, wrote of 'Distinguishing those that have feathers and bite From those that have whiskers and scratch'. Most codes, however, draw no distinctions between animals of different kinds. Germany and Greece distinguish between animals-for-use and animals-for-fun (*Nutz-* and *Luxustiere*), the distinction being an addition to the BGB in 1908. Northern countries make more distinctions. England has different rules of liability depending on whether the animal is familiar or foreign or livestock. The rules in Ireland and Scotland are different, despite or because of recent legislation for those countries. Dogs are discriminated against, cats privileged: as the author notes, no Northern country imposes liability for the cat which unexpectedly scratches an infant.

The liability imposed tends to be strict (or there wouldn't be much point in having a special rule) though Austria has been attracted to a mere presumption of fault. In England, however, liability is strict only if the animal is foreign (and therefore dangerous!), if it is a cow which tramples the tulips or a dog which damages livestock. If the dog bites the farmer, however, or the cow tramples the neighbouring occupier himself, there must be proof of actual knowledge of the particular creature's propensity to cause the harm in question, as is the case with all native domesticated animals.

Liability is imposed on the person in charge of the animal, increasingly the *gardien* rather than the owner (when different), but not usually the underling who looks after the animal. Austria exceptionally allows the keeper to escape liability if he delegates to a subaltern unless the subaltern's fault is very grave. This rule is a '*Fremdkorper*'.

Von Bar presents the copious data relating to these matters with impeccable clarity, illustrated and concretised by admirably chosen examples from the jurisprudence of all the countries, recounted with a terse dry humour. Of equal value and even greater interest are the author's comments on the law so presented, and it is an attractive feature of the work that the authorial voice is heard – '*nach unserem Eindruck*', '*das scheint mir*' and so on.

The voice lets us know the author's impatience with distinctions: he would prefer the rule 'one is liable for damage done by an animal in one's keeping' to be applied *à la lettre*. Thus he deplores the German and Greek distinction between animals-for-use and animals-for-fun: in any European Code these provisions would be '*leicht auszumachende Streichkandidaten*'. Characteristically he gives three reasons for disapproving the favourable treatment of useful animals: (1) it excludes the most important cases, (2) it leads to difficult borderline disputes and (3) it runs contrary to the tendency to impose stricter liability on profit-making activities.

One must, however, distinguish animals from things which are not. The '*einigermassen gespenstische Diskussion*' of the question whether viruses and bacteria are to be included irritates the author considerably. He is firmly of the view that they

are not (as the Netherlands has decided, and Scotland has indeed enacted, though this last fact is one which the author oddly does not disclose). One reason for his view is that they have no keeper: on the same principle one is not liable for the fleas which infest one, or for animals in the wild.

The relevant (and for the author, determining) characteristics of animals are that, unlike inanimate things, they are biological, and unlike humans, irrational. Because they are alive, they can fall ill, excrete, and, most of all, move about. Thus the author would impose liability for the dog which rather than biting licks and thereby transmits a disease (Scots law is expressly to the contrary), for the cow which leaves a mess on the highway, and for an animal one falls over: this is not, he says, like falling over a sack of flour, since the sack didn't put itself there. Nor, however, did the animal necessarily do so. Indeed he would impose liability if the animal-obstacle was dead, because a dead animal is still a thing and that is what counts.

On the ground that animals are irrational, the author will have nothing to do with any rule relating to the intention, will, disposition or nature of the animal. He denies the existence of the 'reasonable dog' (p. 231), and is naturally antipathetic to the notion that there should be liability only if the animal acts *contra naturam propriam*. Nor is he interested in the way in which the animal causes damage. We have seen that the distinction between biting and licking has no appeal for him. Indeed, he would impose liability towards the person who is frightened or put to flight by the mere sight of an animal. One is reminded of Shylock's 'Some men there are love not a gaping pig; Some that are mad if they behold a cat'.

This is introduced by a fascinating discussion of causation in relation to animals. The author's view is that the only causation in issue here is purely physical, layman's causation, not the lawyer's causation involved in discussions of human action, the difference being that in the latter case we are concerned to attribute liability to the person, and there can be no question of attributing liability to a thing. Thus there is no room for considerations of adequacy of causation '*Adäquanzerwägungen sind schließlich nichts anderes als verdünnte Fahrlässigkeitserwägungen, und diese haben nun einmal bei Tieren keinen Platz*' (p. 230). He is therefore dismissive of the provision in the Portuguese Civil Code which imposes strict liability only where the harm is due to the special danger inherent in keeping animals, and the remarkably opaque provision in the NBW (art. 6:179) which is said to have a like effect. It will be clear from this that the author sets himself against the positive law in many jurisdictions, even where the text is of quite recent origin.

Given his dislike for distinctions between different kinds of animals and the different kinds of ways they may cause harm, the author could be expected to have a field-day on the Northern systems, but here the text is more descriptive than evaluative. Even so, he is quite right to follow English judges and commentator in reviling the English Animals Act 1971, which '*gehört mit seiner unscharfen Sprache und seinen vielen unnötigen Alternativen zu den abschreckenden Beispielen englischer Gesetzgebungstechnik*'. Very true; he kindly refrains from adding that this was the first legislative fruit of the English Law Commission.

In the light of what we have said, there can be no doubt that the primary objective of the author – to produce a textbook – is quite admirably fulfilled. No one can fail to

learn a lot by reading or even dipping into it, and everyone will be stimulated to do some rethinking of what is familiar. But what of the secondary aim, to produce the materials out of which a European Code might emerge? As indicated, the structural division between the codified and the Northern systems is not well adapted to bridging the gap between them. The former treat (or should treat) all animals the same and ignore (or should ignore) differences in the modalities whereby the different kinds of harm may be caused. The latter make distinctions of many kinds as to species of animals, individual specimens, modes of causing harm, types of harm caused. Nor are these distinctions (or, indeed, the minor points in continental law to which the author takes exception) by all means relics of medieval attitudes: many of them are the result of recent legislation, doubtless enacted in the belief that they were appropriate for the countries for which the draftsmen had responsibility. Proposals for a European Code would therefore have to overcome, even in this tiny area, very significant differences deliberately adopted. Dare one ask, *Cui bono*?

TONY WEIR