

## Book Review

**A Fenyés/E Karner/H Koziol/E Steiner (eds)**, *Tort Law in the Jurisprudence of the European Court of Human Rights* (De Gruyter, Berlin/Boston 2011). xxiv + 906 pp. ISBN 978-3-11-025966-7. € 199.95 (hardback).

Supported in part by an operating grant from the European Commission, this collection of essays constitutes the outputs of a project conducted by the Institute for European Tort Law of the Austrian Academy of Social Sciences and the European Centre of Tort and Insurance Law. According to the Preface, the goal of the project 'is to give a general overview and thorough analysis of how the European Court of Human Rights (ECtHR) deals with tort issues when applying article 41 of the European Convention on Human Rights (ECHR), how its approach towards those issues might be different from that of national courts and to what extent it follows general principles of European tort law'. In many ways an intimidating and impressive collection of essays, running to 900 pages, the range of perspectives presented is rich and can only enhance the reader's understanding of the jurisprudence developed under the ECHR, as well as deepen the understanding of the domestic tort lawyer. From the perspective of this reviewer, however, the title of the work is somewhat misleading as it suggests analysis of ECtHR jurisprudence generally. In fact, the collection is described as being focussed on art 41 of the ECHR which provides that:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary afford just satisfaction to the injured party.

A comprehensive attempt to establish the principles which guide the ECtHR in its decision-making under art 41 is to be lauded and welcomed; commentators unanimously decry the lack of coherence and predictability in the application of art 41. The literature frequently refers to the lack of 'principles' and 'parsimonious reasoning'<sup>1</sup>; the fact that five sections and a Grand Chamber are all taking decisions on just satisfaction has led to inconsistency.<sup>2</sup> However, this project has greater ambition than establishment of principles informing art 41 jurisprudence. The aim is also to elucidate how European principles of tort law are reflected in that jurispru-

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<sup>1</sup> *J Varuhas*, *A Tort-Based Approach to Damages under the Human Rights Act 1998* (2009) *Modern Law Review* (MLR) 750, at 750.

<sup>2</sup> *DJ Harris/M O' Boyle/Colin Warbrick*, *Law of the European Convention on Human Rights* (2nd edn 2009) 856.

dence. The question that arises, though, is how the knowledge and practice of national domestic lawyers will be enhanced as a result of this exercise. The target audience for this work is somewhat unclear, although the editors close their Preface by expressing the hope that this book will assist the ECtHR in its 'difficult, demanding and responsible task'.

The collection is divided into two parts: the first, dealing with 'Fundamental Issues', including a detailed treatment by Franz Bydlinski of art 41 jurisprudence and the second part addressing 'Special Topics' such as Damage, Causation, Wrongfulness and Fault and the Protective Purpose of the Rule.

Consideration of art 41 can only arise where two pre-requisites are satisfied: (i) there must have been a violation of the Convention or its protocols; and (ii) internal law should allow only partial reparation. Thus, the liability to compensate is linked to a Convention violation and the jurisprudence under the ECHR articles and its protocols reveal many tort-inspired bases of liability. The conceptual challenge for commentators addressing this project is that European tort principles are not easily assimilated to art 41 per se. Of necessity, therefore, the legal analysis must focus on the jurisprudence relating to the ECHR rights. The clearest exposition of the stages in the analysis is set out by Steininger and Wallner-Friedl in their chapter on 'Wrongfulness and Fault'. As they rightly observe, the fact that the ECHR does not refer to wrongfulness or fault does not mean that such issues are not relevant to art 41. They go on to cite the European Commission of Human Rights which stressed: 'The responsibility of a State under the Convention, arising for acts of all its organs, agents and servants, does not necessarily require any "guilt" on behalf of the State, either in a moral, legal or political meaning' (p 505).

The authors quite appropriately then identify that while art 41 does not require any subjective blame on the part of the state before compensation can be awarded, in order to establish a violation of the substantive article it is necessary to consider whether the state has fallen below any required standard of conduct as prescribed by the ECHR and its jurisprudence. The point is that the gateway to just satisfaction is a violation of the ECHR – comparative analysis of ECHR jurisprudence and the related relevance of tort law principles has largely to take place at the level of the substantive articles. One is put in mind of the functionality principle applied by comparative lawyers and described by Zweigert and Kötz: 'in law the only things which are comparable are those which fulfil the same function'.<sup>3</sup> Thus, the authors acknowledge that it is useful to avoid notions of 'wrongfulness' and 'fault' since they are charged with national concepts and

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<sup>3</sup> K Zweigert/H Kötz, *An Introduction to Comparative Law* (Oxford University Press, Oxford 1998) 34.

instead they base their analysis of compensation under art 41 on the functional approach chosen by the European Group on Tort Law. This requires that three issues are addressed: (i) did the actor violate an imperative rule forbidding certain conduct or endanger protected rights or interests; (ii) did the actor violate an objective standard of conduct and (iii) subjective fault.

Subjective fault being irrelevant (p 505), the authors move to examine (i) and (ii) by considering the ECtHR's practice regarding a 'violation of the Convention' which is the prerequisite for liability under art 41 ECHR (p 508). The authors then proceed to analyse the conduct standards under a number of articles but they do not elaborate what this means in terms of art 41 – this highlights the limitations of the work. If there is no effective analytical bridge between art 41 and the substantive articles under the ECHR and its protocols, it is hard to see how this dimension of the project significantly enriches our understanding beyond the analysis of art 41 to which we already have access in recognised and leading works on the ECHR.

Conversely, in his chapter on 'Methodological Approaches to the Tort Law of the ECHR', Bydlinski eschews any need to examine the requirements for the 'violation of individual Convention rights in [his] tort law investigation. Thus, no more than unlawfulness in the sense of a violation of the Convention is required' (p 54). This approach is at odds with the Steinger and Wallner-Friedl chapter and the contrast between the two highlights a lack of conceptual clarity which for this reader lies at the heart of the project. Is the project about art 41 per se, or is it about the mediation of generally recognised principles of tort law into ECHR jurisprudence? Or is it about the mediation of tort law principles through art 41?

This collection would have benefitted from a strong editorial hand. The first chapter (Steiner, 'Just Satisfaction under Article 41 ECHR: A Compromise in 1950 – Problematic Now') is focussed on the history of art 41 and concludes with discussion of recent reforms, including the Article 41 Unit set up in 2006 with the Registry of the Court (which advises the Chambers on levels of awards) as well as proposals for further reforms. What it does not do is lay the ground clearly for the following papers – this is a great shame as clearly the individual contributors have explored their own topics in great detail but from a very personal perspective. This reader found the lack of a clear and consistent framework for inquiry a major impediment to appreciating the work. Furthermore, the lack of rigorous editing is manifest in the inevitable repetition that occurs – for example, there is inevitably duplication in the Jozon chapter ('Satisfaction by Finding a Violation') of the topics covered by Bydlinski.

Criticism notwithstanding, there is much to be welcomed in this work and this reviewer would single out Bydlinski's chapter ('Methodological Approaches

to the Tort Law of the ECHR') will be welcomed by all scholars and practitioners who seek to understand the principles guiding the ECtHR under art 41.

Berka's chapter ('Human Rights and Tort Law') takes another approach and examines the relationship between human rights and tort law from three perspectives: tort law liability of the state for infringements of fundamental rights; the adoption of tort law to implement fundamental rights protection duties with respect to legal relations between private persons and the limitation of tort claims by fundamental rights. While acknowledging the desirability of undertaking the project against the background of as many private law systems as possible, this exceeds the bounds of an individual investigation and he confines his domestic exemplar to Austria. This is a large canvass, which takes us way beyond the confines of art 41 (and beyond the scope of the project as envisaged in the Preface) and which requires more detailed analysis than would be feasible in this collection.

The second half of the collection, which is devoted to 'Special Topics', follows a different format. First, the authors discuss the selected topic (Damage, Causation, Wrongfulness and Fault etc) and then conclude with comparative remarks. There is much to be commended in these chapters and the detailed treatment of 'Compensation for Pecuniary and Non-Pecuniary Loss' by Kissling and Kelliher is particularly welcome. However, the complexity and scale of the project challenge is manifest. As several authors acknowledge (for example, Oliphant and Ludwigowska, 'Damage' and Steininger and Wallner-Friedl, 'Wrongfulness and Fault'), comparative reflections are overly ambitious given the wide variety of jurisdictions and the considerable variation in concepts.

In conclusion, our understanding of art 41 jurisprudence, as well as the role that tort law concepts play in ECHR jurisprudence generally, is enhanced considerably in the light of Tort Law in the Jurisprudence of the European Court of Human Rights. The reader has to work hard, though, and to make the most of the analysis needs a framework of reference that is based upon an already deep understanding of tort law, comparative law and international human rights law. As previously indicated, it is a pity that this framework is not established clearly at the outset.

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