The Mouse and the Snail: Reappraising the Significance of *Donoghue v Stevenson* Part III – Wrongfulness, Blameworthiness and 'Loss'

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The previous article in this series provided a conceptual 'map' of the 'intellectual superstructure' of the law of delict which recognised that reparation is afforded for *damnum iniuria, iniuria* (on the basis of *actio iniuriarum*), wrongful interference with property and for nominate 'delicticles' which have in common only their dissimilarity from one another and the other governing *genera* of delict. Implicit throughout the previous article was recognition that the law of delict is principally concerned with 'personal actions' to afford remedy to those who have been wronged. Yet although the law of delict is almost self-evidently concerned with obligations arising from 'wrongfulness', discussion of this concept, and what it entails, do not often feature in discussion of the Scots law of delict. This is as regrettable as it is inexplicable: in addition to affording redress for 'wrongs' committed by a defender, the law of delict also regulates the attribution of blame for actual or perceived wrongfulness. Hence, every case of delict can be said to be principally concerned with answering the twofold question of whether the defender effected some wrong and whether the defender's mind-state was such that blame can be attached to them for the occurrence of that wrong. The criteria for determining 'wrongfulness' and 'blameworthiness' will differ depending on the nature of the wrong alleged, but that does not ultimately change the fact that these two components must be established in any successful delictual claim; accordingly, some critical discussion of what these related, yet distinct, concepts entail is necessary.

The nominate 'delicticles' each have their own independent requirements for establishing 'wrongfulness' and 'blameworthiness' on the part of the defender. In the case of some such delicticles, the requirement to establish both 'wrongfulness' and 'blameworthiness' is not *ex facie* clear, since the law has developed in such a way as to obscure the need to do so. The necessity of establishing both elements remains, however, even if such is not usually discussed within the relevant case law. Hence, to take a case of 'breach of confidence' as but one example, it is necessary to show that the defender breached a 'duty of confidence',[1] the duty being imposed in those circumstances in which 'the reasonable person in the position of a recipient of information would have realised in all the circumstances that the information was confidential'.[2] The breach of the duty is clearly itself the act which constitutes 'wrongfulness' here, with the fact that the defender must have acted knowingly being the factor which constitutes blameworthiness. If the defender did not knowingly share confidential information, then they cannot be liable for 'breach of confidence', just as it stands that if no 'duty of confidence' is breached then the question of 'breach of confidence' does not arise at all.

The conceptual separation, combined with practical conflation, of wrongfulness and blameworthiness can also be demonstrated by considering the position of defamation at common law. In respect of such, it was as a matter of practice only necessary to show that the words complained of bore a 'defamatory' meaning (by answering the question 'would the

[1] Elspeth C. Reid, *The Law of Delict in Scotland*, (Edinburgh University Press, 2022), para.19.25

[2] Brian Pillans, *Delict: Law and Policy*, (W. Green, 2014), para.9.03.

words tend to lower the [pursuer] in the estimation of right thinking members of society generally': *Sim v Stretch* [1936] 2 All ER 1237, at 1240 *per* Lord Atkin), since once this was established then malice on the part of the defender would be presumed (*Morrison v. Ritchie* (1902) 6 F 64, at 652 *per* Lord Moncrieff). But though, practically speaking, defamation could be thought of simply as a wrong constituted by the communication of defamatory words (which can be identified as the wrongful act), ultimately to establish liability on the part of the defender it was still necessary to demonstrate that they could be blamed for the wrongful act: it was simply the case that doing such was trite, given that blameworthiness was, in this case, presumed where wrongfulness was established (hence why defamation was described as 'a delict of *de facto* strict liability' by Blackie).[3] Although the Scots law of defamation was recently reformed with the passing of the Defamation and Malicious Publications (Scotland) Act 2021, the position in respect of establishing 'wrongfulness' and 'blameworthiness' has changed only slightly. It remains the case that the publication of defamatory words constitutes a 'wrong' and that such will be deemed blameworthy according to principles of strict liability.[4]

The fact that the requirement to show both wrongfulness and blameworthiness lie at the heart of any delictual claim can also readily be shown with reference to the principles of the three systematised *genera* of the Scots law of delict. In a case predicated on the *actio iniuriarum*, for instance, to demonstrate that the defender has committed a blameworthy wrong, the pursuer must demonstrate that the defender contumeliously committed an act which was *contra bonos mores* [contrary to 'good morals', or less archaically, 'public policy'].[5] Demonstrating that the defender's behaviour was *contra bonos mores* and generated an affront constitutes the 'wrongfulness' element of the delictual action, while demonstrating *contumelia* (i.e., showing that the defender hubristically disregarded the interests of the pursuer)[6] determines whether or not the particular defender can be blamed – and so held liable – for the *iniuria*. To recall the example of 'rape', discussed in the previous article in this series, it is manifestly clear that subjecting another to sexual penetration without consent is *contra bonos mores* and so 'wrongful'. One who does so will not, necessarily, be blameable for the wrong, however: it is open for the defender to advance the defence that they 'reasonably believed' that the penetration was in fact consensual. If the defender succeeds in doing so, though the court may recognise that a wrong has been committed, no delictual liability will result from the wrongful act in question. For liability to arise, the court must find that the wrong was committed contumeliously – which, in this instance, means determining that the defender hubristically disregarded the interests of the pursuer by proceeding with the penetration without any 'reasonable belief' that the pursuer consented to it.

Likewise, in a claim predicated on wrongful interference with property, the pursuer must establish that the defender behaved wrongfully (by, for instance, retaining property which the pursuer can show should be returned as of right, or subjecting the pursuer's heritable

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[3] John Blackie, 'Defamation' in Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations*, at 634.

[4] Reid, n.1, para.18.51.

[5] See the discussion in Jonathan Brown, *Dignity, Body Parts and the Actio Iniuriarum: A Novel Solution to a Common (Law) Problem?* [2019] CQHE 522; Jonathan Brown, *O Tempora! O Mores! The Place of Boni Mores in Dignity Discourse* [2020] CQHR 144, *passim*.

[6] See the discussion in David Ibbetson, '*Iniuria*: Roman and English' in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2013), at 40.

property to an intolerable nuisance) while also showing that blame legally attaches to the defender for the wrongdoing, for example by demonstrating that the defender 'vitiously dispossessed' the pursuer of the thing (see Stair, *Institutions*, I, 9, 20), or that the nuisance is, or threatens to be, an ongoing one (as in *Cumnock and Doon Valley DC v Dance Energy Associates Ltd.* 1992 GWD 25-1441). As can be seen from the examples listed, wrongfulness would appear to be logically anterior to blameworthiness; that is to say, before one can enquire as to whether or not the defender can be blamed for the commission of the wrongdoing, it must be established that some kind of wrongdoing in fact occurred.

In cases of *damnum injuria*, or so-called 'Aquilian liability', as in all other instances of delict, it remains necessary for the pursuer to establish both 'wrongfulness' (which here can be taken to be the wrongful causing of a loss)[7] and 'blameworthiness' (which, in cases of Aquilian liability, can be understood to be determined by reference to the concept of 'broad' *culpa* [fault] encompassing intentional, reckless and negligent acts or omissions),[8] but claims which are raised within this *genus* are subject to a further anterior requirement. Before questions of 'wrongdoing', to say nothing of 'blameworthiness', can meaningfully arise, the pursuer must establish that they have suffered a 'loss' [*damnum*] which the law recognises as reparable (see *Simpson v ICI* 1983 SLT 601). In other words, then, while 'wrongfulness' may be thought anterior to 'blameworthiness' in all cases of delict, in cases of *damnum iniuria* in particular the requirement that there be some *damnum* is itself anterior to both. If one cannot establish that one has suffered reparable physical, psychiatric or economic loss, then one's claim is bound to fail regardless of how egregiously wrongful, or morally corrupted, the conduct of the defender may have been.

While, then, it was suggested that 'the idea of wrongfulness as something somehow independent from, and logically anterior to, negligence will, [Fagan] suspects, baffle most Scottish and English legal scholars',[9] it appears that a division of this kind can, in fact, be detected within the schema of Scots delict. Without presuming to speak for English lawyers, it is thought that no Scots lawyer who takes the time to think holistically about the place of the law of delict within the wider schema of the law of obligations should not be surprised to find that within our system 'wrongfulness' must be a separate concept from 'negligence'. The former is the factor which engages the law of delict, while the latter concerns (one potential means of allowing for) the attribution of blameworthiness to a defender for said wrongful act. A pursuer must demonstrate both 'wrongfulness' and 'blameworthiness' on the part of the defender in any delictual action of whatever *genera* or *species*, but it must be noted that in respect of actions predicated on *damnum iniuria* there is in fact a trifecta of factors which must be proven: loss (as anterior to all else), wrongfulness and blameworthiness. The additional factor of 'loss' complicates the picture somewhat, since not all wrongdoing which effects a loss will be blameworthy and not all wrongful and blameworthy conduct will result in a loss. Most significantly, not all ostensibly blameworthy conduct which factually causes loss will be

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[7] Liability under this heading arises, after all, where there has been *damnum iniuria datum* [loss *caused by* wrongful conduct]. The causation referred to here is simple 'but for' causation; that is, it must be shown that but for the alleged act, the loss would not have occurred: See William A. Wilson, 'The Analysis of Negligence' in *Introductory Essays in Scots Law*, (2nd Edition) (W. Green, 1984), at 126.

[8] Geoffrey MacCormack, *Culpa in the Scots Law of Reparation*, [1974] Jur. Rev. 13

[9] Anton Fagan, 'Negligence' in Reinhard Zimmermann, Kenneth Reid, and Daniel Visser, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, (Oxford University Press, 2005), at 505.

actionable, due to the overarching principle of 'remoteness of damages' (of which, see *Simmons v British Steel Plc* 2004 S.C (H.L) 94). For 'Aquilian liability' to be established on the part of a defender, then, the pursuer must necessarily show that the loss which they suffered was sufficiently proximate – or close – to the wrongful and blameworthy conduct of the defender.[10] A core means of establishing 'proximity' (and so demonstrating that one's losses are not too 'remote' to be reclaimed) can be arrived at by distinguishing between 'primary' and 'secondary' victims of loss.

While 'the terminology of primary and secondary victims has been fairly universally adopted in subsequent judgments on cases involving psychiatric injury… it has not been applied in cases involving claims for other types of damage'. Yet, with that said, 'a closer examination of Lord Oliver's speech in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 would suggest that the case law subject to his analysis was not confined to psychiatric injury claims'.[11] Indeed, it has been implicitly suggested (in *Landcatch Ltd. v International Oil Pollution Compensation Fund* 1999 SLT 1208, at 1213 *per* Lord Justice Clerk Cullen) that the distinction between primary and secondary victims can be traced back to the opinion of Lord Kinloch in *Allan v Barclay* (1864) 2 M. 873 (a case concerning pure economic loss). Hence, Pillans posits (correctly, it is here submitted) that 'the distinction between primary and secondary victims is not confined to psychiatric injury cases and indeed operates across the whole of the law of negligence' (and, it can be added, of the law pertaining to *damnum iniuria datum*).[12] While it may be the case that the forthcoming analysis can be applied within the confines of the Anglo-American torticle of negligence as well as the Scots law governing the recovery of *damnum iniuria datum*, the present author leaves consideration of this point to those more versed in the peculiarities of the Common law tradition than he. The focus of the foregoing argument will remain centred on Scotland, although it may be of comparative interest to Anglo-American scholars and lawyers.

Within the law of Scotland, one may be categorised as either a 'primary' or a 'secondary' victim of loss (whether physical – comprising both bodily harm and damage to property – psychiatric or economic), with the loss itself being categorised in turn either as 'pure' or 'derivative'.[13] The categorisation of the victim and of the type of loss that they have suffered can and likely will have consequences for the prospects of the claim they wish to raise. It is therefore important to understand the distinction between these categories, and to define the core terms carefully. This, regrettably, has not always been done in practice, and the courts have made use of a hodgepodge of loose terminology to describe a range of matters which can be more neatly categorised according to the primary/secondary – pure/derivative typology discussed here.[14] Notwithstanding the difficulties in parsing the language employed by the courts over the past two centuries, the distinction between 'pure' and 'derivative' loss can be drawn clearly: a loss may be termed 'pure' if it arises directly out of the incident of wrongdoing and designated 'derivative' if the loss arises from a 'pure' loss suffered by the victim. In other words, pursuer who is hit by a car can be described as a (primary, for the reasons set out below)

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[10] Brian Pillans, 'Delictual Liability at Common Law' in Joe Thomson (ed.), *Delict*, (W. Green, 2007), para.5.04.

[11] *Ibid.*, para.5.73

[12] *Ibid.*, para.11.14.

[13] Pillans, n.2, para.11.45.

[14] See Pillans, n.10, para.5.74.

victim of pure physical loss, since the bodily harm which they sustained was directly caused by the incident. If that same pursuer is, as a result of their injuries, unable to work, and so loses pay, then they have suffered – in addition to the 'pure' physical loss – 'derivative' economic loss, since the monetary loss complained of here derives from the pursuer's injuries, which have prevented them from being able to work. To take some less straightforward examples which nonetheless continue to demonstrate the point, a financial speculator who loses all of their money as a result of a bad investment made on the negligent advice of an associate may be termed a (again, primary) victim of 'pure' economic loss and if they subsequently come to suffer from depression due to their loss of wealth and status, this psychiatric injury can be described as 'derivative' since it did not arise as a result of the negligent advice given, but from the form of 'pure' loss that the unfortunate speculator suffered.

'Primary victims' of loss are those who suffer loss directly by wrongdoing caused by the defender, while 'secondary victims' are those who suffer loss indirectly as a result of this wrongdoing. That is to say, the loss suffered by a secondary victim arises as a result of loss sustained by the primary victim, rather than as a direct result of the act which led to the primary victim's loss. The case of *Allan v Barclay* (1864) 2 M. 873 demonstrates the point, though the language of 'primary' and 'secondary' victims is not used therein (though the phrase 'secondary injuries' is – at 874): in this case, one John Allan, the Airdrie-based employer of one William Hill, raised an action for reparation against Andrew Barclay for (it was alleged) negligently failing to move an engine that had broken down and was burning 'in a blaze of light', into a recess at the side of the road, 'where it would have done no damage'. Since he had not done so, the horse ridden by Hill took fright because of the glare of the light and cast off both the cart and Hill, who suffered serious personal injuries as a result.

Mr. Hill, it was claimed, provided services which 'were of the utmost importance to the pursuer, as, being acquainted with the pursuer's business, and with his customers, he was instrumental, to a very great extent, both in maintaining and in extending it'. Not being able to find a ready replacement for Hill, Allan claimed to suffer monetary loss of £30,[15] in addition to losses of £20[16] arising from damage done to the horse and cart which he owned. The pursuer's claim for his losses arising from Hill's injuries was rejected by the court, with the claim for the remaining £20 of losses in turn thrown out because the sum was then too low to be sued for in the Court of Session (*Allan v Barclay* (1864) 2 M. 873, at 875, *per* Lord President Colonsay). Had the £20 claim of reparation been procedurally competent, it is thought that it would have had (if, of course, the relevant facts were proven) some prospect of success, being that Mr. Allan was here clearly a primary victim of pure physical injury.[17] He can be said to have been so given that his property was (allegedly) directly damaged as a result of the defender's conduct; with this established, whether or not Barclay would have ultimately been

[15] Approx. £4,016.25 in 2022's money, according to the CPI inflation calculator.

[16] Approx. £2,677.50.

[17] Recall that in Scots law damage to property can, along with so-called 'personal injury', be together categorised as 'physical loss': in effect, from the standpoint of establishing the Scottish conception of Aquilian liability (though not, obviously, in assessing the ultimate *quantum* of damages once the case has been established), there is no distinction to be drawn between breaking a man's leg and breaking the leg of a table: See Jonathan Brown, *The Mouse and the Snail: Reappraising the Significance of Donoghue v Stevenson Part II – The 'Intellectual Superstructure' of Scots Delict*, at 4.

liable to repair the loss suffered by Allan would then have depended on Allan's ability to prove that the conduct of Barclay was both wrongful and blameworthy.

In respect of the £30 claim, it is clear that Allan was a 'secondary' victim, since the 'primary' victim – the individual who directly suffered loss as a result (at least allegedly) of Barclay's conduct – was Hill, who was the 'primary victim' of a 'pure' physical loss (and, potentially, derivative economic loss also, if Allan was so miserly as to not pay his employee during the period in which he was unable to work). Allan's losses of £30 did not arise directly from the acts or omissions of Barclay, but rather out of the losses suffered by Hill. Consequently, though Hill himself may have had an action against Barclay, had he chosen to pursue it, since 'the personal injuries of [Hill] will properly be held to have been in the contemplation of the wrongdoer', it was found that Barclay could not be 'held bound to have surmised the secondary injuries done to all holding relations with the individual, whether that of a[n employer] or any other' (*Allan v Barclay* (1864) 2 M. 873, at 874, *per* Lord Kinloch, quoted with approved in *Reavis v Clan Line Steamers (No.1)* 1925 SC 725). As such, he was not liable for the economic losses suffered by Allan. The primary/secondary victim dichotomy can thus be seen as a useful tool in applying the principles pertinet to the law relating to remoteness of damages, but it does not follow from *Allan* that all secondary victim claims are bound to fail. Rather, the categorisation as one or the other simply serves as the second step in establishing delictual liability in the course of an Aquilian action: having demonstrated that a reparable 'loss' has in fact been suffered, the pursuer must then show reason(s) why the losses which they suffered were not too remote to have been in the contemplation of the defender at the time of the alleged wrongdoing. Generally, this can be done by showing that the loss suffered was a reasonable or probable cause of the defender's act or omission,[18] but in some instances (such as in cases of 'psychiatric injury') the law may place additional hurdles in the path of secondary victims (see, e.g., *Weddle v Glasgow City Council* [2021] SAC (Civ) 17).

The utility of clearly distinguishing between primary and secondary victims, and 'pure' and 'derivative' forms of loss, across the law relating to Aquilian liability (and, indeed, for the Anglo-American torticle of negligence) as a whole can be demonstrated by considering the outcomes of two well-known cases, one from Scotland (*Dynamco Ltd. v Holland, Hannen and Cubitts (Scotland) Ltd.*1971 SC 257) and one from England (*Spartan Steel & Alloys Ltd. v Martin and Co. (Contractors Ltd.* [1973] 1 QB 27). The facts of these cases are, on the surface, remarkably similar, but they differ quite significantly in one key respect. In both cases, workmen employed by the defender/defendant carelessly cut through electrical cables, causing a power outage which affected nearby factories. In the Scottish case of *Dynamco*, the pursuer's case was dismissed and they received no reparation for the losses which they suffered. In the English case of *Spartan Steel*, however, it was found that the plaintiffs were entitled to £400 of damages in contemplation of the interrupted steel 'melt' that was adversely affected by the power outage, although ultimately damages for the 'four further melts' that the plaintiffs alleged they could have conducted during the time of the power outage were refused.

It is submitted that the reason for the failure of the pursuer's claim in *Dynamco,* the success of the plaintiffs' claim of damages for the interrupted steel 'melt' in *Spartan Steel,* and failure of the claim in respect of the four hypothetical 'melts' in *Spartan Steel,* can be explained with reference to the primary/secondary victim dichotomy, and the divide between 'pure' and

[18] Wilson, n.7, at 126.

'derivative' forms of loss. In *Dynamco*, as noted by the Lord Ordinary, the pursuers suffered no physical loss since no property owned by them was damaged in the course of the power outage (at 258 *per* Lord Kissen). The pursuer, then, stood in the shoes of a secondary victim of pure economic loss, since their financial losses stemmed from a loss sustained by the primary victim (that is, the pure physical loss suffered by the South of Scotland Electricity Board as a result of the damage done to the cable). Though the court in the case itself held that 'the law of Scotland has for over a hundred years refused to accept that a claim for financial loss which does not arise directly from damage to the claimants' property can give rise to a legal claim for damages founded in negligence' (at 265 *per* Lord Migdale), claiming to support this proposition with reference to three cases (*Allan v Barclay* (1864) 2 M. 873, *Simpson & Co. v. Thomson* 5 R. (H.L.) 40 and *Reavis v Clan Line Steamers (No.1)* 1925 SC 725), the cases cited by Lord Migdale in fact fail to provide support for a general prohibition on claiming damages for pure economic loss. Indeed, there exists Eighteenth century case law recognising the recoverability of negligently caused economic loss (*Graeme and Skene* v. *Cunningham* (1765) Mor 13923). Instead, the cases cited by Lord Migdale merely provide authority for the proposition that the law of Scotland has generally barred, on grounds of foreseeability, claims for the reparation of pure economic loss by secondary victims of such. In other words, the pure economic losses of secondary victims are, in all cases, thought to be too remote to be reclaimed. If, however, a pursuer were able to make out that they stood as a primary victim of pure economic loss – by establishing a relationship of sufficient proximity to the wrongdoer[19] – then reparation ought, logically, to be afforded, provided that the other requirements of liability are made out (which is, on one reading, implied by the judgment of Lord Cameron in *Dynamco* itself, at 267-274).

In *Spartan Steel*, by contrast, although the plaintiffs complained of lost profits, and comprehended the losses that they suffered in purely monetary terms, categorically in law they suffered (or can be said to have suffered) three distinct kinds of loss: pure economic (in respect of the hypothetical 'melts' which could have been conducted during the period of power-outage), pure physical (in respect of the damage done to the 'melt' which was actually occurring at the time of the power outage) and derivative economic loss arising from the physical damage done to the steel due to the interruption of the 'melt'. In respect of each loss, the plaintiffs stood as secondary victims, again because the primary victim in the case was the electricity board who owned the cable, and the plaintiffs' loss arose out of the damage done to said cable, rather than immediately and directly from the wrongdoing. While, as in Scots law, English law stood (and stands) hostile to claims of pure economic loss raised by secondary victims, the law is much more welcoming of claims raised by secondary victims of pure physical loss. The reasons for this, it is submitted, are rooted in policy concerns and a fear of 'opening the floodgates of liability'. While a potentially limitless amount of persons may foreseeably suffer economic loss or psychiatric injury as a result of another's misfortune, it stands to reason that only a small number of persons (if any at all) will be in a position to suffer foreseeable physical loss (in the sense of 'damage') as a consequence of a loss suffered by another. Hence, it is thought, the law – in Scotland and England alike – is likely to continue to prove less inimical to claims arising from physical loss suffered by secondary victims.

[19] Reid, n.1, para.5.26.

Although Aquilian liability may arise where loss has been caused by 'wrongful conduct' for a variety of blameworthy reasons (i.e., because of the defender's intentional, reckless or negligent wrongdoing, since the trigger for blameworthiness is broad *culpa*), the categorisation of primary/secondary victims and pure/derivative forms of loss are most relevant in those cases in which the reason for the defender's liability lies (or is said to lie) in negligence. It is straightforward to establish Aquilian liability in any case in which the defender intentionally, or recklessly, acts so as to cause a loss to the pursuer, since such will axiomatically mean that the pursuer – and loss which may foreseeably have been suffered by them – either will be or manifestly ought to have been in the contemplation of the defender. It does not matter whether the victim is classed as primary or secondary, nor does it matter what the nature of the loss suffered is; intentionally or recklessly causing a loss to another results in delictual liability, whether on the basis of the general principle of *damnum iniuria* or (in the case of 'pure economic loss') because of the operation of some specific nominate delicticle such as that of causing loss by unlawful means (*Global Resources Group v MacKay* 2009 SLT 104; *McLeod v Rooney* 2010 SLT 499).[20]

Cases of alleged negligence, however, give rise to greater difficulties than do cases of intentional or reckless conduct, as it is now generally thought that (in respect of some types of harm, and some categories of victim, at least) there must be some control mechanism(s) beyond the mere foreseeability of harm, and attribution of blame, to generate an obligation of reparation to generate liability. Hence – though the matter may still be controverted in Scots law, in spite of the famed decision of *Donoghue* – it now seems to be taken as statement of the obvious that for delictual liability to be generated by a negligent act which caused 'loss', there must have been a 'directional' duty of care owed by the defender to the pursuer. This idea was 'not immediately universally embraced as valid in Scots law'[21] and indeed it might be said that – though various Nineteenth and early Twentieth century Scots cases referred to concepts of 'duty' and 'duties' – the reception of the concept into Scottish jurisprudence did not begin in earnest until Lord Atkin propounded the general test for the existence of a directional 'duty of care' in *Donoghue*.[22]

The effect of the full reception of the 'directional' duty of care concept was not immediately felt, but – likely spurred on by the new orthodoxy which held that 'the English and the Scots law on the subject are identical' (*Donoghue v Stevenson* 1932 SC (HL) 32, at 35 *per* Lord Buckmaster), combined with the view that the same result would generally be achieved whether one proceeded on the basis of a 'remoteness' analysis or a 'duty of care analysis' (*Bourhill v Young* 1941 SC 395, at 425 *per* Lord Jamieson) – the idea that the law of delict is principally concerned with 'duty' and 'duties' came to dominate.[23] The development of the idea of 'duty' as a – or the – central concept in the law of delict may also have been aided by the fact that the term can be read as synonymous with 'obligation': hence Walker's definition of a 'duty of care' as 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct in particular respects towards another or other

[20] Of course, it may be questioned whether Scots law ought to continue to recognise a separate nominate delicticle of 'causing loss by unlawful means', modelled on the English tort of the same name, when the general principles of *damnum iniuria* could competently complete the same task in law.

[21] Pillans, n.10, para.5.12.

[22] *Ibid.*, para.5.05.

[23] David M. Walker, *The Law of Delict in Scotland*, (W. Green, 1981), at 172.

persons'. Against this background, it has been said that 'it has become accepted that the existence of a duty is a necessary pre-requisite to be established by a pursuer before liability may be determined in delict generally and negligence in particular', with this 'duty' element being employed as a means of demonstrating sufficient proximity between the alleged wrongdoer and their victim.[24]

In spite of the perceived centrality of the concept of 'duty', however, it may be thought that the idea of adds little – if anything – to the law of delict, due to the already operational principles laid out above and in the foregoing two articles. As Thomson recognised in a 1996 article, 'the duty of care is only needed to impose delictual liability in respect of a defender's negligent conduct… whenever a defender intentionally harms the pursuer – provided that the interest harmed is regarded as reparable – the defender incurs liability. There is no need for the imposition of a duty of care before there is liability'.[25] Yet even where negligent conduct is concerned, it is not clear that the 'duty of care' concept serves as a useful analytical tool. As Wilson noted in his *Introductory Essay* on 'Negligence', the directional 'duty of care' concept introduced into Scots law in *Donoghue* appears to be nugatory, taking into account the already operational principle of 'remoteness of damage'. Lord Atkin's general test in *Donoghue* 'seems to make foreseeability the sole criterion for the existence of a duty and, if that is the case, duty of care becomes an unnecessary concept because foreseeability is already one of the first three requirements [of liability in negligence]'.[26] Accordingly, within the Scots law of negligence – at least where pure physical losses are concerned – it is submitted that the language of 'duty' – to say nothing of 'duty of care' – has no meaningful place save, perhaps if one insists on doing so, as a generic descriptive term for 'the general duty of reasonable conduct owed to everyone' (i.e., for the *standard* of care which the law expects all to take as a matter of course).[27] There is little point in working to demonstrate that the losses incurred by a pursuer were foreseeable, and so not 'too remote' to be reclaimed, only to duplicate one's efforts by then showing that on grounds of foreseeability the defender owed a 'directional duty of care' to the particular pursuer in question. At best such duplication of effort is redundant; at worst, it a recipe for confusion and incoherence.

Accordingly, it is thought, Scots lawyers should recognise that actionable negligence in this jurisdiction is predicated on liability for *damnum iniuria datum*, and so there are three distinct elements which must be proven for a pursuer to succeed in such a claim. Firstly, the pursuer must be able to demonstrate that they have suffered a recognised loss. Secondly, they must show that this recognised loss was caused by the defender (i.e., that 'but for' the defender's actions, the loss would not have occurred). Finally, they must demonstrate that the defender may be justly blamed for the causing of the loss, by demonstrating that the defender's conduct was culpable, which can be demonstrated by showing that the defender intentionally or recklessly caused the loss, or did not take sufficient care so as to present a reasonably foreseeable loss. This last point can be assessed either through recourse to the 'duty of care' concept, or to the principles of 'remoteness', as Lord Jamieson noted in *Bourhill* (at 425), but

[24] Pillans, n.10, para.5.12.

[25] Joe Thomson, *A Careworn Case? Saeed v Waheed 1996 SLT (Sh Ct) 39*, [1996] SLT (News) 392, at 393.

[26] Wilson, n.7, at 138.

[27] Robert Black, *A Historical Survey of Delictual Liability in Scotland for Personal Injuries and Death: Part III, English Accretions* [1975] CILSA 318, at 322.

logically only one or the other approaches need be adopted. In adopting the 'remoteness' approach, a general 'duty to take reasonable care' on the part of the defender is presumed.

In contrast to Anglo-American jurisprudence, then, in which 'there is no liability in the air' (see *Overseas Tankship (UK) Ltd. v Morts Dock and Engineering Co. (the Wagon Mound (No.1))* [1961] AC 388, *per* Viscount Simmonds at 425) and so a 'directional duty of care' owed by the defendant to the claimant is considered necessary, in Scots law it would seem that there is instead a general duty, incumbent on all, to take reasonable care. This 'duty' is however given legal significance only where a blameworthy breach of that duty causes a loss which is sufficiently proximate to the breach. Rather than reading the term 'obligation' as a simple synonym of 'duty', then, Scots lawyers and jurisprudents should recall that the word carries a particular meaning in law, denoting a 'legal tie', bonding together two (or more persons) to the payment or performance of some debt. Hence, though as a matter of ordinary language, one may say that one is under an obligation ('duty') to abstain from harming others, or causing loss, or interfering with property without right, there is in fact no such obligation ('legal tie') in law. An obligation ('legal tie') will only arise *ex delicto* where the constitutive delictual act occurs (or the *damnum* caused by another's wrongfulness emerges). Insofar as delictual liability for *damnum iniuria* is concerned, liability will arise only where it can be shown that the loss complained of was not too 'remote' from the defender's wrongful and blameworthy act or omission; if this be established, liability should follow save in exceptional circumstances (of which, see *Simmons v British Steel Plc* 2004 SC (HL) 94, at 115 *per* Lord Rodger).

Ultimately, then, while Pillans suggests that the idea that delict can be reduced to a series of directional duties 'clearly works in the context of intentional and other 'nominate' delicts as the relationship requirement is easily satisfied', being that 'it is absurd to suggest that an alleged wrongdoer did not have a sufficiently proximate relationship with an intended victim of an intentional act to give rise to a duty not to interfere with the legally protected interest in respect of which the pursuer has claimed to have suffered harm',[28] this analysis would appear to do no more than add an additional and redundant layer of complexity to a topic which can readily be explained without recourse to it. With the language of 'duty' being loaded with heavy conceptual baggage, particularly from a tradition which is in many respects alien to Scots jurisprudence, it might be thought better to avoid recourse to such terminology, particularly since the principles of delict are clearly able to operate without resort to such.

Just as the language of 'duty' is redundant in cases of intentional or reckless wrongdoing generally, so too does the 'duty of care' concept appear functionally vacuous in respect of negligently caused physical loss. If a foreseeable physical loss is caused – recalling here that the relevant concept of causation is 'but for' causation – by an act of wrongdoing, it is thought that there will necessarily be in all cases sufficient proximity between the alleged wrongdoer and the victim to render the question of duty as ancillary as it is in cases of intentional wrongdoing. Accordingly, as Wilson suggested, the 'duty of care' concept – in Scots law – would appear, on the face of it, to be meaningful only where four matters are concerned: 'pure omissions', damage caused by straying animals, cases of 'pure economic loss' and cases of 'pure psychiatric injury'.[29] The next, and final, article in this series will

[28] Pillans, n.10, fn.4.

[29] Wilson, n.7, at 138.

accordingly assess the extent to which the concept of ‘duty’ is in fact useful in determining liability where such matters are concerned.