

Review

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Iniuria and the Common Law. Edited by Eric Descheemaeker and Helen Scott. Hart Studies in Private Law, 9. Oxford and Portland, OR: Hart Publishing, 2013. xxxii + 244 pp. ISBN 978-1-84946-503-8.

This book contains ten papers presented at a select seminar (20 participants, 5% of them women and 15% Regius Professors) held on 9–10 September 2011 at All Souls College, Oxford. Its preface dedicates it to the memory of the late Alan Rodger (Lord Rodger of Earlsferry), who was to have participated and presented a paper as well. After the preface there follow a list (and a picture) of the conference participants, acknowledgements, a table of contents, a list of the contributors and their university affiliations, a table of cases, a table of legislation and one of historical sources. The reader, who will also find an index at the end of the book, certainly cannot complain about its accessibility.

In the introductory chapter, “*Iniuria* and the Common Law” (pp. 1–31), Eric Descheemaeker and Helen Scott explain that this book is an example of what they call “oxymoronic comparative law,” which consists of using a concept from one legal system (in this case, the Roman delict *iniuria*) “in order to interrogate another where, on the face of it, it does not belong.” The legal systems interrogated are English, Scots, and South African law. This is a happy combination, since the two famous mixed jurisdictions maintain an open link, unbroken by codification, with Roman law on the one hand while forming a part of the common law world on the other. The purpose of the seminar was thus to examine the significance of *iniuria* in the common law, and “to stimulate doctrinal scholarship around the modern law of tort in England, Scotland and South Africa from the perspective of the Roman delict.” Helen Scott then provides a section on the Roman

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law of *iniuria*, and Eric Descheemaeker, in four more sections, deals with some of the conceptual issues connected with the attempt to examine *iniuria* from the perspective of the common law: the precise nature of *iniuria*, which was not clearly defined but rather an open-ended principle in Roman law (“Mapping *iniuria*”); the fact that *iniuria* is on the one hand very modern in its focus on the contemptuous intent of the defendant, but very old-fashioned in being an injury to the *dignitas* of the claimant, dignity being connected to social rank in a degree that is no longer acceptable in modern society (“The Asymmetry of *iniuria*”); the precise nature of the *actio iniuriarum* (penal or reipersecutory) in Roman versus modern law (“The *actio iniuriarum*: Between Private Punishment and Loss Compensation”); and finally, the influence of *iniuria* on legal thinking in the common law, which does not contain the concept as such (“*Iniuria* in the Common Law”). This last section also takes stock of all the further contributions to the book and to that extent serves as a kind of conclusion.

David Ibbetson (“*Iniuria*, Roman and English,” pp. 33–48) points out that Roman law had two underlying principles concerning *iniuria*: *contumelia* and *contra bonos mores*, which would cover a wide range of tortious behavior, though a few more specific forms of *iniuria* were also present. English law, however, only has specific torts, which makes it less flexible. Nevertheless, general principles not unlike the Roman ones are found to lie beneath the surface in the English approach to cases which do not automatically fit under any specific tort.

Kenneth McKenzie Norrie (“The *actio iniuriarum* in Scots Law: Romantic Romanism or Tool for Today?,” pp. 49–66) examines the role that the *actio iniuriarum* – received in Scots law especially through the works of Bankton as an action for a general wrong, but overshadowed in the nineteenth century by the action for negligence – still has a part to play in the future development of Scots law. The author sees a possibility especially in the field of protection of personal privacy.

Eric Descheemaeker (“*Solutium* and Injury to Feelings: Roman Law, English Law and Modern Tort Theory,” pp. 67–95) treats the concept of *solutium*, a term used with increasing frequency to refer to compensation for “emotional distress” in the field of civil wrongs. In Roman law, *solutium* is not a specific technical term. The word was not used in the context of *iniuria*. The modern concept has no clear basis in Roman law. In Scots law, the term was used in the *iniuria* context, and originally interpreted as a purely penal measure; however, nowadays it is

thought of as a form of compensation. That is one ambiguity; the second is whether it protects feelings, or rather bodily integrity, reputation, and dignity. This difference between internal and external factors is made more explicit by comparing it to the medical parallel illness/disease. According to Descheemaeker, the word *solatium* tends to hide the fact that this important question has been left unaddressed (p. 74). *Solatium* came into English law via Scots law, in the middle of the nineteenth century. The term is used in an untechnical way, as in “*solatium* for injured feelings.” In English law, there is a tendency to see *solatium* as something aiming at protecting feelings (the internal factor) rather than interests. And there is ambiguity about its nature: penal or compensatory? The term *solatium* is described by Descheemaeker as a black box which hides both the precise nature of the remedy (penal or compensatory?) and also leaves it unclear whether internal or external interests are protected. As a consequence, he suggests we would be wise to do away with the concept.

Paul Mitchell’s contribution (“*Dissimulatio*,” pp. 97–117) starts with a rule laid down in a text by Ulpian (D.47.10.11.1), that a person who has hidden (*dissimulatio*) his injured feelings on suffering *iniuria* cannot later bring the action; an immediate response to the *iniuria* is required. English common law has not received this principle, but Mitchell shows exactly how the common law deals with similar cases in which a claimant is trying to profit from a wrong appearance that he himself has created.

Helen Scott (“*Contumelia* and the South African Law of Defamation,” pp. 119–39) studies a modern South African case in which what is still called the *actio iniuriarum* was brought, and examines two points of view expressed in the corresponding sentence: that *animus iniuriandi* was a concept invented by the Pandectists, and that it is not a valid defense for the defendant to state that his intention was only to make a joke. Careful examination of Roman *iniuria* texts – strangely only given in translation – shows that in fact, intention was an important element in Roman *iniuria*, and that actions done in jest mostly did not lead to liability. The conclusion is that the modern South African law of defamation does not sit easily with Roman *iniuria*.

Paul J. du Plessis (“An Infringement of the *corpus* as a Form of *iniuria*: Roman and Medieval Reflections,” pp. 141–53) takes his lead from Ulpian’s threefold division of *iniuria* (D.47.10.1.2: *omnem iniuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere*), follows the term *corpus* through Roman and Medieval times, and tries to establish its precise meaning, making

a number of interesting observations along the way about the development of *iniuria* as a delict with a physical and a non-physical side to it. The contribution closes by pointing out various possible lines of further research on *iniuria*.

John Blackie (“The Protection of *corpus* in Modern and Early Modern Scots Law,” pp. 155–67) analyses the development of the protection of physical integrity and physical liberty since early modern times in Scots law. There was reception of the Roman law of delicts, and an initial conceptual unity between civil and criminal law concerning infringements of physical integrity and liberty, but this has since been lost. Delict and crime became separated, and the new delict of assault now provides the protection of *corpus* in private law. However, the author still sees a possible role for *iniuria* in developing better protection of the *corpus* in cases with a sexual element, which may be a better solution than just qualifying them as a form of assault.

Anton Fagan (“The Gist of Defamation in South African Law,” pp. 169–95) argues in favor of a return to the original conceptualization of the *iniuria* of defamation, requiring only publication and the *animus iniuriandi*, which has been abandoned by the South African courts since about 1980.

Jonathan Burchell’s paper (“Retraction, Apology and Reply as Responses to *iniuriae*,” pp. 197–214) has only a very loose connection with Roman (-Dutch) law, but forms an interesting exercise to try to find alternative ways to provide satisfaction to the victim of *iniuria*. It focuses especially on statements in the press: a context in which a balance must be maintained between protection against *iniuria* on the one hand and freedom of the press on the other.

François du Bois (“Harassment: A Wrong without a Right?” pp. 215–40) treats the English Protection from Harassment Act (1997), which has created a fairly unique wrong – undefined in the law itself – with a wide range of application. In this sense it is not unlike the Roman delict of *iniuria*. Both protect the civility rules in society, and sanction situations where someone (in the words of the late Peter Birks) has been deprived of “his or her fair share of respect” *contra bonos mores*. This shows – even in the absence of any formal connection between *iniuria* and the PHA – the continuous need in different societies for a case-by-case approach to a lack of civil behavior.

This book is obviously much more about the common law than about *iniuria*, which mainly serves as a binding element and a point of reference. Still, for it to fulfill this role properly, it needs to be well understood in its origins and development, and

also within the broader context of the Roman law of delicts. To that extent, there would have been room for some improvement. In this book, *iniuria* is mostly interpreted from the sources alone, without reference to the vast literature on Roman law. For example, no reference is found to Jhering's long and fundamental article¹ about the interests protected by *iniuria* in classical Roman times, which certainly would have made a good subject for discussion during the seminar. Not every author seems to be sufficiently aware of the undoubtedly penal character of all Roman delictual actions – even the *actio legis Aquiliae*, which in spite of its slow development in the direction of an action for compensation retained an eminently penal characteristic even in Justinianic Roman law: the impossibility to bring it against the heirs of the person who caused the damage, or (in its noxal form) against the master of the slave who caused damage and subsequently died without the master's fault. The real paradigm shift in this respect did not occur until the end of the middle ages, and the fundamental influence that helped to bring it about came from the moral theology of St. Thomas Aquinas and its continuation in the Spanish School of Salamanca. In this book, the middle ages are all but ignored; only in the contribution by du Plessis do we find anything about them – concerning Roman and Canon law, not moral theology – and du Plessis is absolutely right in identifying the medieval development of *iniuria* as an area in need of further investigation. It might well be the subject of another seminar.

To the above criticism may be added a few instances of poor Latin (e.g. “sui nomine or servi nomine” (p. 8); “iniuria manus / iniuria verbis” (p. 100)). But otherwise this is a well-presented book which reports an interesting seminar that has achieved its goal: providing food for thought by looking at the common law from a Roman law perspective. It does not give final answers, but shows the reader a broad panorama of dealing with injury and insult in Roman and common law, and in the mixed jurisdictions of South Africa and Scotland. It should provide ample inspiration for future research.

¹ Rudolf von Jhering, “Rechtsschutz gegen injuriöse Rechtsverletzungen,” *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, 23 (1885), 155–338.