Medical Intervention and *Incapax* Patients: The Place of *Negotiorum Gestio* within Law's "Fundamental Structural Language"

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A. INTRODUCTION

In 2017, Professor Martin Hogg published a magisterial monograph on the subject of *Obligations: Law and Language*.[1] From the outset of that work, the author notes that the words used by the parties to obligational relationships—even obligational relationships which are constituted *ex voluntate*—do not need to, and indeed do not generally, map on to the "fundamental structural language" of the law.[2] This "fundamental structural language" can be understood as the lexicon comprised of those basic terms which are used by "external observers" of obligational relationships—most often being lawyers, legislators and jurists—to "make sense" of the law of obligations conceptually, as well as of specific undertakings in particular.[3] Words such as 'promise', 'offer' and 'unqualified acceptance', to take some basic examples not directly examined by Hogg for "constraints of space",[4] might be applied by the parties to a (potentially) obligational relationship. However, the subjective understanding that the parties themselves have of these terms, or their respective intentions in using them, will not necessarily correspond with the objective legal understanding of the relevant words.

Within the field of *ex lege* obligations—that is, those obligations which are imposed by law, or arise juridically—there is less (indeed, usually no) opportunity for the parties to demonstrate their own understanding of the words habitually employed to describe the obligational nexus. It does not matter how a negligent driver who is sued for causing injury to another road user would describe their relationship to the pursuer: the institutional position is that they are delictually liable to repair the *damnum* [loss] that they wrongfully caused. A party to a frustrated agreement might not think or believe themselves to be 'unjustifiably enriched' by possessing something given to them in the expectation of their performance of

[1] M Hogg, *Obligations: Law and Language* (2017).
[2] Ibid, *passim*.
[3] Ibid, 1.
[4] Ibid, 3.

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some undertaking which is no longer forthcoming (nor, indeed, might they have conceptualised the original agreement as a 'contract'), but this is ultimately the legal position that they find themselves in. The available examples of this phenomenon are legion and, in a sense, limited only by one's imagination: the 'fundamental structural language' of the law is primarily employed for a variety of purposes disconnected from mere description of particular and prosaic relationships. It is used to ensure consistency in legal decision-making, predictability in legal outcomes, and clarity in conceptualisation and pedagogy (*inter alia*).[5]

One fundamental structural concept which has been neglected in the study and practice of modern Scots law is the idea of *negotiorum gestio*, an institutional concept which in many respects languishes "in the decent obscurity of a learned language".[6] This concept is unknown to, or at least unarticulated in,[7] Anglo-American jurisprudence,[8] but has formed a foundational part of the Scots law of obligations since at least the time of Stair.[9] Notwithstanding the fact that the subject forms a core and definitional part of Scots private law under section 126(4) of the Scotland Act 1998,[10] "there is a view", endorsed by implication by Niall Whitty in the *Stair Memorial Encyclopaedia*, "that the full potential of *negotiorum gestio* in Scots law has not, or not yet, been realised".[11] While, then, it has been said that "in broad terms, *negotiorum gestio*-like actions have played a considerable role in health care provision" in and across numerous civil-law jurisdictions,[12] the idea has gained little traction in Scotland, notwithstanding the suggestion made in a "pioneering" article[13] of

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[5] Ibid, 4-5.
[6] Recall Gibbon, who stressed that the most 'licentious' passages of his renowned *History of the Decline and Fall of the Roman Empire* were accessible only to the educated and could not serve to titillate the common rabble: H Morely (ed), *Memoirs of Edward Gibbon* (1891) 194.
[7] D Sheenan, "Negotiorum gestio: a civilian concept in the common law?" [2008] ICLQ 253.
[8] J P Dawson, "Negotiorum gestio: the altruistic intermeddler" (1961) Harvard Law Review 817 at 817.
[9] As Hogg notes, "the publication in 1681 of the *Institutions of the Laws of Scotland* by James Dalrymple (Viscount Stair) cemented a Roman concept of obligations in Scots law": Hogg, *Obligations* 32.
[10] This section of the Scotland Act ought to be, as Gretton notes, of considerable interest to comparatists: see G L Gretton, "Trust without equity", in L Smith (ed), *Trusts and Patrimonies* (2015) n 106.
[11] N R Whitty, "Negotiorum gestio", in *The Laws of Scotland: Stair Memorial Encyclopaedia* (1995) para 87 at para 88.
[12] See S Birkeland, "Negotiorum gestio in family medicine, informed consent obtainment and disciplinary responsibility" [2016] International Journal of Family Medicine 1.
[13] See D W Meyers, "T B Smith: a pioneer of modern medical jurisprudence", in E C Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 199, *passim*.

1959 by Professor Sir T B Smith.[14] Following from a recent observation to the effect that "adopting [a] *negotiorum gestio* analysis … would not materially change the requirements for a successful suit against a negligent physician",[15]the present article seeks to critically consider the extent to which the institutional idea of *negotiorum gestio*, and the 'fundamental structural language' surrounding it, might be employed in respect of medico-legal matters in Scotland today.

B. NEGOTIORUM GESTIO

Literally translated as "management of affairs",[16] a relationship of *negotiorum gestio* arises where a party intervenes, with a benevolent motive, in the affairs of another absent or incapacitated person so as to safeguard the interests of that absent or *incapax* person (termed the *dominus*).[17] Though the *negotiorum gestor* in all circumstances lacks any actual authorisation or mandate from the *incapax*, the *gestor* will not be delictually liable for any interference with the interests of the *dominus*, provided that it may be presumed that the *dominus* would have consented to the interference, if they were aware of the circumstances.[18] If the ostensible *negotiorum gestor* acts so as to interfere with the interests of the *dominus* despite having knowledge that the *dominus* would not have consented to the interference, then the supposed *gestor* is not a *negotiorum gestor* at all, but rather is an officious intermeddler who may be liable in delict depending on the nature of the interference.[19]

Whitty suggests that for *negotiorum gestio* proper to arise, the *gestor* must "intend to donate his labour and services", but also "intend to recover his expenses and outlays from the *dominus*".[20] While this plainly describes the necessary requirements for a claim of *actio negotiorum gestorum*—that is, a claim for the *gestor*'s expenses and outlays—it may be queried whether such intention to recover, or indeed the very ability to recover outlays and

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[14] T B Smith, "Law, professional ethics and the human body" [1959] SLT 125.
[15] J Brown, "Obligations, consent and contracts in Scots law: re-analysing the basis of medical malpractice liability in light of *Montgomery v Lanarkshire Health Board*" [2021] Legal Studies 156 at 163.
[16] As Whitty notes, the abstract noun is civilian, not properly-speaking Roman, the term in this incarnation being found in only one Roman text (D.49.1.24pr. (Scaevola), where the *gestor* is implicitly likened to a tutor or curator): Whitty, "Negotiorum gestio" para 87.
[17] Ibid, para 87.
[18] Bell, *Principles*, s.540.
[19] Brown, "Obligations" 163.
[20] Whitty, "Negotiorum gestio" para 95.

expenses, is in fact a core component of *negotiorum gestio* in all its guises. This question may be realised because plainly *negotiorum gestio* may serve not only as a "sword" arming the *gestor* with a potential claim for recompense in respect of costs incurred,[21] but also as a "shield" protecting them from delictual claims[22] such as, for example, one of wrongful interference with property. It would be odd—indeed, it would be unjust—for an individual who usefully intervened so as to prevent his neighbour's house from burning down by entering the property (perhaps inadvertently causing damage as he did so) and extinguishing the fire to be precluded from justifying his behaviour on the grounds of *negotiorum gestio* simply because he did not incur or intend to recover expenses in the course of his rescue. According, it may be thought, instead, that useful benevolent—though unauthorised—intervention in the affairs of an absent or *incapax* person may be justified by reference to *negotiorum gestio* even in the absence of any so-called *animus negotia aliena gerendi*,[23] but that such intention to recover expenses must be present if there is to be a successful action to claim any outlays.

C. NEGOTIORUM GESTIO AND MEDICAL TREATMENT

> Scots law has not, or not yet, extended the doctrine of *negotiorum gestio* beyond the preservation of the patrimonial interests of the *dominus* so as to cover the preservation of his health, or the rescue of his person in situations where his life or personal safety is endangered.[24]

This, it is submitted, is one of those clear instances, alluded to by Whitty, in which it can be said that the full potential of *negotiorum gestio* has not been realised. This can be demonstrated by considering the uses to which "functional equivalents"[25] of *negotiorum*

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[21] Stair was of the view that a *gestor* would be entitled not only to expenses, but to recompense for services rendered: Stair, *Inst* 1.8.3. In this he was "corrected" (see Whitty, "Negotiorum gestio" para 115) by Erskine, who took the view—endorsed by later authorities—that recovery for *negotiorum gestio* is limited to expenses: Erskine, *Inst* 3.3.52.
[22] Consider, e.g., Bankton, who notes that officious intermeddling amounts to *culpa*, and so gives rise to a right of reparation on the part of the *dominus* whose interests are interfered with, "yet, when the management is undertaken to serve an absent friend, whose business calls for it, the agent ought not to suffer by his good office": Bankton, *Inst* 1.9.24.
[23] This term simply translates as "intention to manage the affairs of another", but Latinised as such it implicitly includes both an "intention of managing another's affair and of recovering his expenses and outlays": Whitty, "Negotiorum gestio", para 110.
[24] Ibid, para 102.
[25] See *Ted Jacobs Engineering Group Inc. v Johnson Marshall and Partners* [2014] CSIH 18 at para 90 per Lord Drummond Young: "in translating a legal rule or concept, it is generally functional equivalence rather than linguistic equivalence that matters".

gestio have been put in many of the codified Continental European jurisdictions.[26] As was recently observed by Birkeland, the "institution" of *negotiorum gestio* "may appear familiar to some medical doctors",[27] since it can be invoked "in acute situations where a patient temporarily is not decision-competent".[28] Indeed, the German "functional equivalent" of *negotiorum gestio—Geschäftsführung ohne Auftrag* [agency without specific authorisation][29]—is expressly extended to the medical sphere by the rules pertinent to the 'treatment contract' (*Behandlungsvertrag*) set out in § 630d BGB. Hence, in the many European jurisdictions which recognise the institutional concept of *negotiorum gestio*, the doctrine has been used to assess whether medical intervention may be justified.

Recognising the value of 'informed consent' within modern medico-legal practice, and the view that the paternalistic principle of 'best interests' (expressly rejected by the Scottish Parliament in passing the Adults with Incapacity (Scotland) Act 2000[30]) "is not a safeguard which complies with article 12 [of the Convention on the Rights of Persons with Disabilities (CRPD)] in relation to adults",[31] it may be thought that the concept of *negotiorum gestio* provides an institutional mechanism by which a "best interpretation of will and preferences" test could be introduced into Scots law. Indeed, as Meyers noted, the focus of the enquiry in any purported case of *negotiorum gestio* is "'do we know or can we find out what the patient would want done under the circumstances at hand?' Not, 'What do we think is 'best' for the patient?'".[32] This perfectly accords with the approach endorsed by the UN Committee on CRPD, suggesting that if Scotland is serious about protecting the interests of vulnerable groups, this is an approach which should be expressly adopted by the courts.

In counterpoint to the above, it might be contended that there is a significant difference between a codified jurisdiction such as Germany and an uncodified jurisdiction

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[26] See Christian von Bar, *Benevolent Intervention in Another's Affairs* (2009) 56: "all the codifications of the states which currently belong to the EU contain… an independent law on the unsolicited and unobligated undertaking of another's affairs, though the designation for that law varies".
[27] Birkeland, "Negotiorum gestio" 1.
[28] Ibid, 2.
[29] Bürgerliches Gesetzbuch (BGB) 2.13. On this concept and *negotiorum gestio*, see G Dannemann and R Schulze, *German Civil Code (Bürgerliches Gesetzbuch (BGB) Article-by-Article Commentary* vol 1 (2020) 1377.
[30] G T Laurie et al, *Mason and McCall Smith's Law and Medical Ethics*, 11th edn (2019) 4.26.
[31] General Comment No.1 (on Article 12: Equal recognition before the law (Adopted 11 April 2014)).
[32] Meyers, "T B Smith" 209.

such as Scotland. In the former, the application of *negotiorum gestio* to medico-legal situations is expressly provided for in statute. To this, it may be countered that in the uncodified Nordic jurisdictions, the institution of *negotiorum gestio* is not only recognised, but has been applied to medico-legal cases also. As von Bar notes, "decisions that explicitly refer to this area are very rare"[33] in uncodified jurisdictions, and indeed "at least as far as Finland and Sweden are concerned a discrete profile of the law of benevolent intervention is hardly discernible".[34] In Denmark, however, the legal position has been described as "similar to Scotland" and it seems apparent that a conception of *negotiorum gestio* which "has remained particularly faithful to its historical model in Roman law" has been received into that jurisdiction also,[35] with a role to play in 'acute [medical] situations where a patient temporarily is not decision competent (the traffic victim brought in an unconscious state to the emergency ward in need of acute intervention').[36]

Unlike in Scotland, Danish jurisprudents appear to have consistently thought it "self-evident that acts of benevolent intervention may be directed towards saving the life and preserving the health of another".[37] This observation was, however, "deduced indirectly" with reference to "the fact that the concept of *negotiorum gestio* is accepted as a general ground of justification in Danish tort law".[38] In other words, it is because *negotiorum gestio* is clearly conceptualised as a "shield",[39] as well as a "sword",[40] in Denmark that this legal system clearly recognises the relevance of *negotiorum gestio* to instances in which the *gestor* has acted to preserve the life or limb of the *dominus*. Were Scots lawyers to better appreciate the utility of *negotiorum gestio* as a defence to what are—at first sight—delictual wrongs, this jurisdiction too could readily extend the concept to dignitary, and not merely patrimonial, interests of human persons.

D. CONCLUSION

[33] Von Bar, *Benevolent Intervention* 74.
[34] Ibid, 75.
[35] Ibid, 73-75.
[36] Birkeland, "Negotiorum gestio" 2.
[37] Ibid, 74.
[38] Ibid, 74 n 53.
[39] I.e., as a defence to a delictual claim.
[40] I.e., as a means of allowing the *gestor* an action to claim expenses.

Ultimately, then, it appears that the 'fundamental structural language' of the law does not correlate with the descriptive language ordinarily used by law-subjects to describe the nexus of obligational relationships in which persons might become entwined. As such, the fact that presently few lawyers—and fewer medical practitioners—in Scotland would describe medical intervention in the affairs of an incapable adult as giving rise to a relationship of *negotiorum gestio* is irrelevant to the argument presented in this paper. There may be no reported decision, as yet, vindicating the view that the law of *negotiorum gestio* in Scotland should apply, as in Denmark, to the protection of the non-patrimonial aspects of a person's existence as well as the patrimonial, but such is not fatal to the development of this area of law. Scots lawyers have, historically, been committed to "the institutional scheme or, in other words, to a more systematic approach" towards jurisprudence.[41] By recalling that commitment and through use of reason, it may be concluded that the Scottish conception of *negotiorum gestio* extends to the medico-legal sphere in this jurisdiction as it does in many other Continental European legal systems.

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[41] P Birks, "More logic and less experience: the difference between Scots law and English law", in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 167 at 174 n 20.