

## Obtaining the “Main Keys to Wisdom”: Distinguishing “Damages” from other Pecuniary Remedies in Scots Law

### A. INTRODUCTION

It is usual for writers on Scots law to use the term “damages” to describe any monetary remedy ordered by a court in substitution for the performance of some *ex voluntate* obligation, or to remedy some wrong committed within the context of the law of delict.<sup>1</sup> This is regrettable. While, in the nineteenth century, Scots law was praised by foreign scholars such as Sedgwick for the system’s advanced and practical analysis of the “elements of injury”,<sup>2</sup> since that time Scottish jurisprudence has fallen into something of a doctrinal muddle.<sup>3</sup> The reasons for this muddle are complex and multifaceted, but it can be said with some confidence that a factor which made (and continues to make) a significant contribution to the emergence and perpetuation of the confusion is the fact that Scots lawyers have generally failed to clearly conceptualise the distinction(s) between the various types of pecuniary judicial remedies offered by law.

In this jurisdiction, as in the Common law world, it seems now to be thought that the subject of “damages” can be located as a high-level taxonomical category of its own, with the various nominate monetary awards located as lower-order categories under the umbrella term. This, as the following article intends to establish, is fundamentally wrongheaded: as Whitty pointed out, “one of the main keys to wisdom is to distinguish between three remedies”, of which “damages” are but one, when considering the divide between patrimonial loss and non-patrimonial injury.<sup>4</sup> To this, the present author would add that seekers of conceptual clarity must obtain a second key: there is a need to distinguish further between the three remedies identified by Whitty—damages for pecuniary loss, “*solatium*” for pain and suffering (erroneously named, and more accurately termed assythment) and *solatium* for hurt feelings—and a fourth: that of “violent profits”. This article, consequently, will seek

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<sup>1</sup> Consider, e.g., D Walker, *The Law of Damages in Scotland* (1955).

<sup>2</sup> T Sedgwick, *Treatise on the Measure of Damages* (1847) 208-209.

<sup>3</sup> N R Whitty, “Rights of personality, property rights and the human body in Scots law” (2005) 9 ELR 194 at 200.

<sup>4</sup> *Ibid.*

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to demonstrate that the word "damages" ought not to be used as a catch-all word in Scottish jurisprudence and that there are sound reasons for distinguishing "damages", as a singular concept, from the other pecuniary civil remedies recognised by the law of Scotland.

## **B. "DAMAGES" AND THE "INTELLECTUAL SUPERSTRUCTURE" OF SCOTS LAW**

The extent to which the Scots law of damages is related to the English law on the same subject has been raised,<sup>5</sup> but it is submitted that no meaningful answer to this can be given until the fundamental meaning of the term "damages" is clarified. In England and the wider common law world, the "law of damages has gained an extraordinary amount of attention" as of late, and specific and nominate forms of damages (including "vindicatory damages", "restitutionary damages" and "*Wrotham Park* damages") have come to obtain judicial recognition.<sup>6</sup> This is symptomatic of the fact that in the Anglo-American tradition, the term "damages" serves as a functional catch-all term for monetary awards: "damages are an award in money for a civil wrong".<sup>7</sup> Taxonomically speaking, then, the nominate forms of "damages" can be located as species of the *genus* itself known as "damages".

The "intellectual superstructure" of Scots law differs considerably from the position which prevails in the common law. It is foundationally Civilian in character, having "a Roman concept of obligations" (*inter alia*).<sup>8</sup> This has consequences for the structure of the law pertaining to civil remedies. Rather than developing its law pertaining to civil wrongs from specific actions, such as "trespass" and "case", as did the English, Scots law came to recognise, at an early stage, the availability of a general action for reparation with accompanying "compensatory remedy for any form of *damnum iniuria datum* (damage caused by wrongfulness)".<sup>9</sup> This compensatory remedy can be termed "damages" and exists to effect *restitutio in integrum*: that is, to put the pursuer in the position that they would have

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<sup>5</sup> J Bailey, "Aggravated damages or additional awards of solatium: a distinction without a difference?" (2018) 22 ELR. 29 at 30.

<sup>6</sup> Ibid 29.

<sup>7</sup> J. Edelman, J. Varuhas and S. Colton (eds), *McGregor on Damages*, 21st edn (2021) para 1.001.

<sup>8</sup> M Hogg, *Obligations: Law and Language* (2017) 32.

<sup>9</sup> H L MacQueen and W D H Sellar, "Negligence", in K Reid and R Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations* (2000) 517, at 517.

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been in had they not suffered the "damage".<sup>10</sup> "Damages", arising from *damnum iniuria datum*, are modelled on the received provisions of the *Lex Aquilia* from Roman law.<sup>11</sup> Originally, the Aquilian action did not serve to repair "damage done" to the body of a (free) person, but by the eighteenth century the law had come to recognise the recoverability of medical expenses arising from "personal injury", and by the nineteenth the proposition that physical harm to a person was a recognised form of "loss" was trite.<sup>12</sup>

Yet although the general Scottish action for "damage and interest" came to encompass wrongs to the person as well as property, Scots law continued to recognise a second broad heading of liability for wrongs to non-patrimonial interests as well as a specific nominate "delicticle" of assythment.<sup>13</sup> The former heading was termed "injury" and was based on the *actio iniuriarum* of Roman law.<sup>14</sup> The latter was a native action developed at a foundational stage of the Scottish legal system.<sup>15</sup> The remedy in an action of assythment was itself termed assythment. Numerous remedies were originally available for *iniuria*,<sup>16</sup> but gradually—as money came to be viewed as "the universal solvent"<sup>17</sup>—these remedies were overtaken by a single pecuniary remedy which came to be termed "*solatium*".<sup>18</sup> The *actio iniuriarum* subsists in Scots law as an organising category today, albeit that there is scant reference made to it in reported case law.<sup>19</sup> The nominate action for assythment was expressly abolished by

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<sup>10</sup> J Chalmers, "Remedies", in J Thomson, *Delict* (2007) at 10.19.

<sup>11</sup> Whitty, "Rights of personality" 200.

<sup>12</sup> Hence, the (unreported) case of *Gardner v Ferguson* has been described as "the first case in the modern Scots law of negligence": E J H Schräge, *Negligence* (2001) 8.

<sup>13</sup> For the terminology of "delicticles", see E C Reid, "Personality rights: a study in difference", in V V Palmer and E C Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009) 387 at 394.

<sup>14</sup> See J Brown, "'Still a part of me?': 'functional unity' and the human body in Scots law" [2022] JR 80 at 82-86.

<sup>15</sup> R. Black, *A Historical Survey of Delictual Liability in Scotland for Personal Injuries and Death*, 1975 8 CILSA 47, at 52; Jenny Wormald, *Bloodfeud, Kindred and Government in Early Modern Scotland*, 1980 87 Past & Present 54, at 88.

<sup>16</sup> See J Brown, "The Defamation and Malicious Publications (Scotland) Bill: an undignified approach to law reform?" [2020] SLT (News) 131.

<sup>17</sup> *Auld v Shairp* (1874) 2 R 191, 199 per Lord Neaves.

<sup>18</sup> E Descheemaeker, "*Solatium* and injury to feelings: Roman law, English law and modern tort scholarship", in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (2013) 67 at 76.

<sup>19</sup> Cf. *Stevens v Yorkhill NHS Trust* [2006] CSOH 143.

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section 8 of the Damages (Scotland) Act 1976,<sup>20</sup> but by that time the underlying idea of the action—that a pursuer in any delictual action should be entitled to some compensatory payment for pain and suffering—had already been integrated into the general actions for *iniuria* and *damnum iniuria*.<sup>21</sup>

Recognising that delict preserves patrimonial interests by way of an action modelled on *damnum iniuria*, and non-patrimonial interests by way of an action modelled on *iniuria*, Walker determined that “liability in cases of delict, with few exceptions, is referable to the concepts of *iniuria* of *damnum iniuria datum*”.<sup>22</sup> Yet this division does not tell the whole tale. Actions to protect interests in ownership, possession and the enjoyment of property can also be located within the province of delict, albeit some authors have determined that they ought to be taxonomically located under the heading of “property law”.<sup>23</sup> Although the primary interest which a litigant seeks to protect in such cases is a “real (*i.e.*, proprietary) right”, the action itself is principally concerned with a named defender, rather than the “thing” at the heart of the dispute. Hence, following Bankton,<sup>24</sup> it can be concluded that claims concerning wrongs effected to interests in property—even where there has been no recognised “loss”—can and should be categorised as delictual.

The principal remedy for wrongful interference with property which has not resulted in loss will depend on the precise nature of the interference, but in certain cases of wrongful interference—in fact, “in all cases where there never was a right to possess [on the part of the defender] or where a right which existed has terminated”<sup>25</sup>—a pecuniary remedy known as “violent profits” is available. “Violent profits” have been described as a “form of penal damages”,<sup>26</sup> but such is a misclassification: “violent profits” are neither penal nor a species of “damages”. As with *solatium* in respect of the *actio iniuriarum*, which was “effortlessly reinterpreted as being purely compensatory when the time came for legal writers to fit the

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<sup>20</sup> Though the provision—indeed, the whole of the 1976 Act—was repealed by Schedule 2 to the Damages (Scotland) Act 2011, which is silent on the matter of “assythment”.

<sup>21</sup> D W McKenzie and R Evans-Jones, “The development of remedies for personal injury and death”, in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 277 at 295; Descheemaeker, “*Solatium*” 76.

<sup>22</sup> Walker, *Delict* 31.

<sup>23</sup> See, e.g., J Thomson, “A careworn case? *Saeed v Waheed* 1996 SLT (Sh Ct) 39” [1996] SLT (News) 392 at 393.

<sup>24</sup> See Bankton, *Inst*, 4.14.1-2.

<sup>25</sup> D Walker, *Civil Remedies* (1974) 770.

<sup>26</sup> *Ibid.*

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*actio iniuriarum* into the modern theory of Scots delict law",<sup>27</sup> it is possible to conceptualise "violent profits" as serving a restorative purpose. "Violent profits" are calculated with reference to the sum that the pursuer could have raised through the use of the thing had they not been dispossessed of it;<sup>28</sup> this, it is thought, is clearly consistent with the theory that the law of delict serves to afford reparation to the pursuer rather than to punish the defender.

The Scots law of delict, then, can be said to be principally concerned with three broad headings of liability: liability based on *damnum iniuria*, liability based on *iniuria*, and liability for wrongful interference with another's proprietary right(s). In addition to this, the law also recognises nominate "delicticles" which must be grouped under a miscellaneous category.<sup>29</sup> Little can be said here on the nature of the remedies available for these disparate wrongs. In respect of the three ordered categories, however, it is clear that the nature of the primary pecuniary remedies payable under each heading differ in substance and cannot—or should not, for reasons of conceptual clarity—be collectively described as "damages". We should, rather, distinguish between at least three types of pecuniary civil remedy within the "intellectual superstructure" of Scots law: "damages" (relevant only where there has been a "loss"),<sup>30</sup> "*solatium*" (relevant where there has been a contumeliously inflicted *iniuria*) and "violent profits" (relevant where there has been an unlawful dispossession).

In addition to these three remedies, however, it has long been recognised that a fourth remedy—ordinarily termed *solatium*—is available in recognition of the "pain and suffering" of the pursuer in relevant actions.<sup>31</sup> The root of this remedy does not lie in the *actio iniuriarum*, but rather in the defunct delict of assythment.<sup>32</sup> That the remedy has come to receive the appellation "*solatium*" is unfortunate, as such has the potential to confound analysis in this area (just as the general classification of all pecuniary remedies as "damages" in Scotland has done). Indeed, the problems generated by the appellation are compounded by the fact that "traditionally... damages are divided between patrimonial loss and *solatium*",

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<sup>27</sup> Descheemaeker, "*Solatium*" 73.

<sup>28</sup> See Stair, *Inst* 1.9.16, 1.9.27; C Anderson, "Spuilzie today" [2008] SLT (News) 257.

<sup>29</sup> Such would include, for instance, the so-called 'economic delicts', breach of confidence, and statutory defamation, amongst others.

<sup>30</sup> The "rules that apply to damages [are engaged] no matter what area of the law triggers the remedy": D Brodie, *Stewart on Reparation* (2021) para 28.001.

<sup>31</sup> See W J Stewart, *How Much for a Leg?* (2010) 6-7.

<sup>32</sup> Descheemaeker, "*Solatium*" 76.

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with “neither term [being] free from controversy”.<sup>33</sup> Though the term “*solatium*” is used here by Stewart, evidently he means that the law of delict generally divides “damages” between those for patrimonial loss and those paid as assythment recognising the “hurt and skaith” inflicted by the delinquent’s wrongdoing.<sup>34</sup> *Solatium* is more properly understood to denote the remedy payable in a case of “affront”, as discussed above (and as Stewart implicitly recognises).<sup>35</sup> Accordingly, it might be thought that, although assythment was ostensibly abolished by 1976 Act, the remedy in fact survived and continues to play a significant role in the modern Scots law of delict, albeit under a misbegotten name. With the legislation which posited the clear and unequivocal rejection of assythment now repealed,<sup>36</sup> it is suggested that Scots lawyers should consider reviving the terminology of “assythment” so as to clearly denote the distinction between the remedy of *solatium* available for an *actio iniuriarum* and the inappropriately named “*solatium*” available to compensate the “pain and suffering” of a pursuer.

### C. CONCLUSION: THE “KEYS TO WISDOM”

While an investigation into the links between the Scots and English law of “damages” might be thought fruitful, anyone who wishes to embark upon such research must be conscious of the fact that Anglo-American jurisprudence knows nothing of the *actio iniuriarum*, assythment or “violent profits”, but that these ideas are foundational in Scots law. Accordingly, it is imperative for scholars to recognise that whatever correlation and overlap can be detected between Scots and English law is likely to be superficial, given the differing underlying “intellectual superstructure” of the two systems. The common law has developed a law of “damages”, while Scotland has, instead, a distinct taxonomy of pecuniary judicial remedies. Before useful comparative work can be conducted, then, the fundamental organisation of the Scottish system must be worked out, with appropriate terminology employed for the purpose of conceptual clarity.

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<sup>33</sup> Stewart, *How Much for a Leg?* 6.

<sup>34</sup> The object of assythment, per Balfour, is “contentatioun of the hurt, damage and skaith sustenit incurrit”: J. Balfour, *Practicks, or a System of the More Ancient Law of Scotland*, (1754) at 516. Balfour’s use of the term ‘damage’, here, demonstrates that the problem discussed in this article is not new.

<sup>35</sup> Stewart, *How Much for a Leg?* 7.

<sup>36</sup> Damages (Scotland) Act 2011, schedule 2.

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To obtain the first “key to wisdom” in understanding the taxonomy of “damages” in Scots private law, one must recognise that the term “damages” ought not to be treated as an umbrella term in this jurisdiction at all. Rather, the word should be used exclusively to refer to the remedy that is available to a pursuer in an action to recover a “loss” suffered by the defender’s wrongful conduct (which includes breaches of *ex voluntate* obligations). The object of an action predicated on *damnum iniuria* is to obtain reparation for “loss”; the remedy, consequently, serves to effect *restitutio in integrum*. The fact that other pecuniary remedies such as *solatium* do not appear to do this does not render the law incoherent, but is rather a feature of the fact that such remedies are not species of “damages” at all. Such is implicitly recognised by authors such as Brodie and Chalmers who both recognise that while “the object of damages is commonly described as being *restitutio in integrum*... whether this principle is really applicable to *solatium* is doubtful”.<sup>37</sup>

Yet clearly distinguishing *solatium* from “damages”, as a class, is not sufficient to bring clarity of understanding to the law in this area: to obtain the first key to wisdom one must also recognise that Scots law has come to recognise two types of *solatium*, one rooted in the assythment, the other in *actio iniuriarum*. That the same word is used to denote two distinct remedies is confusing and unhelpful. Accordingly, it is suggested that the term *solatium* should be reserved for the remedy payable in response to the occurrence of an affront (*actio iniuriarum*), while the term “assythment” should be revived and put to work as the descriptive term for the remedy payable for the “pain and suffering” sustained by a pursuer. This, it is submitted, would make it easier for Scots lawyers to obtain the first “key to wisdom” and recognise that the three remedies identified by Whitty cannot be lumped together under the single heading of “damages”.

With this key obtained, it is submitted that the second key to wisdom is recognition of the fact that other pecuniary judicial remedies such as “violent profits” should also be distinguished from “damages”. Although, historically, it has been thought that the protection of “real rights” such as ownership and possession should be taxonomically regarded as falling primarily within the province of “property law”, there are in fact sound reasons for recognising that actions which serve to protect individual interests in real rights are rooted in the law of obligations. With this in mind, then, the present article has suggested—as a starting point—a fourfold organisation of pecuniary judicial remedies in Scots private law: “damages” (for pecuniary loss arising from *damnum iniuria*); *solatium* (for non-patrimonial

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<sup>37</sup> Chalmers, “Remedies” para 10.19; Brodie, *Stewart on Reparation* para 28.002.

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affront arising from *iniuria*); assythment (for non-patrimonial pain and suffering arising from *damnum iniuria* or *iniuria*); and "violent profits" (for unlawful dispossession). In any case, it is concluded that Scots lawyers should, going forward, avoid the use of the word "damages" as a generic catch-all term.

*Jonathan Brown*  
*University of Strathclyde*