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Essential Elements of the Law of Delict

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Delict is the area of Scots law which deals with legal wrongs. It is sometimes thought to be concerned just with negligence, but the scope of delict is much wider, as will be seen in this and the following two chapters. It is also an area which is still largely dealt with by common law, that is, by cases and courts. This allows a greater degree of flexibility in approach, as what may be defined as a delict can change as society changes. Delicts may be intentional or unintentional (negligence). When one person causes harm to another, there may or may not be liability in delict. The courts are careful to make sure that liability in delict is quite restricted, to make sure that the liability they face if not foreseen is at least foreseeable.

Introduction to the concept of the legal wrong

The Scots law of delict forms part of the law of obligations, along with the law of contract, which together owe their origins to Roman law, as seen in Justinian's Institutes of 533 AD. The English equivalent to delict is tort, but the two legal systems vary in their approach to the problems arising. Scots law takes a general approach which makes it possible to include new delicts as society and circumstances change, whereas English law specifies particular torts, and then faces the problem of having to make new civil wrongs fit the existing categories.

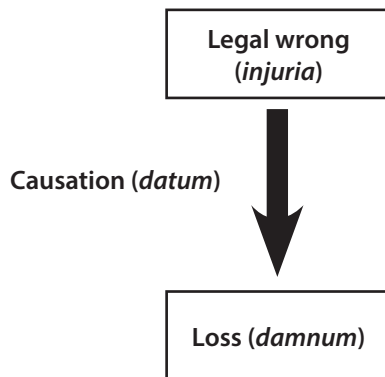
The word delict comes from the Latin '*delictum*' which means 'a legal wrong'. The obligation which the law imposes is to make reparation for the harm done usually by payment of compensation. A delict is a civil wrong, which should not be confused with a crime.

In some circumstances the incident which gives rise to a claim in delict may also constitute a crime. For example, if Adam, while driving his car, knocks Ben down, Ben will have a delict claim against Adam for damages for the injuries he has suffered, but Adam will also be facing prosecution under the Road Traffic legislation for his poor driving. So one incident gives rise to two court appearances for Adam.

It is not always the case that a delict will also be a crime, or that a crime will amount to a delict, and as discussed in Chapter 2 of this book, the standards of proof required in the civil and criminal courts differ. For a finding of liability in a civil delict action, as also with cases in the law of contract and agency, the judge must decide on the *balance of probabilities* that the defender is at fault, whereas in a criminal case the finding of the court that the accused is guilty must be *beyond a reasonable doubt*, which is clearly a harder test.

Like the law of contract, the formal source of most of the law of delict lies in the common law. However, there are certain statutory delicts, some of which will be discussed in Chapter 10.

Not every act that results in harm to a person will give rise to an action in the law of delict. For there to be liability three key elements need to be present.



Key concept: *Damnum injuria datum* – loss (harm) must be caused by a legal wrong

These three essential elements will be discussed further in the rest of this chapter.

Intentional v unintentional delicts (negligence)

Delicts can be intentional or unintentional. Intentional delicts include, among others, assault, trespass, fraud, passing off and harassment. Unintentional delicts, where an individual has been negligent, give rise to the concept of the duty of care. It should be emphasised that people are not always liable for the adverse consequences of accidents and other instances where their negligence results in harm to another person. In order for a defender to be made liable for the harm suffered by the pursuer as a result of the defender's negligence, the law poses a number of questions:

- 1 Was there a duty of care owed by the defender to the pursuer? This is the element of *injuria* referred to in the diagram above.
- 2 Was this duty breached by some act or omission of the defender which fell below the standard of care of a reasonable person?
- 3 Did the pursuer suffer a loss? This is the *damnum* (see the diagram).
- 4 Was it the breach of the defender's duty of care that caused the loss to the pursuer? This is the element referred to as '*datum*' in the diagram.
- 5 Was it reasonably foreseeable that a loss would occur, or was it too remote to contemplate? The issue of remoteness will be discussed in Chapter 9.

Tip

In order for an action for delict to be successful it is necessary for the pursuer to show that the defender is responsible for the wrongful act *and* the damage which has been suffered. The damage must be caused by the wrongful act. If the defender can show that the damage is due to another cause, then the action must fail.

Breach of the duty of care

The case which laid down the general principles of the duty of care was *Donoghue v Stevenson* 1932 S.C. (HL) 31, and in particular the judgment of Lord Atkin. This case, often referred to as 'the snail in the ginger beer,' is regarded as the foundation of modern delict and tort law throughout the common law world. The facts of the case were that Mrs Donoghue and a friend went to a local café, where Mrs D's friend bought her a ginger beer which she poured over ice cream, a concoction known as an ice-cream float.