



Introduction

A Fundamental Structural Language

A number of words are used within the law of obligations to describe the fundamental nature and characteristics of obligations, and in so doing to differentiate between different species of obligations. The meanings which we give to these words are fundamental to our understanding of the law, and disclose much about the legal history of individual legal systems and of the place of the law of obligations within such systems. These words can, collectively, be styled ‘fundamental structural language’: they form the foundations of the law and give it shape.

The meanings of the words which comprise this lexicon are not usually left to the parties to individual obligational relationships to define. There is, of course, beyond the field of voluntary/consensual obligations (contracts and unilateral promises), no opportunity for parties to determine the meaning of the words that describe their obligations, as the nature of non-voluntary/imposed obligations (tort/delict, unjustified enrichment, and – in legal systems where it exists – *negotiorum gestio*, otherwise called benevolent intervention) is determined by the law itself, and not by reference to the parties’ intentions. Even within the realm of voluntary/consensual obligations, many of the fundamental structural words employed by jurists and courts are not used very often (if at all) in specifying the obligations to be imposed on the relevant party or parties. They are more often employed by external observers of such obligations – the courts, academic lawyers, legislators – in order to make sense of obligations in general as well as to analyse specific undertakings, and these external observers often draw upon core or default meanings of the terms employed without reference to party intentions. The purpose of the present work is to explore such core or default meanings, in order to see whether clear, commonly agreed

meanings of the lexicon can be identified both within and across legal systems.

B The Field of Study: Which Legal Systems and Source Material?

The focus of the present study will be on the law and language of a number of English language legal systems. The legal sources to be considered will be academic commentary, case law, and legislation (including some codes), as well as a number of English language model/uniform law provisions, including the Draft Common Frame of Reference (DCFR), the Uniform Commercial Code (UCC), the Restatement (Second) of Contracts, and the Principles of European Tort Law (PETL). The legal systems examined are those of England, Scotland, Canada, Australia, and the Common law states of the United States. Occasionally reference will also be made to the laws of Louisiana and South Africa (both, like Scotland, so-called 'Mixed' legal systems). The meanings of words in other languages are rarely considered, save that the Latin and (sometimes) Greek origins of English words (and hence Roman law and Greek thought) are often considered, and sometimes also French words (given the importance to the development of legal thought of English language translations of the original French text of Pothier's work, as well as English words deriving from old or middle French).

C The Field of Study: Which Fundamental Structural Words?

The lexicon of fundamental structural language in the law of obligations is of arguable content. Some words are not used in all of the legal systems under study, and some are used in quite varying ways, not all of which are arguably structural or taxonomic. Constraints of space preclude a treatment of every possible word which might form part of a fundamental structural lexicon.¹ The words which form the subject of the present study are grouped together in the succeeding chapters of

¹ Other fundamental structural words often used in obligations law, such as 'harm', 'fault', 'loss', and 'damage' and the categories of 'joint', 'several', and 'joint and several' obligations, deserve thorough examination, but their study must await a future opportunity.

this book, most often (though not invariably) because they form pairings of opposites.

The specific words selected for study in the following chapters are ‘obligation’ and ‘liability’, as well as (briefly) ‘debt’ (Chapter 1); ‘conditionality’ and ‘contingency’ (Chapter 2); ‘unilaterality’ and ‘bilaterality’ (Chapter 3); ‘gratuitousness’ and ‘onerousness’ (Chapter 4); ‘mutuality’ and ‘reciprocity’ (Chapter 5); and ‘voluntariness’ and ‘involuntariness’ (as well as ‘consensuality’ and ‘non-consensuality’) (Chapter 6). In total, these constitute a large portion of the language most commonly used to describe the basic features which obligations may have.

D The Search for Clarity in Meaning

It is not the intention of this work to suggest that the words to be studied should have only one meaning. Whilst many of the words *do* have a primary or default meaning, to which courts and legislators can turn when employing them, a number of them have more than one common meaning. Of course, the ascription of multiple meanings to words, especially fundamental structural words, runs the risk of confusion, unless when the word is employed care is taken to explain in which precise sense it is being used. Unfortunately, such care has often not been taken in the use of some of the terms. This common lack of clarity in usage occurs not just within individual legal systems, but across them, and different systems may use the same word in different senses, making borrowings from the law of other systems an exercise fraught with risk: courts or writers in one legal system may not appreciate that what is usually meant by usage of a certain word in another legal system is not what is commonly meant by usage of the word in their own system.

The purpose of the present work is to expose linguistic uncertainties and confusions where they exist, and to seek to identify the various meanings which have been ascribed to the words selected in the various systems chosen for study. In certain cases, suggestions will be made as to abandoning certain usages, or as to preferring some usages over others, in the hope that this might either resolve internal difficulties within specific legal systems or else make supra-national legal conversation easier.

E The Purposes of Deploying Fundamental Structural Language

Why do lawyers employ fundamental structural language in describing the field of the law of obligations? Doing so serves a number of purposes, some general and some more specific or targeted (because some purposes are achieved through the use of specific words). Most basically, of course, the word ‘obligation’ is needed to give existence to the field of law at all, though (as Chapter 1 will show) certain meanings given to this word have given it a field of application well beyond ‘obligations law’ narrowly so called.

General legal purposes served through deployment of the fundamental structural language to be studied include:

1. *Consistency in legal decision-making* – the usage of certain basic terms, with agreed meanings, to describe aspects of the law of obligations ensures that undertakings exhibiting the same characteristics are analysed in the same way by courts.
2. *Predictability of legal outcomes* – this general purpose follows on from, and is a result of, the first purpose. If there is consistency in legal decision-making, then those who need to predict future legal outcomes (including litigants, legal counsel, and commentators) will be able to undertake this task more easily and accurately. Their being able to do so avoids wasted resources and unnecessary litigation and facilitates the structuring of future transactions and legal relationships.
3. *Clarity in conceptualisation and pedagogy* – in order to understand and teach the law, it must be broken up into understandable categories and sub-categories. The fundamental structural language of the law of obligations allows this, as many of the terms employed are used to create taxonomic divisions within the field.
4. *Ensuring legal cohesiveness* – contradictory or unclear usage of language can impede the proper interaction of different parts of the law with each other. Where this occurs it strikes at the very idea of a well-ordered and functioning legal system. Conversely, clear and precise usage of fundamental structural language ensures that the different branches of the law cohere with each other.
5. *Enabling inter-jurisdictional dialogue* – the sharing of meanings of structural language between jurisdictions can assist in inter-jurisdictional dialogue. Caution should be shown with such a goal, however, as uniformity of usage may not always be either

a desirable or an achievable goal. A desire for shared meanings within a fundamental structural lexicon may conflict with the ability of legal systems to allow historical and cultural understandings to be expressed within those legal systems – such understandings may be specific to jurisdictions (e.g. Scots law's concept of the 'unilateral promise') or may be shared within legal families, such as the Common Law and Mixed legal families. In a non-harmonised legal world, we may have to live with certain terminological discrepancies between legal systems. If so, we can at least hope to be clearer about what specific legal systems mean by the language they use.

I have previously written about more specific or targeted purposes which lawyers may be pursuing when deploying specific words² (so, e.g., certain words can be used in order to highlight links between different sorts of obligation sharing a common feature, so that their use serves what can be called a 'structural linkage purpose'). An alternative way of looking at more targeted purposes of the structural language under consideration is to identify the core semantic function of the words in question. Doing so, fundamental structural language can be said to function so as to enable identification of the following:

1. The *fundamental nature* of the legal phenomenon in question (a legal bond): the word 'obligation' does this.³
2. What *consequences* it is that obligations give rise to: the words 'liability' and 'debt' do this.⁴
3. *Whether* any legal tie or consequences have as yet arisen: the words 'conditional' and 'contingent' do this.⁵
4. *How* it is that an obligation has arisen: the words 'voluntary' and 'involuntary'/'imposed' do this,⁶ as do 'unilateral' and 'bilateral'.⁷
5. *Why* an obligation has arisen: the words 'onerous' and 'gratuitous' do this.⁸
6. To what, if anything, an obligation *relates*: the words 'mutual', 'reciprocal', 'synallagmatic', and 'independent' do this.⁹

² M. Hogg, 'Saying What We Mean: Fundamental Structural Language in Contract Law' in L. DiMatteo and M. Hogg (eds) *Comparative Contract Law: British and American Perspectives* (Oxford University Press, 2015), ch. 2.

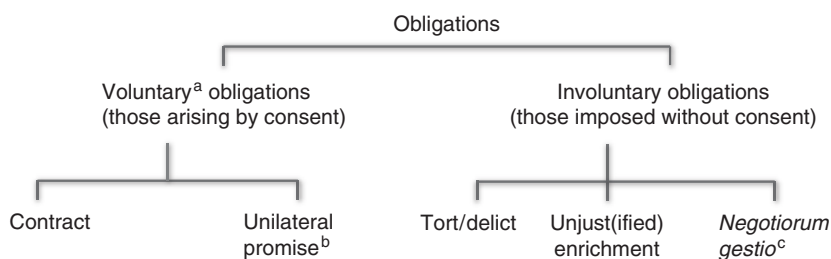
³ See Chapter 1. ⁴ See Chapter 1. ⁵ See Chapter 2. ⁶ See Chapter 6.

⁷ See Chapter 3. ⁸ See Chapter 4. ⁹ See Chapter 5.

As legal systems develop, a need may emerge to identify new features of obligations and new terminology may thus develop to meet the need identified.

F Fundamental Structural Language and Taxonomy

As discussed in the previous section, one basic purpose served by the adoption and use of fundamental structural language is in designing legal taxonomies. Various taxonomies of obligations have been proposed over time. One possible taxonomy would posit the subdivision of legally recognised¹⁰ obligations in the following diagram:



^a Or consensual (and hence non-consensual).

^b Where distinguished as a species of voluntary obligation separate from contract (this is not the case in most systems).

^c Not recognised in all systems.

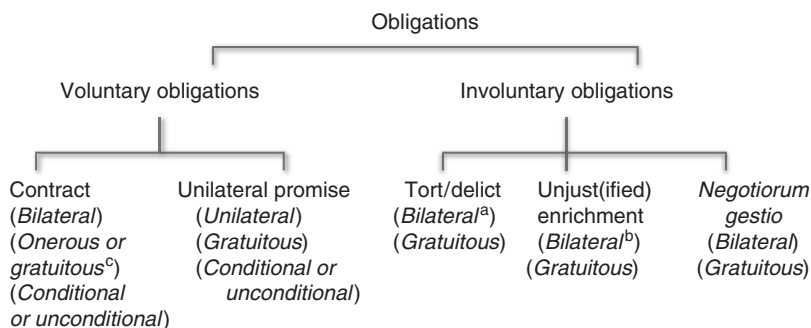
On this scheme, the primary classificatory idea is the presence or absence of the consent of the party bound to being so bound.

It is possible to superimpose on to this taxonomy the further characteristics of whether (i) the source of obligation is the conduct of one party alone, or whether more than one party is involved in the creation of the obligation – the language of ‘unilateral/bilateral’ may be employed here; (ii) whether the obligation imposes duties on only one party, or on both/all parties – the language of ‘onerous/gratuitous’ may be employed here; and (iii) whether the obligation, when first arising, is either conditional or unconditional.

¹⁰ And hence excluding a higher-level distinction that might be drawn between natural and legal/civil obligations, the former not being fully (if at all) legally enforceable and the latter being fully recognized at law.

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If this is done, then the taxonomy in the above diagram may be expanded upon:



- ^a Tortious/delictual obligations are bilateral in the sense posited because it requires both a tortfeasor/wrongdoer and a victim before the duty to make reparation can arise.
- ^b The duty to restore an unjustifiably acquired enrichment arises only where there is one party who has been enriched and another who has suffered a corresponding loss (or at least whose rights have been interfered with).
- ^c Contracts under seal/deed in Common law systems are gratuitous in this sense; in systems not requiring consideration for contract formation, gratuitous contracts may be formed without such formality.

As the discussion in later chapters will show, there is no universally accepted meaning of the terms ‘unilateral/bilateral’ and ‘gratuitous/onerous’, and in many jurisdictions the latter pairing is not even used in a taxonomic way. Moreover, there is an alternative tradition of using the term ‘voluntary’ not to mean assumed by the will of a party but to mean ‘undertaken for no consideration/without obligation’ – if it is so used, then its taxonomic function becomes quite different.

The simple point, which will be made in much fuller detail in later chapters, is that vastly differing taxonomies are constructed depending on the meaning given to fundamental structural language. The above diagram is far from uncontroversial, and it omits some terminology that might conceivably be used to create additional taxonomic divisions: so, for instance, in his 1818 *Treatise on Obligations and Contracts*, Henry Colebrooke adopts a lexicon which also includes identification of ‘perfect’ and ‘imperfect’ classes of obligation;¹¹ ‘mixt’ (mixed)

¹¹ Colebrooke conceives of an imperfect obligation as being obligations which appeal only to the conscience, whereas perfect ones give a right to compel performance to the party to whom they are owed: *Treatise*, para 9.

obligations;¹² obligations ‘to give’ or ‘to do’;¹³ obligations relating to ‘uncertain’ or ‘certain’ things;¹⁴ ‘alternative’ or ‘single’ obligations;¹⁵ and ‘joint’, ‘several’, or ‘joint and several’ obligations.¹⁶ Not all such terms have continued to furnish (if some of them ever did) commonly used distinctions, and to the extent that some are worthy of further study (the ‘joint’/‘several’/‘joint and several’ distinction continues to be an important one), such study must await another occasion.

G Objections to the Search for Default or Core Meanings of Fundamental Structural Language

As later chapters in this work will show, judgments in which courts attempt to decipher the meaning intended by the usage of fundamental structural language often disclose a contractual or legislative context to the usage of such words. An immediate objection to examining either legislative or contractual examples of such terminological usage is that every instance encountered will necessarily be of terms used within a specific context to achieve a specific purpose. That is undeniably so. That being the case, why bother with such an examination: if the meaning ascribed to words in specific statutes or contracts is entirely context specific, then surely we can learn nothing about fundamental structural meanings of such terms from such usage? As one English judge remarked of submissions made before him as to the meaning of the term ‘liabilities’ in a piece of legislation,

the word does not have a single, fixed meaning and [...] the precise meaning will depend upon context. In those circumstances other legal contexts are unlikely to be of much assistance.¹⁷

One objection to the study undertaken in this work might therefore be that words *always* have a contextual meaning, and the search for any ‘basic’ understanding, even of core terms, will be a fruitless enterprise.

By way of an initial response to this objection, two things can be said. First, as the discussion in the succeeding chapters to this book will

¹² These being obligations which are both natural and civil in nature: Colebrooke, *ibid.* The plethora of different ways in which the perfect/imperfect classes have been defined has been commented on: see G. Rainbolt, ‘Perfect and Imperfect Obligations’ (2000) 98 *Philosophical Studies* 233–56 (Rainbolt identifies eight different meanings).

¹³ Para 11. ¹⁴ Para 12. ¹⁵ Para 13. ¹⁶ Para 14.

¹⁷ Richards J in *R v. Sec of State for the Environment, ex parte East Riding of Yorkshire Council* [1999] All ER (D) 890.

demonstrate, in many cases where courts have interpreted fundamental structural terms in specific legislation or contracts, they have drawn upon a belief that there *are* ‘core’, ‘default’, or ‘basic’ meaning of the terms. Many judges have a sense that words like ‘obligation’ and ‘liability’ are so basic to the law of obligations (and indeed to other fields of law) that there is, or ought to be, a shared understanding as to their fundamental meaning (or meanings, plural), shared understandings upon which the exercise of interpreting the specific usage of the words can be built. What will become clear, however, is that there appears to be some judicial discrepancy in the understanding of such ‘core’ meanings of the terms. It serves the purpose of clarifying the law to expose these differences in views, especially if the differing core understandings are being used (rightly or wrongly, depending on one’s view of the interpretative exercise) as starting points from which to proceed to contextualised meanings.

Second, an examination of this sort may (and will) show that legislators make use of fundamental structural language in the legislation they adopt. One cannot ignore such legislative practice, or simply assume that it is misguided. There is ample cross-jurisdictional evidence that those involved at the heart of legislative drafting believe that resting statutory provisions upon a foundation of fundamental structural language is a sensible course of action. However, it is reasonable to observe from such legislative practice that legislators often fail to provide definitions for this language, this omission creating problems when judges subsequently demonstrate differences of opinion as to the meaning to be ascribed to such language. A plea is made in this work for more careful legislative consideration of whether there should be provision of definitions of fundamental structural language in legislation (codes commendably tend to have such definitions), as well as for a greater awareness by the courts that there is a judicial divergence in understanding as to the meaning of such core terms.

H The Continuing Desirability of Default or Core Meanings of Fundamental Structural Language

It was suggested earlier that because the language employed within fundamental structural lexicons is predominantly used by parties external to obligational relationships – courts, legislators, and academic commentators – recourse to standardised, default meanings for such language is appropriate. A judge describing a specific obligation as

‘unilateral’ in nature may likely be doing so not because the party bound to the obligation used such a descriptive term in the constitutive act founding the obligation, but rather because that term is one used by lawyers generally to designate a specific type of obligation having a certain characteristic from which certain consequences may flow. The same could be said of other words to be examined in this work, such as ‘gratuitous’, ‘voluntary’, and ‘reciprocal’. This is not to say that the individual context in which the obligation exists has no part to play in deciphering the meaning intended through the use of a fundamental structural word; as will be seen in, for instance, the study of the words ‘conditional’ and ‘contingent’, the context of usage may well be crucial in ascribing the proper meaning to descriptions of an obligation. But that does not detract from the value of having a default position from which to begin. The value of so doing is clearly reflected in legislative and codal provisions which, in employing such language in giving shape to obligations law, set out a specific meaning of the words employed.

These points are made in order to argue that a difference needs to be drawn between the legitimate approach to identifying the meaning of fundamental structural language and the approach which is taken in some legal systems, such as England, to construing the language used by parties within contracts. A distinct trend has emerged in relation to the latter exercise of moving away from ordinary or default meanings of the language used by parties in specifying their contractual obligations¹⁸ towards identifying what might reasonably be taken to be the meaning intended by the parties themselves.¹⁹ This newer approach to the interpretation of contracts is mistrustful of the utility of shared, default meanings of words. But without shared, default understandings of the fundamental structural language of the law of obligations, any attempt to create taxonomies of obligations would be impossible: if judge A understood the nature of obligations described as ‘mutual’ to mean one thing, judge B understood them to mean another, and judge C to mean something else, the point in employing such a fundamental description would be entirely destroyed. It is therefore important to understand why, whatever the merits of the new approach to the interpretation of contract terms, the search for the meaning of fundamental structural language within the law of obligations must be undertaken

¹⁸ The older approach may be seen in *Charter Reinsurance Co v. Fagan* [1997] AC 313.

¹⁹ See *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896. But a return to a more conservative approach is emerging: see *Arnold v. Britton* [2015] UKSC 36.