

Contractual and non-contractual obligations in English law : systematic analysis of the English Law of obligations in the comparative context of the Netherlands Civil Code = Contractuele en niet-contractuele verbintenissen in het Engels recht : systematische analyse van het Engelse verbintenissenrecht in het rechtsvergelijkend perspectief van het Nederlands Burgerlijk Wetboek

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Stellingen

1 It might at first sight be thought that the notion of a 'duty' is simply a correlative of a 'right'. However in English law this would be a most dangerous assumption because there are many situations where one person may be under a duty to another person but breach of that duty will not necessarily give rise to a right to a legal action.

2 The adoption of the categories of 'contract' and 'tort' after the abolition of the forms of action in nineteenth century English law has taken the Common law some way towards a law of obligations in the Civilian sense of the term. However the notion of 'tort' still lacks a unifying factor at the level of *obligatio* because its functions remain too diversified.

3 The English law of contract is based on the idea of promise rather than agreement (*conventio*). And this is one reason why the common law (as opposed to equity) has never developed a general doctrine of error. Mistake has instead developed largely around either the institution of the legal remedy (rescission, rectification etc.) or the scope and contents of the promise itself (offer and acceptance, implied terms etc.).

4 In English law, abuse of rights and unjust enrichment are not as yet capable of motivating in themselves a legal remedy. However they are principles which often find expression through existing legal remedies and legal duties. Much the same could be said about a notion such as *bona fides* in contract.

5 When set in the development of the law of civil procedure and combined with the traditional separation of questions of fact and questions of law, the autonomy of the parties and equality in litigation ultimately present the framework for the application of written and unwritten rules of law.

6 Er is niets tegen een goede preferentie (anders: H.C.F. Schoordijk, *Tracing, constructive trust, ongegronde verrijking, zaaksvervanging*, college Universiteit van Amsterdam 15 november 1991, Deventer 1991, p.19).

7 It is not a matter of course that Dutch should be the official language of legal education at Netherlands Universities.

8 Een beroep door de verzekeraar op een beding in polisvoorwaarden inhoudende 'geen premie, geen dekking' brengt de verzekeringnemer in een uiterst nadelige positie. Een dergelijk beding is vermoedelijk onredelijk bezwarend (Vgl. *Tijdschrift voor Consumentenrecht* 1988, p.123 en *Het Verzekeringsarchief* Deel 67-1990-3, p.246-247).

9 Ondanks de verbetering van de bescherming van de consument in de Wet op het Consumentenkrediet (Staatsblad 1990, 395) geldt ook voor Nederland hetgeen Reifner over het nieuwe Duitse consumentenkrediet heeft gesteld: *Das Zentrum des Verbraucherschutzes im Kreditrecht liegt jedoch nach wie vor im Zivilrecht* (U. Reifner, *Handbuch des Kreditrechts*, München 1991, p.31). Het verdient daarom aanbeveling de regels met betrekking tot het consumentenkrediet zoveel mogelijk in het BW op te nemen.

10 The Great Ice Cream War (a trade dispute on U.S. ice-cream quotas, cf. J. Bovard, *The Wall Street Journal* September 6, 1989) reveals the limits of international trade law when dealing with the abolition of trade-distorting agricultural subsidies. Furthermore it shows that government bureaucrats do not fear to boldly go where no man has gone before.

Stellingen

1 The English law of obligations, unlike the Civilian systems, still uses the notion of a legal action (*actio*) as an active institution functioning alongside the other two fundamental institutions of legal subject (*persona*) and legal object (*res*).

2 With regard to moveable property, English law does not have the institution of an *actio in rem* as such. Instead it grants a number of *in personam* remedies to protect possessory 'rights' and this means that there is no clear dichotomy in the English law of actions between personal and real remedies with the result that there is no systematic dichotomy between property and obligations.

3 The English Common law does not yet recognise a distinction between *ius publicum* and *ius privatum*. However at the level of the law of actions the distinction is often to be recognised and this does have important substantive implications in that it forces lawyers into distinguishing, as far as is possible, between public and private *interests*.

4 English law does not think in terms of the subjective right (*le droit subjectif*). The term right is a useful rhetorical device, especially in attempting to establish liability where there is no fault or damage, but it does not exist as a generalised means of envisaging legal relations and legal entitlements.

5 English law has never developed the conceptual (and epistemological) notion of the *vinculum iuris*. This will always act as something of an obstacle, at the level of *scientia iuris*, to a *rapprochement* between the English and the Continental (French and Netherlands) law of obligations.

6 The Common law has never reached an axiomatic stage of legal science; instead it remains rooted in an inductive stage - indeed on occasions it can be almost descriptive in its approach. It is this epistemological factor which lies at the heart of the so-called 'inner relationship' between English and Classical Roman law.

7 The criteria for the admission of the development risk defence in product liability cases should be severe. The defence that a producer has complied with regulations should only be granted if the regulations were imperative, leaving the producer no other choice than to manufacture the product as it has been manufactured. Moreover, when deciding whether the state of scientific and technical knowledge was not such as to enable the defect to be discovered, the producer has to prove not only that he was unable to discover the defect according to general accepted standards for the type of product the producer manufactured, but also that he has taken into account that the accepted standards could be outdated or unsuited for his particular line of manufacture (see J.A. Jolowicz, *Product liability in the EEC*, in: *Comparative and private international law*, Berlin

1990, p.388).

8 The (new) Netherlands Civil Code attempts to provide a clear and logical system of coherently arranged rules, in the hope of ensuring certainty and predictability of the law. It reflects the Netherlands (legal) culture. The pursuit of codification of European Civil Law should take account of these objectives.

9 In the codified systems, a separate codification of consumer law, such as proposed by the French Commission Calais-Auloy, is undesirable from a systematic point of view. Consumer protection is at the heart of private law. In English law, however, separate codification of consumer law is arguably better given that the tradition of English contract law is one geared more towards the *commerçant* than to the consumer.

10 Het is niet vanzelfsprekend dat Engels de voertaal in het Nederlands juridisch onderwijs zou moeten zijn.