FORT HARE LECTURES

NATIVE LAW : DELICTS

C3.23 - C3.54
An actionable wrong in Native law may be defined as any act on the part of one person which violates or results in harm or injury to another person that the person aggrieved is entitled to seek and obtain redress from the person whose act is responsible for the administration of justice in the community.

The primary object of every legal system, whether it be that of a highly differentiated society such as the modern nation-state or that of a pre-literate community such as a primitive African tribe, is to protect the rights of members of the community, considered either as individuals or as groups, and to impose duties upon those to whom the legal system applies. If the rights of a member of the community are interfered with or otherwise infringed, a wrong is thereby inflicted upon the member concerned; such a wrong usually results in some harm or injury being suffered by the person aggrieved. In such a case, every developed legal system provides the individual affected with a remedy by means of which he can obtain redress if his case warrants any redress.

Theoretically, similarly if a member of the community fails to carry out a duty imposed upon him under the legal system, his failure to fulfill his obligation may result in an injury being inflicted upon another member of the community, thus entitling the latter to seek and obtain redress for the harm suffered by him.

1. The expression "developed legal system" is used advisedly to distinguish between those primitive legal systems in which the injured person is expected to defend his rights by his own personal efforts and those developed legal systems in which the individual is allowed to take the law into his own hands, except in cases of action actually or arguably.
Every right and duties are correlative. Every right exercised by one member of the community imposes a corresponding duty upon another member of the community; every duty imposed upon one member of the society signifies the existence of someone to whom that duty is owed and in whom is vested a right relative to that duty. The legal system of a society may thus be regarded as a network of rights and duties ordering or governing the relations between members of the society, providing remedies for the adjustment of disturbed relations, for the recognition and protection of rights, and for the redress of wrongs.

Although an actionable wrong is an act which infringes the rights of another, it must not be supposed that the Doric legal system recognizes and protects every conceivable right or undertakes to provide a remedy for every conceivable infringement of the rights of another. Unlike other legal systems, we shall find that only certain rights are accorded protection under the law. The nature of these rights depends naturally upon the legal system with which one is concerned. Different legal systems accord protection to different categories of rights. Similarly, as far as wrongs or injuries are concerned, it is not every wrongful act that is regarded as entitling the person aggrieved to set in motion the legal process of the society. What those wrongs are will depend upon the particular legal system under consideration. Some injuries are actionable while others are not. In each society, the legal system must be examined in order to
to discover what rights are protected and which are not, or what wrongs give rise to legal remedies and which do not. A knowledge of what the legal position is under one legal system does not necessarily inform us as to what the legal position will be under another legal system. It is this lack of coincidence between different legal systems that makes it impossible, difficult if not impossible for the student of jurisprudence to arrive at universal principles of law legal theory applicable to all legal systems. In other words every legal system, more accurately, every legal system being the product of a particular set of historical and other conditions and an expression of the peculiar genius of a particular society is in some respects unique.

Perhaps the chief interest of the student of comparative law lies in bringing out the resemblances and the differences in the principles underlying the various aspects of the legal systems to which his attention is directed. Thus, in a country like the Union of South Africa in which peoples with different cultural backgrounds preoccupy differing legal systems live in close juxtaposition, the study of comparative jurisprudence is more than a matter of mere academic interest. It is one of vital practical importance, giving rise to practical problems in the administration of justice among the different sections of the population, especially the African population.
governments have found it imperative as a matter of public policy to accord recognition to the legal systems of the African tribes subject to their authority and to make provision for the application of native law in disputes between Africans. As far as the Union as a whole is concerned, the policy of recognizing and applying native law in disputes between Africans in matters of customs followed by African Africans has been given effect to since the passage of the Native Administration Act 28 of 1927, as amended from time to time. Under that law, side by side with the ordinary court system of the country in which European law is applied, there has been established a special court system open to Africans only, ranging from Court of Chief and Headman, through Court of Native Commissioner to Native Appeal Courts. Where disputes between Africans involve matters of customs followed by African law, these courts are empowered, within certain well defined limits, to apply Native law and Custom. Thus although the recognition and application of native law is subject to limitations based upon considerations of public policy or natural justice or to such statutory limitations as may be imposed by the Legislature, the native legal system continues to be applied to a large section of the African population.

Admittedly with the more rapid industrialization and the consequent urbanization and redistribution of the African peoples with the spread of western education and standards of living, it is becoming more and more

1. For a history of the recognition and application of native laws in SA.
3. For recognition of native law —
difficult to apply Native law in its original form and to
avoid the introduction of concepts derived from European
law in the settlement of disputes between African Africans.
The conflicts between European law and Native law
are becoming more and more acute as the peculiar
conditions or circumstances in which the African legal
system was developed tend to disappear.

But the time is not yet when it can with full
justification be said that justice, that natural
justice, demand the application of European law,
without modification, to all sections of the population,
Africans included. If the system of Native law
is going to continue to be applied in settling disputes
between among people who constitute such a
considerable proportion of our population, it is
imperative that the principles of this system
should be studied and expanded for the guidance
not only of legal practitioners but also of the general
public.

As already indicated the recognition and application
of Native law and Custom has a fairly long history in Southern
Africa. Not only has Native law been applied from in
some Southern Africa for centuries, but records have been
kept of the decisions of the Court of Appeal in Native
law. Thus in the Transkei, from the records
of the decisions of the Native High Court, go back
1874; in Natal the records of the Native High

1. For conflict between European & Native Laws
2. For "Studies in Native Law" see Lewin J. cit.
Courts which contain many references to Native law go back to 1875; in the Fransvald Natives land there are affected recognition and applied since 1885. Bodies in the reports of the Supreme Court established to deal primarily with European law are to be found not a few important decisions bearing upon various aspects of Native law. For the Union as a whole, the records of the decisions of the Native Appeals Court established under Act 35 of 1927 have been kept since 1929. In addition, to this various commissions appointed by both the governments to investigate and report upon Native affairs are valuable mine information on Native laws and customs.

It is clear, therefore, that there is in existence in South Africa a respectable body of authoritative documentary material in which a study of the principles of Native laws and their development under the impact of western civilization and the influence of European legal conceptions might be based. Just as the principles of Roman-Dutch law which is the common law of South Africa have with the passage of time become clearer and better defined as the result of interpretation by the various divisions of the Supreme Court of South Africa and the contributions of students of this system of law, so it may be supposed that the development of Native laws may be advanced by systematic study and exposition. It may be that it will be a long time before South African law
Someone who will do for Native law what Plowden
would for South African law, namely, to produce a treatise
intended as a compendium of Native law, in a
more or less readable form, embodying the principle
of Native law, eliminated, corrected and brought up
to date by reference to the changes which have been
brought about by statute law and the decisions
which have applied of various South African courts applying
Native laws, hence a more significant contribution than
Native laws, been able to the study of various aspects of Native law.

It goes without saying that in the application
of Native laws the courts established by European
governments have not infrequently imported into
Native laws certain principles and concepts based
upon or derived from the European legal system
which is applied to the country as a whole. It is
the task of the student of any particular aspect
of Native law to disentangle the elements of
European law and the elements of Native law in
order to bring to light the principles of original
Native laws and to show if to can how
these developments have taken place in the light
of statutory enactment or judicial decisions
in order to bring Native laws into line with
the changed and changing conditions of modern
European life.

The object of this study is to make an attempt to set
forth the rules and principles of one aspect of Native law
- Custom, namely the laws relating to delict. It does not
attempt to indicate, if any, the principles of original Native
Laws have been addressed and in what way the Native law of Injuries has been influenced by European law. What conflict have arisen in the course of its application and how, if at all, such conflicts have been or the being resolved.