Convergence and Divergence in the Use of Fundamental Terms and Concepts in Obligations Law

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This paper represents ongoing research towards a book which I am currently writing to be called *Obligations: Law and Language*. The purpose of the intended book, and the subject of this paper, is to examine ‘fundamental structural language’ in the law of obligations, by which I mean certain terms which are basic to the law of obligations and which are used to describe the nature of obligations and certain features which connect them or distinguish them from each other. The premise of the project is that there is a lack of clarity about the use of some of these terms. They are deployed in judgments (and sometimes legislation) either without definition (because it is assumed that the reader understands what is meant by them) or on the basis of a presumed shared understanding which may be inappropriate, yet often either conceptions of the terms are not in fact shared or any conceptions are hazy and imprecise. The intention is not to suggest that the terms considered should have only one shared meaning (for more than one may be appropriate or may be settled practice), but I hope to identify – in the light of the purposes for which we need such language – what established meanings for the terms exist, and to encourage greater clarity and precision in usage of such language.

Some of the terms which I intend to discuss in the book include (i) obligation, (ii) liability, (iii) debt (debtor), (iv) voluntary, (v) involuntary, (vi) unilateral, (vii) bilateral, (viii) gratuitous, (ix) onerous, (x) conditional, and (xi) unconditional. A full discussion of all of these will not be possible in the paper, so a small number of the terms will be used as a focus for discussion.

It is suggested that the use of such fundamental structural language help to fulfill a number of purposes, some general, some targeted:

**General purposes**

General purposes in having shared understandings of fundamental structural language in obligations are those which are promoted by each of the terms generally. These general purposes are the facilitation of:

- Consistency in legal decision-making;
- Predictability of legal outcomes;
- Clarity in communication of meaning, and hence of understanding of what is meant; and
- Legal cohesiveness.

**Targeted purposes**

Some of these purposes are served by specific terms in this list (i.e. the terms discussed do not serve all of the purposes below, only some of them):

- to describe the binding nature of obligations, and to identify to what it is exactly that they give rise – what might be called a normative purpose.
- to describe accurately the entire field of obligations law, ie everything which falls to be classed an obligation – what might be called a structural inclusion purpose.
- to distinguish obligations from things which are not obligations – what might be called a structural exclusion purpose. This is essentially the obverse of purpose number 2, and language which identifies that which falls within the class of obligations should also exclude that which does not. This purpose is largely fulfilled by language targeting specific obligations.
- to identify aspects of one species of obligational liability which have a commonality with other sorts of obligations – what might be called a structural linkage purpose.
- to distinguish classes of obligations (e.g. types of contract) which we wish, for whatever reason, to treat in different ways – what might be called an internal classificatory purpose;
- to allow parties to encompass their intentions in a form which allows them to be achieved – what might be called a lawful effects purpose;
- to facilitate inter-jurisdictional dialogue on obligations law – what might be called a supranational obligational conversation purpose.

But this last one may not be possible. Moreover, arguably it might conflict with a further purpose:

- to allow fundamental legal cultural understandings to be expressed in the legal system – such understandings may be specific to jurisdictions (e.g. Scots usage of ‘promise’), or to legal families (e.g. civilian, common law, mixed).

So, arguably an unswerving pursuit of the penultimate targeted purpose would conflict with the final one; we may have to live with definitional differences across jurisdictions. If that is so, at least we can be clearer about what different jurisdictions mean by the language they use.

At this stage in my research, I have had the opportunity of researching only some of the terms identified; these will be the focus of my paper. The discussion of these terms will take account of existing national legal definitions adopted in Common law systems (and one Mixed legal system, that of Scotland), as well as of definitions used in supranational instruments and Restatements such as the Restatement (Second) Contracts and the DCFR.