Chapter 1

The Place of Grotius in European Private Law

It has long been recognised that the writings of Hugo Grotius represent a turning point in the history of European private law. A pioneer of a natural law interpretation of the law of obligations, it is not uncommon to find terms like ‘watershed’ describing his most influential work, *De Jure Belli ac Pacis*. The literature on the history of delict in Europe is vast, but invariably Grotius features in a prominent position, separating medieval exegesis from the theoretical inquiries of early modern scholars. Before Grotius stood the imposing commentaries of the medieval commentators, after Grotius the lucid treatises of Pufendorf, Woolf and their natural law brethren. Within delict in particular, Grotius has been credited with introducing the first general formulation of liability for wrongdoing. At heart this is a statement of delictual principle: that the blameworthy infliction of loss must be restored. The distillation of all of delict down to just three ideas—fault, loss and remedy—is a remarkable departure from the convoluted scholarship of earlier centuries.

Grotius’ influence within delict can be felt in many modern regimes. A direct link can be drawn between his *De Jure Belli ac Pacis* and Article 1382 of the *Code civil des Français* through Jean Domat (1625–1696) and the

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3 Grotius, *De Jure Belli ac Pacis* (hereafter ‘DJBAP’), 2.17.1.
eighteenth-century jurist Robert Pothier (1699–1772).4 As will be seen in due course, Grotius’ formulation of delict rests on the enumeration of specific rights and a single notion of blameworthiness that applies across the full spectrum of wrongdoing. Whenever one of the specific rights is infringed through blameworthy conduct, an obligation to repair the loss inflicted is imposed. Pothier takes this generalised form of delict a step further, removing even the need for a specific right to be infringed.5 This was carried forward into the French Code, with the key term ‘dommage’ left undefined.6 Grotius’ treatment therefore represents an important first step towards the remarkably general French formulation of delict. A less direct though nevertheless cogent link has been drawn between Grotius and later German law, reliant on the influence of successive natural lawyers.7

In recent decades the nature of Grotius’ influence has been re-examined. Rather than his own personal genius, the prevailing view is that the colossal injection of new ideas that his works gave private law scholarship had its origins in Aristotelianism, as constructed by Thomist theologians in the second half of the sixteenth century.8 The authors who will be referred to as the Thomists in this work are known in the literature by many names, such as the neo-scholastics, early scholastics and the School of Salamanca. But the name Thomist reflects their unique approach to legal questions. They were theologians who wrote not on matters of law directly but on the legal dimensions of the theology and ethics of St Thomas Aquinas. Grotius was not alone in being affected by this peculiar source for legal innovation. Many authors of the so-called ‘northern natural law school’ were similarly influenced by the Thomist approach to law.9 But Grotius, as the first and most influential of their

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5 Robert J. Pothier, Traité des obligations, selon les règles tant du for de la conscience, que de for extérieur (Paris: Chez Debure, 1768), para. 116: ‘On appelle délît, le fait par lequel une personne, par dol ou malignité, cause du dommage ou quelque tort à quelqu’un’.
6 The assumption that Pothier’s formulation of delict influenced Article 1382 is often made but rarely analysed. Putting aside the near-identical content, it is easy to see Pothier’s treatise being used in the drafting stages of the codification process, even if the final text omits any references to its intellectual origins. However, there still appears to be room for doubt: Eric Descheemaeker, The Division of Wrongs: A Historical Comparative Study (Oxford: Oxford University Press, 2009), 118ff.