THE DOCTRINE OF ABUSE OF RIGHTS: Perspective from a Mixed Jurisdiction

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Abstract

The doctrine of abuse of rights, found in various guises in Civil Law jurisdictions, refers to the concept that the malicious or antisocial exercise of otherwise legitimate rights can give rise to civil liability. The assumption often made by comparative lawyers is that this doctrine can be looked to as an indicium of Civil Law/Common Law difference, in that it is generally found in Civil Law systems and modern civil codes, but is absent from Common Law systems. This article examines the approach to the doctrine in Scotland, a mixed jurisdiction on the edge of Europe, and, in conclusion, reflects upon whether this apparently straightforward distinction may be sustained.

1. Scots lawyers a-whoring after strange gods

‘Alas . . . we in Scotland have gone a-whoring after some very strange gods.’ This colourful assertion was made by one of Scotland’s most distinguished twentieth-century jurists and comparative lawyers, Sir Thomas Smith, in his inaugural lecture at the University of Edinburgh in 1958. Smith was one of the key figures in the rediscovery of the distinctiveness of Scots law as a mixed legal system, and he devoted much of his writing to uncovering its Civilian elements. Smith’s evangelical vision (and graphic turn of phrase) encompassed many areas of private law, but the profanity instanced here was the denial of ‘the principle of aemulatio vicini (or what is popularly but not very happily called ‘abuse of rights’).’ Smith’s assumption was that the place of abuse of rights in Scots law should be acknowledged in order to secure a further element of the Civil Law tradition. Hitherto, Scots law had failed to

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1 Senior Lecturer in Law, University of Edinburgh.

2 The text of the lecture is reproduced in ‘Strange Gods: The Crisis of Scots Law as a Civilian System’, in *Studies Critical and Comparative* (W Green, Edinburgh, 1962) 72 (henceforth ‘Strange Gods’). The biblical allusion is to Deuteronomy 31.16, God’s words to Moses and Joshua - predicting the faithlessness of the children of Israel.

3 ‘Strange Gods’ at 83.
use the ‘spadework’ of the Scots Institutional\textsuperscript{4} writers to build a Civil Code in the early nineteenth century, and thus the principles of the evolved Civil Law had not become ‘fully related and systematised’.\textsuperscript{5} Instead the Scots had succumbed to the ‘pressures and blandishments of English legal doctrine’ and this had been ‘to the detriment of [their] law’.\textsuperscript{6} Comparative law could, however, redress the resultant distortions by taking ‘cross-bearings on her position from other so-called “mixed” systems’.\textsuperscript{7} Thus Smith urged the teachers of the Civil Law in Scottish universities - as the ‘fideicommissaries of the past and fiduciaries for the future’\textsuperscript{8} - that they had a ‘special duty to denounce the strange gods, and to preach a return to purer doctrine’.\textsuperscript{9} The first question raised by this rousing rhetoric is whether in fact a doctrine of abuse of rights belongs within the legal tradition of Scotland as a mixed jurisdiction.

2. Rejection of *aemulatio vicini*: A strange god?

The doctrine of *aemulatio vicini*, bracketed by Smith with abuse of rights, encompasses the general principle that no one should exercise what is otherwise a legitimate right in a way which is solely motivated by the desire to cause annoyance to his or her neighbour. Typically it is found in the context of neighbourhood law: if, for example, one discovers that a neighbour’s house is served by a pipe leading under one’s own garden, one is not entitled to cut off the supply, even in the absence of a servitude right (easement), when there is no legitimate reason for doing so.\textsuperscript{10}

Smith had singled out this particular area of law because of what he saw as the insensitive treatment of *aemulatio vicini* by the courts over the years: Scots law had been gravely compromised by ‘incautious ad hoc references to “common law” solutions’.\textsuperscript{11} In Smith’s account, the difficulties began with the reasoning applied by Lord Watson (a Scottish ‘Law Lord’) in the well-known nineteenth-century House of Lords English case, *Mayor of

\textsuperscript{4} The Institutional writings are the works of jurists such as Stair (1619-1695), Bankton (1685-1760), Erskine (1695-1768), and Bell (1770-1843), so called because they generally follow the model of the Institutes of Justinian and encompass the whole of the civil law. (Other Institutional writers have written on the criminal law also.) Such Institutional writings have the formal status of a source of law in the Scots courts.

\textsuperscript{5} ‘Strange Gods’ at 76.

\textsuperscript{6} ‘Strange Gods’ at 86.

\textsuperscript{7} T B Smith, ‘Scots Law and Roman-Dutch Law’, in *Studies Critical and Comparative* (W Green, Edinburgh, 1962) 46 at 56.

\textsuperscript{8} ‘Strange Gods’ at 88.

\textsuperscript{9} ‘Strange Gods’ at 81.

\textsuperscript{10} The applicability of *aemulatio* to such circumstances was recognised in *More v Boyle* 1967 SLT 38.

\textsuperscript{11} ‘Strange Gods’ at 76.
Bradford v Pickles. The ‘false god’ held up in that case was the principle that, in Lord Watson’s words, ‘no use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious’.

In adopting this principle for English law, their Lordships had been fortified by Lord Watson’s observation that the *aemulatio vicini* doctrine had in effect fallen into desuetude in Scots law:

I am aware that the phrase ‘in aemulationem vicini’ was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to the legal rights of his neighbour . . . The law of Scotland, if it differs in that, is in all other respects the same with the law of England. No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.

And when it comes to depriving a neighbour of an amenity such as water or light or prospect in the absence of a relevant easement, *Mayor of Bradford* remains authoritative in English law. The existence of public law controls curbing antisocial developments means that modern cases are much rarer than during the era of rapid industrialisation and urbanisation, but from time to time English litigants are still reminded that there is no absolute rule of law which prevents landowners from using their land in a way which injures a neighbour. And, as is well known, *Mayor of Bradford* did not end there. The denial of malice as a determining factor was rapidly carried over from the context of landownership to the ‘economic torts’. A year or two later, in the landmark English case of *Allen v Flood* (involving a trades union dispute where one group of workers effectively induced an employer to sack another, smaller group of workers), the unfaaltering Lord Watson could be found declaring that ‘the law of England does not . . . take into account motive as constituting an element of civil wrong . . . the existence of a bad motive, in the case of an act which is not in itself illegal, will not

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12 *Mayor of Bradford v Pickles* [1895] AC 587 (henceforth *Mayor of Bradford*), in which the Bradford Corporation attempted unsuccessfully to prevent a local landowner from digging his land in such a way as to pollute underground water feeding Bradford’s main reservoir. His purpose was ostensibly to excavate for flagstone, but it was alleged that he was doing this as a way to force the Corporation to pay an inflated price for the land.

13 At 598.

14 At 598.


16 See T Weir, *Casebook on Tort*, 10th edn (Sweet and Maxwell, London, 2004) 604: ‘Whatever morality may say, in law one is free to beggar one’s neighbour provided one neither does anything unlawful oneself nor gets anyone else to do anything unlawful in English law.’

17 [1898] AC 1.
convert that act into a civil wrong for which reparation is due'. There then followed a string of further English tort cases involving interference with employment contracts, in which the courts unhesitatingly took up an ‘abstentionist’ stance, steering clear of any kind of regulatory role over unfair trade practices, even where the actions complained of were patently unfair.

In turn, this laissez-faire disregard of malicious motive spilled over into comparable Scots cases. One of the cases noted particularly by Smith was Mackenzie v Iron Trades Association. In that case, the First Division of the Court of Session drew upon the reasoning applied in Allen v Flood to refuse the claim of an unemployed ironworker against the employers’ insurance organisation which had effectively put him on to an employers’ blacklist. There is a series of further, perhaps less well-known, cases in the early years of the twentieth century in which the authority of Allen v Flood is accepted more or less without reservation by the Scots courts in order to dismiss claims without regard to the existence of malice. However, the case which has attracted most comments is Crofter Handwoven Harris Tweed Co v Veitch, a case concerning the delict of conspiracy, again in relation to an industrial dispute. In the House of Lords, the Lord Chancellor, Viscount Simon, asserted without challenge that, as far as interference with trade was concerned, there was no difference between Scots law and the English law of Tort. T B Smith perceived this as a ‘particularly insidious method of subverting Civilian principles by Common law Doctrines’.

None of these early twentieth-century Scots cases made anything of Civilian principles: all relied substantially upon the reasoning of Allen v Flood and the cases deriving from it. Allen v Flood drew heavily upon the principles stated in Mayor of Bradford, and Mayor of Bradford in turn was premised on Lord Watson’s assurance that aemulatio vicini was all but obsolete in Scotland. If that initial premise was mistaken, then it is for English
lawyers to assess the consequences for English law, but it would seem to follow that *Allen v Flood* was of dubious relevance to Scotland and should not have been considered authoritative in the Scottish courts.

But was Lord Watson wrong in belittling the significance of the *aemulatio vicini* doctrine? The answer to that question is not entirely straightforward.

### 3. *Aemulatio vicini* in the Scots Institutional writers

The Civilian credentials of the doctrine of *aemulatio vicini* are detailed in the seminal article by Professor Scholtens published in the *South African Law Journal* in the same year as Smith’s inaugural lecture quoted in the opening paragraph, 1958. More recently they have been traced from the Scots perspective by David Johnson in his essay ‘Owners and Neighbours: From Rome to Scotland’. Classical Roman law had no coherent doctrine of *aemulatio vicini*, even in the neighbourhood context, and no general doctrine of abuse of rights. What Johnson has shown is that the rules on *aemulatio* were built up incrementally, on the basis of Digest sources, by the Glossators and Post-Glossators and by specific reference to the relevance of malicious motive in, for example, the *cautio damnii infecti* and the *actio aquae pluviae arcendae*. *Aemulatio vicini* was thus received into Scots law as a doctrine not of classical Roman law but of the *ius commune*.

There is ample discussion in the Scots Institutional writers of the role of malice or *aemulatio*. While there is little evidence of an overarching doctrine punishing the abuse of rights in all contexts - as developed later in many Civil Law systems - there is plentiful evidence, as noted below, that malice was considered relevant in the context of neighbour law. Bankton also mentions malice as a determining factor in the context of whether one could be permitted to set up a fair or market close to that of another. Clearly the basic principle was that owners could do what they wished with their own property.

Bankton then drew a distinction between actions which cause direct damage to a neighbour and those which only ‘deprive of a benefit’: ‘There is a great difference between one’s suffering damage, and

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26 See note 4 above.


29 At 176-184.

30 *Institute*, 1.426.16

31 See, e.g., Bankton, *Institute* 3.83, r.31.
his being precluded from a benefit or conveniency which he was formerly using.\textsuperscript{32} While direct damage was generally actionable, actions which merely deprived of a benefit were not, and that expressly included operations which obstruct a neighbour’s light or prospect. Kames also drew a distinction between actions which caused direct harm to neighbours (which were not permitted and to which malice was not particularly relevant - or relevant presumably only as an exacerbating factor) and those which caused consequential damage.\textsuperscript{33} All of the writers, while conceding that consequential damage was normally not actionable, qualified this general rule to the effect that even consequential damage was not to be tolerated in the presence of malice or envy.\textsuperscript{34} In other words - or in the words of the pursuer in \textit{Ralston v Pettigrew}\textsuperscript{35} - ‘the proper place for \textit{aemulatio vicini} is where something has been done, which, though disagreeable, or even prejudicial to a neighbour, yet does not directly encroach upon, or destroy any part of his property’. Erskine gave the specific example of a proprietor draining off excessive amounts from a watercourse simply to throw them away and deprive a neighbour,\textsuperscript{36} and Erskine’s editor added in as an example the erection of high walls to block out a neighbour’s light.\textsuperscript{37} These are both examples which find exact parallels in the French abuse of rights case-law.\textsuperscript{38}

The Scots position was summarised in the nineteenth century by Bell to the effect that ‘no one . . . is entitled . . . to act wantonly, with the mere purpose of producing inconvenience and loss to his neighbour \textit{in aemulationem vicini}’.\textsuperscript{39} and in a later passage, quoted in \textit{Bradford v Pickles}, he noted that whether the harm caused by their actions is direct or consequential, landowners must not act in spite or malice - \textit{in aemulationem vicini}.\textsuperscript{40}

These commentaries demonstrate that \textit{aemulatio vicini} was recognised in Scots law prior to \textit{Mayor of Bradford v Pickles}. However, they give little indication of how it worked. Hume went some way towards defining malice, in terms of ‘malicious and unsocial purpose palpable to the common apprehension’,\textsuperscript{41} but these are all terms which have caused considerable controversy and voluminous discussion in the literature on the Civilian abuse of rights doctrine. In order to understand what malice meant, and the level of intention required

\begin{footnotesize}
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\item \textsuperscript{32} Bankton, \textit{Institute}, 4.45.110.
\item \textsuperscript{33} Kames, \textit{Principles of Equity}, 2nd edn (Kincaid and Bell, Edinburgh, 1767) 58.
\item \textsuperscript{34} Bankton, \textit{Institute}, 2.7.15: ‘A malicious humour is not to be gratified’; see also \textit{Institute}, 4.45.112.
\item \textsuperscript{35} (1768) Mor 12808.
\item \textsuperscript{36} \textit{Institute}, 2.1.2.
\item \textsuperscript{37} \textit{Institute}, 2.1.3. (The editor of later editions was J B Nicholson.)
\item \textsuperscript{38} E.g. the well-known cases of \textit{Badoit c/ André}, \textit{Dalloz Périodique} 1856.2.9 and \textit{Doerr c/ Keller}, \textit{Dalloy Périodique} 1856.2.9.
\item \textsuperscript{39} Bell, \textit{Principles}, § 964.
\item \textsuperscript{40} § 966.
\item \textsuperscript{41} Hume, \textit{Lectures}, vol 3, 208.
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before the landowner was stopped from doing what he chose with his property, the case-law from the same period must be examined.

4. *Aemulatio vicini* in the case-law

It is quite clear looking at the early cases that the phrase ‘*in aemulationem vicini*’ was in fairly frequent use, as a means of establishing a form of private law proportionality in disputes between individuals. The first appearance of the term is commonly attributed to a line of cases concerning fairs or markets in the early seventeenth century.\(^{42}\) But the largest number of references to *aemulatio vicini* is to be found in neighbour law - typically water disputes in the rural setting and disputes over light in the urban setting. The ‘Property’ section of *Morison’s Dictionary*\(^ {43}\) contains a number of cases which invoke this principle, often citing *Ius Commune* writers as authority.\(^ {44}\) In most, *aemulatio vicini* is given passing consideration only and malice is not in issue: for example, a neighbour objects to a particular type of land use, and the defender responds to the effect that an owner may do what he likes with his property except where he acts *in aemulationem vicini*,\(^ {45}\) or the pursuer argues that for the defender to oppose a proposed operation is to act *in aemulationem vicini*. Such cases confirm that the existence of the doctrine was uncontentious, but they do little to assist the understanding of its scope. In the few cases where malice is disputed, there is scarcely any more analysis, although there is suggestion that malice might extend to personal avarice as well as spite towards one’s neighbour.\(^ {46}\)

The indications are, therefore, that the doctrine had not been ‘fully related or systematised’ in the Institutional writers or in the contemporaneous case-law, but that is perhaps not so surprising. Although the doctrine may have existed in the jurisprudence and doctrine of the Civil Law systems of the eighteenth century, one could hardly call it systematised there at that time,\(^ {47}\) and indeed in France it has to this day not been codified. Even in the Civil Law systems where it has now been translated to modern codified

\(^{42}\) H MacKechnie, ‘Delict and Quasi Delict’ in G C H Paton (ed), *Introduction to Scottish Legal History*, vol 20 (Stair Society, Edinburgh, 1958) 265 at 272 (noting Anderson v Blackwood (1629) and Falconer v Glenbervie (1642) Mor 8033, 4146); this line of cases is also noted by Smith in his Short Commentary.

\(^{43}\) A multivolume dictionary of the early decisions of the Scots Court of Session (Supreme Court) from its institution until its reorganisation in 1808.

\(^{44}\) E.g. Fairly v The Earl of Eglinton (1744) Mor 12780; Dewar v Fraser (1767) Mor 12803; Kelso v Boyds (1768) Mor 12807; Ralston v Pettigrew (1768) Mor 12808.

\(^{45}\) E.g. Trotter v Hume (1757) Mor 12798.

\(^{46}\) ‘Where the act is intended solely *in majus emolumentum* or *lucrri faciendi causa* the law will not gratify an avaricious spirit, which desires to make profit to itself at so great an expense as the destruction of the property or interest of a neighbour’ (argued - unsuccessfully - in Gordon v Grant (1765) Mor 7356 - case in fact on muirburn, the practice of periodically burning areas of heather in order to control its growth).

\(^{47}\) Indeed, it has been only a few years since Prof Gambaro called the Italian doctrine a ‘gallery of miseries’.
provisions, these are typically so bland as to be meaningless without reference to case-law.

Indeed, moving forward to the period preceding Mayor of Bradford, the Scots cases indicate only a marginal role for malice, apart from in procedural applications - the malicious use of diligence, wrongful arrestment upon the dependence of a court action, and malicious prosecution - where malice is approached rather differently. While *aemulatio vicini* was pled relatively frequently during that period, such pleadings were seldom successful. One example demonstrating its acceptance in the field of neighbour law is found in *Campbell v Muir*, where the court held that fishing in such a way as to obstruct the fishing of an immediate neighbour could be actionable as *aemulatio vicini*. However, in *Murdoch v Wallace*, for example, in which a neighbour had objected to a proprietor - or his tenant - diverting water from a stream, the existence of the *aemulatio vicini* rule was conceded, but Lord Justice Clerk Moncreiff suggested that as long as a proprietor is carrying out operations on his own land, ‘substantial damage’ to the neighbour must be made out before the law will interfere. Beyond neighbour law, in the areas inhabited by abuse of rights in other jurisdictions, there is little indication of a flourishing doctrine. For example, in *Craig v Millar*, a dispute between a tenant who operated a lodging house and his landlord who set up a rival lodging house next door, the tenant brought an action against the landlord on the grounds that he was acting in violation of the good faith of the contract. Although abuse might have been identified in a Civilian jurisdiction, the Scots court took strongly against recognising any restraint ‘inconsistent with the free exercise of proprietary rights’.

In other words, while Lord Watson’s observations in *Bradford v Pickles* clearly underplayed the significance of the doctrine, one cannot take serious issue with his reference to *aemulatio vicini* in the ‘passage in Mr. Bell’s Principles (sect. 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded’. *Aemulatio vicini*, while not to be discounted, was a marginal doctrine, and the complex balancing of interests required for this private law form of proportionality were highly dependent on context. This is of the very nature of a doctrine addressing abuse of rights. Indeed Bell’s assessment approximates to the observations which the English comparatist Gutteridge was to make of abuse of rights in the Civil Law a decade or two later:

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48 1908 SC 387.

49 Note also the *obiter dicta* by Lord Watson in *Young & Co v Bankier Distillery Co* (1893) 20 R (HL) 76 at 77, indicating the applicability of the doctrine to the issue of whether a lower proprietor on a river is obliged to accept an increased flow of water from an upper proprietor.

50 (1881) 8 R 855.

51 At 861.

52 (1888) 15 R 1005.

53 At 1031.

54 At 598 (emphasis added).
It is considered to be undesirable to specify [the rules] with precision for fear lest they should come to be recognised as embodying a principle of general application. The concept of abuse is thus purposely left vague, and the judges are trusted to apply it only when the circumstances are such as to show that a right is being employed deliberately with a disregard for the interests of other persons.\(^{55}\)

While the status of *aemulatio vicini* remained uncertain for several decades, it is now accepted by Scots lawyers that Lord Watson’s denial of the doctrine was ‘far too widely stated’,\(^{56}\) and this qualification on a landowner’s rights is clearly recognised.\(^{57}\) *Aemulatio vicini* was restored to the textbooks a few years after the Smith inaugural lecture by the 1967 case of *More v Boyle*,\(^{58}\) in which a case based on *aemulatio vicini* was held to be relevant. This is admittedly only a sheriff (local) court case, but the judgment by Sheriff Mcdonald is persuasively reasoned. At the same time, *aemulatio vicini* is at best a marginal doctrine, and in the years since *More v Boyle* there has been no case in which malice was in fact decisive as an independent basis of action in a neighbourhood dispute or indeed in any other context.\(^{59}\)

### 5. A false god for English law?

Implicit in T B Smith’s formulation quoted in the opening paragraph is that the rule in *Mayor of Bradford* is a false god to the Scots but native to the Common Law tradition. At first sight a doctrine of abuse of rights would seem inimical to the Common Law, whose history, in the words of Michael Taggart, has been that ‘of the remedial tail wagging the substantive dog’\(^{60}\) and whose primary focus is remedies rather than the content of rights. Another scholar, writing at around the same time, contrasted Scots law with English law by asserting that ‘English law has never penalised an act in *aemulationem vicini*’, using *Mayor of Bradford* as the sole authority for this statement.\(^{61}\) In fact, the Common Law position is not so clear-cut.

The ‘default’ rule that owners can generally do as they please with their property is after all shared by both Common and Civil Law, and the dicta often taken from *Mayor of Bradford* to this effect find a direct equivalent in Article 544 of the *Code civil*. But that rule cannot be absolute. The concern of neighbourhood law in all jurisdictions is to balance the

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\(^{58}\) 1967 SLT (Sh Ct) 38.

\(^{59}\) See, however, *Canmore Housing Association Ltd v Bruce Bairnsfather* 2004 SLT 673, in which the doctrine, though noted, does not seem to have been fully argued. The court appeared to accept both Lord Watson’s formulation and Whitty’s qualification that it was too widely stated, but the petitioners did not argue malice as an independent basis for granting interdict.

\(^{60}\) Taggart, *Private Property and Abuse of Rights* at 157.

\(^{61}\) MacKechnie, ‘Delict and Quasi Delict’ at 272.

interests of neighbouring proprietors. The issue here is whether the mechanisms used to restrict the ambit of this rule, and the degree to which this is achieved, are in some way distinctive to either Common or Civil Law.

It is interesting to note that Bankton, writing in the mid-eighteenth century in his ‘Observations on the Law Of England’ appended to the books of his Institute, commented on English law to the effect that ‘if an ancient watercourse goes to one’s mill or house for his use, his neighbour cannot divert it, tho’ upon his own ground, from taking the former course; and if he does, action upon the case will lie at the suit of the owner of such mill or house, this being to his damage’. 62

In fact, consideration of classical Roman law played a prominent role in Mayor of Bradford. There was extensive discussion of two earlier English cases on the abstraction of water, Chasemore v Richards63 and Acton v Blundell,64 and in all three cases the same passage from the Digest was discussed, namely the passage attributed to Marcellus to the effect that ‘no action, not even the action for fraud, can be brought against a person who, while digging on his own land, diverts his neighbour’s water supply. And of course the latter ought not to have even the action for fraud, assuming that the other person acted not with the intention of harming his neighbour, but with that of improving his own field.’65 Although this passage clearly indicates that when there is no malice there is no action, the question left unanswered is whether there is an action when the water-diverter does act maliciously. In these earlier cases there was no malice, and so the issue did not come to the fore. In Acton v Blundell, Tindal CJ prefaced discussion of the Digest sources with remarks to the effect that ‘Roman Law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords not small evidence of the soundness of the conclusion at which we have arrived’.66 And in Chasemore v Richards, Lord Wensleydale alluded to the Scots aemulatio vicini doctrine, suggesting not so much that there was a fundamental difference in principle, but rather that the issue was handled differently. English law did not need aemulatio vicini because, in recognising the principle of sic utere tuo ut alienum non laedas, its reasonable user principle in nuisance achieved very much the same purpose.67

In Mayor of Bradford, there are certain dicta suggesting aloofness from Civilian

62 1.695.18. See also 1.696.22 to the effect that the Law of England allows a proprietor to build a mill next door to another thereby diminishing profit, ‘but he cannot divert a running water from his neighbour’s mill, or draw away the stream to stop it, or make too great a quantity of water to run to his mill, by which his neighbour receives damage, so that his mill cannot grind as much as it used to do’.

63 (1859) 7 HLC 349; 11 E R 140.

64 (1843) 12 M & W 324; 152 E R 1223.


66 At 353 (M & W); 1234 (E R).

67 At 388 (HLC); 154 (E R). See on this point Taggart, Private Property and Abuse of Rights in Victorian England, note 25 above, at 54.
authority, but generally speaking, the dicta in these cases suggest not that the Roman law was irrelevant, but rather that with regard to this particular passage, the scope of the malice proviso was too uncertain to be followed. Andrew Lewis has written of the earlier case of Acton v Blundell that, while it shows a definite distancing of Roman from English solutions, it also illustrates ‘the extent to which Roman law furnished a model for the comprehension of the case-law in the early modern period’. Mayor of Bradford illustrates not the absence of Roman law influence in English law, but rather the different forces at work in shaping that influence - and also English law’s relative remoteness from the ius commune tradition which had glossed and developed the Classical Roman law sources into the aemulatio vicini doctrine. (It should also be conceded, however, that in South Africa, where the place of the Roman-Dutch sources is relatively secure in this context, the same passage from the Digest (D 39.3.1.12) has not always been interpreted unanimously as supporting malice as an independent basis of action.)

Thus the decision in Mayor of Bradford may indicate the importance attached to individual autonomy in the social and economic order of late Victorian England, but it is not a straightforward consequence of Common Law/Civil Law difference.

6. Mixed jurisdictions

A further recommendation made by Smith was that, once it was accepted that the denial of aemulatio vicini was a false god, the mixed jurisdictions could advance towards a purer doctrine by learning from each other - a strategy which has certainly proved profitable in other areas. But although the authorities in mixed jurisdictions beyond Scotland tend to support the existence of the doctrine, the uncertainty of its scope and the importance of local conditions mean that it is not immediately apparent how collaborative work on abuse of rights can produce a purer doctrine. While false gods may have been rejected elsewhere, the relatively humble hearth gods found in their place are not likely to inspire.

In Quebec, the doctrine of abuse of rights is secure and anchored in provisions in the new Quebec Civil Code, which makes provision for penalising abuse of rights in Article 7. The doctrine is used as a source to innovate into new areas of law well beyond neighbour law
- for example, it has been used extensively to temper contractual rights in recent case-law.\footnote{See, e.g., R Jukier, ‘Banque Nationale du Canada v Houle: Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law’ (1992) 37 McGill Law Journal 221.}

But it has drawn strength primarily from links to French scholarship and it is therefore too remote a model of development for the other mixed jurisdictions.

In Louisiana, abuse of rights has not been codified, but perhaps because it exists against the background of a codified system, the doctrine is broader in its range than \textit{aemulatio vicini} in modern Scotland. While it is prevalent in the context of ownership rights, there is in principle no barrier to its extension to other areas.\footnote{E.g. \textit{Louisiana Smoked Products, Inc. v. Savoie’s Sausage and Food Products, Inc.}, Supreme Court of Louisiana 696 So.2d 1373 (La. 1997), a case on non-competition clauses for the marketing of smoked alligator sausage (abuse was not recognised).} The concept of malice has been developed in the case-law to encompass four alternative criteria: (1) the right has been exercised for the predominant motive of causing harm; (2) there is no serious or legitimate interest for exercising the right; (3) the exercise of the right is against moral values, good faith, or elementary fairness; and (4) the right is being exercised for a purpose other than that for which it was originally conferred.\footnote{Despite this broad conceptual basis, abuse of rights is a doctrine which is constantly pled and rarely applied. It is as a ‘civilian concept which is applied only in limited circumstances because its application renders unenforceable one’s otherwise judicially protected rights’.\footnote{It is, for example, recognised as a defence against eviction, yet this defence more or less never succeeds.\footnote{In South Africa, where the Roman-Dutch sources remain influential, in the absence of a codified structure, which might call for a more general doctrine as a necessary moderating factor, abuse of rights has struggled to assert itself in contexts beyond neighbour law.\footnote{It was Boberg’s perception that, by and large, ‘the positive law has crystallised the underlying criterion of reasonableness into definite rules’.

In short, while the mixed jurisdictions have been characterised as sharing Common


For a rare example of the application of abuse of rights in a context other than neighbour law, involving abuse of the right of public criticism, see \textit{Deney Reitz v South African Commercial, Catering and Allied Workers’ Union} 1991(2) SA 685.

Law and Civil Law as ‘the basic building blocks of the legal edifice’, a survey of abuse of rights in such jurisdictions demonstrates the margins by which they differ as to the relative weight of modern legal sources, and also how this balance changes over time. The mixed jurisdictions cannot, individually or between them, offer a secure point of reference in this area for the development of Scots law. But for those who are interested in the possibilities of convergence, abuse of rights in these jurisdictions can offer examples of the interaction of sources in a way which is not in fact static, but dynamic.

7. Comparative conclusions

In the major comparative article co-written for the Tulane Law Review by P Catala and T Weir in 1964, Tony Weir wrote of abuse of rights that while ‘at the level of labels the systems are completely opposed . . . the difference lies mainly in the method and the aim must be to identify it’. An overarching doctrine of abuse of rights may be required in Civil Law systems to circumscribe the exercise of rights proclaimed in generous terms. But if, as in the Common Law, rights ‘contain their own qualifications’ within the case-law by which they are defined, then such a doctrine is unnecessary.

The reality is that English law as a rule punishes abuse in very many contexts - sometimes even more zealously than in France. Most English neighbourhood disputes fall under the head of nuisance, for example, where malice is very definitely relevant to the English reasonable user criterion for liability, as it is to the Scots plus quam tolerabile test for balancing the interest of neighbouring proprietors in nuisance cases. Mayor of Bradford may therefore be regarded as a relatively unusual instance where the Common Law fails to deal with the emulous exercise of proprietorship rights in relation to depriving a neighbour of an amenity such as water or a pleasant view.

Even if one looks beyond nuisance, the modern French case-law on abuse of rights contains many cases which would find a similar outcome in the Common Law. In a recent case from the Cour d’appel de Grenoble, for example, one proprietor had built a wall which

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81 ‘Delict and Torts: A Study in Parallel, Part II’ (1964) 38 Tulane Law Review 221 at 237.

82 ‘Delict and Torts’ at 258.

83 E.g. Christie v Davey [1893] 1 Ch 316.


85 For commentary on the absence of a right to a pleasant view see Hunter v Canary Wharf [1997] AC 655.

Slight encroachment into his neighbour’s air space between 5 and 19 cm. The neighbour’s action to have the encroachment removed was refused on the basis that overzealous defence of property rights should not ‘degenerate into abuse’.\(^\text{87}\) However, the commentary accompanying the French case\(^\text{88}\) notes that the doctrine is marginal in this context, and that French courts have often disregarded allegations of abuse and ordered removal of minimal encroachments on the basis that the scope of Article 544 should not be compromised. The same result as in the French case would likely have been achieved in Scots law without any reference to abuse or \textit{aemulatio vicini}. If one proprietor demands that a neighbour remove an encroachment which is slight in its potential for annoyance, but whose removal would present significant difficulties, the Scots courts recognise a general equitable power to refuse enforcement of that proprietor’s right, even if there is no malice as such.\(^\text{89}\) In other words, the French doctrine of abuse of rights gives an encroacher only limited prospects of success against a neighbour’s intent on having the offending structure removed. However, the Scots counterpart, who invokes the general equitable jurisdiction of the court, may be dealt with more kindly.

Clearly the penalising of the malicious exercise of property rights does not appear of itself to be incompatible with Common Law reasoning since American jurisprudence generally has taken a more interventionist role with so-called ‘non-invasive nuisance’\(^\text{90}\) perpetrated intentionally, and has found little conceptual difficulty in penalising not only spite fences but also malicious abstraction of water.\(^\text{91}\) Moreover, American jurisprudence has not always followed the same pattern as English jurisprudence with regard to economic torts. After all, just a decade after \textit{Allen v Flood}, in 1909, the Supreme Court of Minnesota found malicious motive to be decisive in a trade dispute between rival barbers, the well-known American case of \textit{Tuttle v Buck},\(^\text{92}\) although the scope of that ‘interventionist’ decision is highly problematic.\(^\text{93}\)

Other instances where difference may be reduced to form over substance can be found in various applications of the continental doctrine.\(^\text{94}\) But even this distinction, drawn in terms

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87 ‘La défense exacerbée du droit de propriété ne doit pas dégénérer en abus.’

88 By Marie-Christine Lebreton.

89 \textit{Anderson v Brattisani’s} 1978 SLT (Notes) 42. See also \textit{Strathclyde Regional Council v Persimmon Homes} 1996 SLT 176.


91 Restatement 858, see also \textit{Pugliese v National Capital Commission} (1978) 79 DLR 3d 592.

92 1909, 107 Minn 145, 119 NW 946.

93 With regard to the economic torts, the meaning of malice is marginal, and the relevance of even minimal self-interest often removes liability; see W Page Keeton, \textit{Prosser and Keeton on Torts}, 5\textsuperscript{th} edn (West Publishing, St Paul, 1984) at 1009-1010 and 1014.

94 E.g., for a further recent French example, this time taken from the field of employment law, see \textit{Cour de cassation}, soc, 29 mai 2002, \textit{Recueil Dalloz Sirey} 2002 Jur Commentaire 2284, in which an employee made a successful claim against an employer who had moved her from one type of job to another, which she could not do properly, and had then dismissed her. This was said to be an abuse of the employer’s right to direct her work,
of legal method, now appears too straightforward. In recent years, considerations of proportionality have come increasingly to the fore in tempering the exercise of private law rights in English law. Clearly European law has made a significant impact, such as in relation to the requirement of good faith in consumer contracts as required by implementation of the EC Directive on Unfair Contract Terms.\(^95\) However, one might point also, for example, to the overarching concept of ‘unconscionability’ in the law of estoppel.\(^96\) And from the perspective of Civil Law method, abuse of rights is in fact an example of a doctrine which has developed largely by reference to precedent. The whole evolution of the French doctrine has been through case-law, as a product of judicial law-making, and abus de droit remains uncodified. The new Quebec Civil Code makes provision for abuse of rights in Article 7. However, as noted, the doctrine has established itself in relation to contractual matters, for example, by means of incremental development in the case-law.\(^97\)

If, therefore, one is to reflect on the oratory of T B Smith quoted in the opening paragraphs, abuse of rights does not present an altogether satisfactory standard around which to rally his irredentist campaign for Scots law. It is not rooted in pure Civilian doctrine and clearly does not offer a straightforward example of Common Law/Civil Law polarity, either in terms of content, as Catala and Weir pointed out, or indeed in terms of method. But, had Smith taken the same platform today, it is possible that his vision for Scots law would have shifted to those initiatives which looked to the mixed legal systems, not in order to identify difference but as a means of exploring similarity. In that respect, not only does abuse of rights offer an intriguing ‘study in parallel’;\(^98\) increasingly it offers material for a study in convergence.


\(^97\) See, e.g., Jukier ‘Banque Nationale du Canada v Houle’.

\(^98\) The title of the article referred to at note 81 above.