“THIS CONCERN WITH PATTERN”: F.H. LAWSON’S *NEGLIGENCE IN THE CIVIL LAW*

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Abstract

F.H. Lawson’s *Negligence in the Civil Law* is an important, distinctive and unusual contribution to lex Aquilia studies. This chapter investigates the work’s organisation and unorthodox methodology, and argues that it is expressive of Lawson’s own ambivalent attitude towards Roman Law, both in his own professional identity and, more broadly, as a subject of scholarship. The chapter also suggests that wider historical and political circumstances led Lawson deliberately to understate his scepticism about the continuing value of fault-based liability systems.

I.

When F.H. Lawson's *Negligence in the Civil Law* first appeared in 1950, English-speaking reviewers were quick to register that this was an important moment. Lawson had become the first Professor of Comparative Law at the University of Oxford only two years earlier, and O Hood Phillips, writing in the *Modern Law Review*, evidently felt that a celebration was in order. "[W]e congratulate Professor Lawson", he wrote, "on putting this admirable tool at the disposal of teachers and students, the University of Oxford on providing him with an appropriate chair, and the Clarendon Press on furnishing an excellent production at reasonable cost".[1] Other reviewers, while less effusive, were overwhelmingly positive in their assessments.[2]

In praising the work for its value to teachers and students, Hood Phillips was echoing Lawson's own description, in the opening sentence of the Preface, as a "book… compiled with the same intention as Professor de Zulueta's *Roman Law of Sale*, namely that of introducing the student, through the detailed study of the Roman law on a particular topic, 'to a general familiarity with the basic conceptions of most continental systems, such as an educated English lawyer ought to possess.'"[3] Lawson had set about this task by providing the complete text and translation of D.9.2 *ad legem Aquiliam*; texts and translations of other Roman legal texts; extensive extracts from a range of "foreign codes" (stretching

[1] O Hood Phillips, (1952) 15 MLR 255.

[2] W Friedmann, (1951) 9 U of Toronto LJ 142; Arthur von Mehren, (1952) 66 Harvard LR 190; BA Wortley, (1951) 33 J Comp Legis & Int Law 111; HE Yntema, (1952) 1 AJCL 294. For a notably less enthusiastic appraisal see RWM Dias, (1952) 11 CLJ 306.

[3] F H Lawson, *Negligence in the Civil Law* (Clarendon 1950) v.

chronologically from 1794 to 1945, and geographically from the Soviet Union as far west as Mexico); and, finally, some Canadian statutory materials together with an article on the Saskatchewan Automobile Accident Insurance Acts. To guide students through this extraordinary range of materials, he had written a lengthy introduction (of nearly eighty pages), which combined systematic and historical analysis. It was, without doubt, a highly accomplished scholarly performance. But it was also, for reasons which I will now go on to explore, a peculiarly ambiguous and even enigmatic book, which was expressive of Lawson's own conflicted instincts about the importance of Roman law both generally and in his own professional identity, as well as being profoundly shaped by the historical conditions in which it was written. My aim is not to debunk, or to diminish Lawson's achievement; rather, it is to show how that achievement is more complex, and harder won, than we might previously have thought.

II.

A closer look at the reviews of *Negligence in the Civil Law* begins to alert us to the fact that the book is a more complicated work than it might first appear. For, while its reception was overwhelmingly positive, reviewers' characterisations of it were strikingly disparate. For H Lévy-Bruhl, both this and Zulueta's book on sale were "essentiellement des livres de droit romain (c'est ainsi qu'il faut traduire «civil law»)"; the non-Roman materials, he explained, were included solely to allow a precise measurement of Roman law's influence on modern law to be undertaken.[4] R.W.M. Dias, similarly, assumed that Roman law was the central focus, and took Lawson to task for including too much else.[5] W. Friedmann and B.A.

[4] H Lévy-Bruhl, *L'Année Sociologique* (1940/1948-) Troisième série, T 4, 338.

[5] RWM Dias, (1952) 11 CLJ 306, 306-307.

Wortley, by contrast, praised the book as an exercise in comparative method (although Wortley particularly admired Lawson's treatment of strict liability, which Friedmann singled out for criticism).[6] O Hood Phillips was also impressed by the work as a piece of comparative scholarship, but, as he explained, comparison should be undertaken "with one eye on law reform", a position which neither Friedmann nor Wortley expressly endorsed in their reviews.[7] Perhaps the most perceptive of the English language reviewers was H.E. Yntema, writing in the *American Journal of Comparative Law*. Yntema detected that the book was formally experimental: it could, in part, be seen as an updated edition of the *lex Aquilia*, "but it is considerably more".[8] "The additional materials", Yntema continued, "have effectively shifted the center of gravity of the volume from the Roman to the comparative law of negligence."[9] The result was "a work… of equal interest as a model text for the student, a scholarly contribution of Roman law, and an illuminating synthesis of the corresponding modern laws."[10]

The sense that Lawson was trying to do two things at once was at the heart of rather sterner assessments by Max Kaser and Wolfgang Kunkel. Kaser characterised Lawson's introduction by inventing the compound adjective "historisch-dogmatische".[11] It was not a happy hyphen: in Kaser's view, Lawson had chosen to create an internal methodological conflict, and had not convincingly resolved it. Kunkel, writing in the *Zeitschrift für ausländisches und internationales Privatrecht*, was, if anything, more unforgiving. He was particularly troubled

[6] W Friedmann, (1951) 9 U of Toronto LJ 142; BA Wortley, (1951) 33 J Comp Legis & Int Law 111.

[7] Hood Phillips (n 1) 255.

[8] HE. Yntema, (1952) 1 AJCL 294.

[9] Yntema (n 8) 294-295.

[10] Yntema (n 8) 295.

[11] Max Kaser, (1953) 70 ZSS RA 481.

by Lawson's habit of treating contemporary material alongside the *lex Aquilia*, commenting that: "Manchmal ist der abrupte Ubergang von der historischen Darstellung des römischen Rechts zu modernen rechtsvergleichenden Problemen etwas verblüffend. [Sometimes the abrupt transition from the historical presentation of Roman law to modern comparative law problems is rather confusing.]"[12] More damagingly:[13]

> Uberhaupt entspricht der Aufbau der Einleitung vielfach nicht den Anforderungen, die wir an die Systematik einer solchen Darstellung zu stellen gewohnt sind. Dies macht das Studium des Buches für den deutschen Leser nicht gerade bequem, erklärt sich aber, wie mir scheint, z.T. aus der ganz anderen Denkweise des englischen Juristen…
>
> [Above all, the structure of the introduction often fails to meet the standards which we, in the system of such an exposition, are accustomed to. This makes the study of the book not exactly comfortable for a German reader, but, it should be said, it seems to me, that it sometimes casts light on the quite different ways of thinking of the English jurist…]

Here, then, in a rather unexpected quarter, was an acknowledgement of the distinctive English contribution to *lex Aquilia* scholarship, with a helpful tip for how to recognise it: it was distinctly below German standards.

III.

[12] Wolfgang Kunkel, *Zeitschrift für ausländisches und internationales Privatrecht* 17 Jahrg H1 (1952) 139, 141.

[13] Kunkel (n 12) 141.

Kaser and Kunkel's critiques of Lawson's introductory essay offer a starting point for closer analysis. What, exactly, had confused and discomforted these eminent scholars of Roman law in a student book on the *lex Aquilia*? Kaser complained about the abruptness of the transition between ancient Roman and modern materials. But that, if anything, tended to simplify the issue. Consider the following passage, in which Lawson addresses the meaning of "*iniuria*" under the *lex Aquilia*:[14]

> We know that as late as the classical period and, so far as appearances go, in the time of Justinian an action could be brought on the lex itself only if the death or injury resulted from direct contact between the body of the wrongdoer and the thing (*corpore corpori*). Translated into the language of English law this means that the lex penalized only trespasses. Now we know that originally all trespasses were prima facie wrongful, and that it was only at a comparatively late date that the question was squarely raised whether a voluntary act giving rise to damage which was neither intended nor reasonably foreseeable could be a trespass. So rare were the cases that the point was finally settled as late as the second half of the nineteenth century in England, though earlier in America, that no action for trespass to the person will lie unless the act was wilful or negligent; but the medieval rule was one of strict liability, and down to the end of the eighteenth century the defendant could escape only if he pleaded and proved inevitable accident. Indeed, before the advent of firearms and swiftly moving vehicles most trespasses would naturally be wilful, and the most obvious defences would be that the defendant had acted in self-defence or was otherwise justified in what he did; and we may perhaps infer that originally the qualification of liability introduced

[14] Lawson, *Negligence* (n 3) 14-15.

> by the word *iniuria* meant strictly that the defendant must not have acted *iure*, i.e. in pursuance of some right.

What is distracting here is not so much the abruptness of a transition between ancient and modern as the movement forwards and then back across different time periods. We move from Justinian to medieval England, cursorily note the development of the forms of action, then glance at later technological changes and their potential effect on legal rules, before circling back to *iniuria* again. The effect feels rather like a five-minute tour of the British Museum with an excited guide: we might catch a glimpse of items that it is worth going back to look at later, but the overall experience is bewildering. The final step, in particular, is troubling. Lawson's suggestion that "*iniuria*" carried a sense of "without right" is etymologically plausible, and supported by juristic examples.[15] But to argue backwards, as Lawson does, and to assert – almost in passing – that carelessness is a quintessentially modern concept associated with "firearms and swiftly moving vehicles" tends to diminish the persuasive force of his arguments. Even on its own terms the thesis is a weak one: it is hardly as if the Romans lacked weapons and vehicles that could cause accidental injury; indeed, several important juristic examples are concerned with precisely such sources of damage.[16] But it is the underlying logic of the argument that is most disconcerting: Lawson apparently did not feel that there was a problem with shuttling back and forth across the centuries, and invoking nineteenth century English decisions on the forms of action to elucidate the meaning of Latin words used two millennia earlier.

What Lawson felt justified this kind of free-ranging practice was the conviction that English lawyers and Roman jurists thought about things in the same way. In his discussion of the

[15] E.g. Inst.4.3.5; D.9.2.52.1 (Alf. l.s.dig.).

[16] E.g. Inst.4.3.4 (javelins); D.9.2.52.2 (Alf. l.s.dig.)(carts).

dividing line between the direct action on the *lex* and *actiones in factum* he even imagines a kind of intellectual camaraderie[17] –

> Where the direct action on the lex failed, the praetor gave actions in factum… and there was the same preoccupation in the minds of the classical jurists as to the boundaries between the actions as in the minds of the English common lawyers of the eighteenth century. Any Roman jurist would have enjoyed dealing with the problem raised in the *Squib Case*.[18]

"Enjoyed" strikes an important note here: these legal issues are being seen as intriguing intellectual puzzles, on which lawyers (of any era) could test their ingenuity and analytical powers. English and Roman lawyers are united in friendly rivalry, rather than divided by two millennia and unimaginably different social conditions.

At times Lawson's eagerness to identify the Roman jurists with their contemporary counterparts risked becoming programmatic, as in this discussion of abuse of rights:[19]

> To use the terminology of modern French law, did Roman law make a person liable for abus de droit? Or did it agree with English law in holding in principle that what a man has a right to do, he may do maliciously without making himself liable? Perhaps these questions are not very important so far as the Lex Aquilia was concerned, for the occasions on which a person could do physical damage to another in the exercise of a right were rare and the right was in each case strictly limited. But they were important for the *actio doli* and, presumably, for the little-known *actio generalis in factum* of Justinian's law, which, far more than actions

[17] Lawson, *Negligence* (n 3) 24.

[18] i.e., *Scott v Shepherd* (1773) 2 W Bl 892.

[19] Lawson, *Negligence* (n 3) 15-16.

> on the lex, were the ancestors of the modern action for wrongful damage. It is therefore worth while to consider them.

"Perhaps" and "presumably" are made to do a suspiciously large amount of work here, and it is difficult to avoid the feeling that what is really sustaining this discussion is not so much an analysis of the Roman texts as the author's deep commitment to the position that the Romans *must have been* like us, and *must therefore* have faced the same dilemmas. Here perceived similarity between Rome, England and France was being used to draw bold – it might even be said unwarranted – conclusions about Roman law. But perceived similarity could also have the opposite effect: by exerting pressure it could restrict a jurisdiction's ostensible freedom of movement, as the following passage on the defence of contributory negligence illustrates:[20]

> In the United Kingdom the Maritime Conventions Act, 1911, substituted [the] principle [of apportionment of damage according to blameworthiness] for the old Admiralty rule which pooled the damage and divided it equally between the parties where a last clear chance could not be found; and, after spreading from Quebec to a number of other Canadian provinces and a few American States, it has at last been applied to England and Scotland by the Law Reform (Contributory Negligence) Act 1945. Whether the whole loss ought still to be thrown on one of the parties to the exclusion of the other if he can be shown to have carelessly omitted to take the last clear chance of avoiding the accident – as is still the case in Admiralty since the Act of 1911 – is a question that has been much canvassed and hardly settled as yet. Although I am inclined to think it is in accord with the policy of the new Act that the search for a last clear chance

[20] Lawson, *Negligence* (n 3) 57.

> should entirely cease, I am bound to refer, not only to the statement of Esmein to the effect that French courts often neglect a slight negligence of one of the parties – which would not in itself be hostile to my thesis – but also to the case of *Camelyre C. Leduc*, which might be called the French *Davies v Mann*.[21]

What is remarkable about this passage is not so much the argument that the "last opportunity" doctrine might still be good law, as the reasoning invoked to support it. In 1950 English courts hardly ever referred even to English textbooks[22], so there was really no need for anxiety about an English court relying on Esmein's contribution to the *Traité pratique de Droit Civil Français.*[23] Nor was an English court – either then or now – likely to consider itself bound by French decisions on delict. As a matter of precedent, of course, English courts were not bound to follow French decisions; and even the softer role of influence was unlikely to be enjoyed when a statute had recently reformed the area, as had happened with the 1945 legislation in England. Lawson knew this. When he says he is "bound to refer" to the French material he cannot be identifying sources that might influence an English court; so he is clearly not engaged in attempting to predict how an English court might decide the issue in the future.[24] What, then, is he doing? There is a teasing mimicry of judicial language in "bound to refer", an ironic insistence that, whatever the mundane rules of precedent might say, a proper decision cannot be reached without considering the French case and treatise. We

[21] *Davies v Mann* (1842) 10 M & W 546 introduced into English law the principle that, where a question of contributory negligence was raised, the party who had had the last opportunity of avoiding the occurrence of the damage was to be regarded as having caused it.

[22] N Duxbury, *Jurists and Judges: An Essay on Influence* (Hart 2001).

[23] M Planiol and G Ripert, *Traité pratique de Droit Civil Français* (Paris, 1925-1934).

[24] When the Court of Appeal, in *Jones v Livox Quarries Ltd* [1952] 2 QB 608, decided that the last opportunity doctrine was no longer relevant, there was, unsurprisingly, no mention of French law.

might perhaps say, provisionally, that Lawson wanted to find the best, in the sense of the most intellectually satisfying, answer, no matter where it might come from.

It was this pursuit of the most intellectually satisfying answer, irrespective of time and jurisdiction, that Kaser and Kunkel found so jarring. To return to Kaser's bipartite adjective, "historisch-dogmatische", the norms of legal historical writing privileged careful chronological sequencing and painstaking attention to legal development; dogmatic writing called for a rigorously self-contained analytical treatment of a particular system. Lawson's approach was cheerfully iconoclastic of both genres. There was a gaping hole in his chronological treatment between the Basilica (9th century AD) and the Prussian Code (18th century) and, as we have seen, his historical arguments were idiosyncratic. At the same time, there was no attempt to conform to the conventions of dogmatic writing: ideas from Roman, English, French, German and other legal systems merrily jostled for position on their merits. The result was an exposition that was both *atemporal* and *atopical*: it was rooted in neither time nor place. H.E. Yntema, in a passage already quoted, had written that Lawson's inclusion of contemporary materials had moved the book's centre of gravity; but, rereading the book today, it can be difficult to avoid the feeling that Lawson had done something far more radical than that, by abolishing the centre of gravity altogether.

IV.

The immediate explanation for the unusual methodology of Lawson's book was not far to seek. As the opening sentence of the Preface acknowledged, Lawson had taken Francis de Zulueta's treatment of sale as his starting point.[25] Zulueta's rather more staid work compared

[25] Lawson, *Negligence* (n 3) v, referring to Francis de Zulueta, *The Roman Law of Sale* (Clarendon Press 1945).

the Roman and English law of sale, and had been designed for students sitting the Oxford Finals paper on the subject, which covered D.18.1 and the English law relating to sale of goods. In 1947 Lawson informed readers of the *Journal of the Society of Public Teachers of Law* that "We have made considerable though not revolutionary changes in the Oxford Law School", which included a new paper: "Roman Law of Delict and Quasi-Delict (with Gaius III.182-225; IV.75-79; Justinian, *Inst.* IV.1-5, 8-9; Digest IX.2; and the English Law of Negligence, etc)."[26] The appearance of *Negligence in the Civil Law* in 1950 can, therefore, be explained in terms of meeting an immediate practical student need.

But the explanation can only be partial. The Oxford Finals paper examined candidates on the English law of negligence, a subject on which Lawson barely touched. This was a pity, because his earlier comparative analysis of duty of care had been extraordinarily prescient and perceptive, and similar insights into other aspects of negligence would have been invaluable.[27] The Oxford paper was also more Romanist than Lawson's book – indeed, the Romanist emphasis in the Oxford syllabus invites us to read one aspect of the book in a new light: in the Preface Lawson apologises for having included the whole of Digest 9.2, because, as he explains, several texts in that chapter deal with matters outside negligence, such as succession. "But it has been represented to me", he continues, "that it is still the practice of English Universities to set for study the whole of a title of the Digest, and omission would make the book less available for that purpose."[28] Lawson's own institution, apparently, was one of the offenders. Clearly there was not a straightforward relationship between the Oxford

[26] FH Lawson, "Changes in the Law Courses at Oxford" (1947-1951) 1 JSPTL ns 112. Lawson here misquoted (perhaps misremembering) the examination rubric, which referred to "the "English law of Torts" not "the English law of Negligence". See further, B Spagnolo, XXX.

[27] FH Lawson, "The Duty of Care in Negligence: A Comparative Study" (1947-1948) 22 Tulane LR 111.

[28] Lawson, *Negligence* (n 3) v.

paper and Lawson's book; this complexity, I suggest, was expressive of Lawson's own ambivalent attitude towards Roman law itself.

V.

Professors of Comparative Law seem to have had something of a gift for revelatory opening sentences in their autobiographical writings. Otto Kahn-Freund, Lawson's immediate successor in Oxford, astounded close friends and colleagues by his statement that "the most important single fact of my life is that I am a Jew".[29] Lawson could not quite match that. But, given the career that he was looking back on, his opening sentence was still eye-catching: "I always wanted to be a historian".[30] It was an ambition he would achieve only after retiring from his Oxford chair and becoming a part-time lecturer at the University of Lancaster.[31] In the meantime, Lawson had forged himself an Oxford career to be envied: he read classics, history and law at the Queen's College and then, after a precarious period, was awarded a Research Fellowship in Roman Law at Merton College in 1925. A Tutorial Fellowship at the same College followed and, in 1931, he was appointed All Souls Reader in Roman Law. The Chair of Comparative Law arrived in 1948, which he held for sixteen years.[32]

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[29] Mark Freedland, "Otto Kahn-Freund (1900-1979)" in J Beatson and R Zimmermann (ed), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (OUP 2004) 299, 302 (quoting from an unpublished memoir).

[30] FH Lawson, "F.H. Lawson: A Bibliography" in P Wallington and R Merkin (ed), *Essays in Memory of Professor F H Lawson* (Butterworths 1986) 11.

[31] Stanley Hussey, "Harry Lawson at Lancaster" in Wallington and Merkin (n 30) 7.

[32] Barry Nicholas, "Professor F H Lawson 1897-1983" in Wallington and Merkin (n 30) 3, 4-5.

The centrality of Roman law, in the positions Lawson held, is striking. And that makes all the more striking Lawson's own consistent denials that he had any real expertise in the subject. Thus, describing his appointment to the Research Fellowship he comments that "my classical background made me an obvious candidate."[33] Well, yes, but a background in classics was hardly a unique advantage in 1920s Oxford. His account of appointment to the Readership goes a step further: "Although I never became a real Roman law specialist, on appointment as All Souls reader in Roman law [1931-1948] I became, as it were, second in command of the subject."[34] This makes the appointment sound like an almost comical misunderstanding: *somebody*, *somewhere* (in Oxford) must – at the very least – have been led to believe that Lawson was an expert Roman lawyer, we might think. Of course, there may be issues of tone and style here: by all accounts Lawson was a modest, self-deprecating man, and it would be uncharacteristic for him to boast. But there is, nevertheless, a powerful sense of a career shaped by opportunities, in which Lawson found himself occupying roles which, by their very titles, implicitly laid claim to an expertise that he would not have chosen to profess.

Lawson's ambivalence about his own Roman law expertise was particularly noticeable in his book reviews. The sheer number of reviews of Roman law books that he wrote, and which were published in an international array of leading journals, is both an ironic counterpoint to his denials of expertise, and also rather suggests that book review editors were under the same impression as the electors to the All Souls readership. The reviews themselves are lucid and authoritative, but, often, also noticeably ambiguous and sometimes evasive about their author's standing. Lawson seems to have felt most confident about claiming the perspective of a professional Roman lawyer when writing for a non-lawyer readership. In his admiring assessment of Fritz Schulz's *History of Roman Legal Science* in the *English Historical*

[33] Lawson, "Bibliography" (n 30) 11.

[34] Lawson, "Bibliography" (n 30) 11.

Review, for example, he hailed "one of the most important books on Roman law published in this century", with the kind of sweeping confidence that implied expert familiarity with other pretenders to such an accolade.[35] He then went on to highlight that some aspects of the book would be "of the greatest interest to the professional Roman lawyer", and proceeded to enumerate those points. He did not go quite so far as to say "of the greatest interest to the professional Roman lawyer *like me*", but that was the inescapable implication. When writing for a more legally expert readership, such as that of *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Lawson's self-positioning was very different. In a short review for that journal of Kaser's *Das Römische Privatrecht*, which made clear that there were no hard feelings about Kaser's earlier, less than effusive, reception of *Negligence in the Civil Law*, Lawson described Kaser's book as:[36]

> the most up to date comprehensive textbook of Roman law, which is now the first reference book for all professional Romanists. Those whose main interest is in the modern law can leave on one side the encyclopaedic footnotes, with their references to controversial literature, and read only the admirably lucid text, in which the author shows his great gifts as an expositor and historian.

Is the first sentence quoted here a description of Lawson's own practice, or a report of colleagues' habits? Does Lawson place himself in the "professional Romanists" category, or the "main interest in the modern law" camp? The remainder of the review leaves one in some doubt. In the next paragraph "English lawyers" are identified as the kinds of "non-specialist" who might find the book interesting, and we might be tempted to detect here a note of self-

[35] F.H. Lawson, (1947) 62 EHR 86.

[36] FH Lawson, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 27 Jahrg H 1 (1962/1963) 174, 174-175.

identification. Ten lines later, however, this hypothesis buckles as Lawson characterises post-Justinianic Roman law in the West –[37]

> Everything tends to become relative, in a way that is not unfamiliar to English lawyers. There is more than a suspicion that this is not merely vulgarisation, but a conquest of Rome by the provinces. Certainly we have always known that *praescriptio longi temporis* and *pacta et stipulationes*, both institutions of doubtful tonality, were provincial in origin.

Lawson is not, of course, repudiating his identity as an English lawyer here, he is drawing on it – but he is also demonstrating an expertise and familiarity with the primary materials that give him the air of a professional. It is as if he has categorised Kaser's potential readers into professionals and non-specialists, only to occupy a third space himself.

V.

While it is possible to explain Lawson's ambivalence about his own standing as a Roman lawyer in terms of his innate modesty, or as a manifestation of the anxieties inherent in being a generalist[38], it can also be linked with his views about the merits of Roman law as a discipline. For one way in which Lawson was emphatically not a professional Romanist was in his consistent denials that Roman law should be studied in isolation, as an end in itself. There is a tantalising glimpse of his generalist, and generalising, impulses in his very first publication, a review of Leopold von Wenger's *Der heutige Stand der römischen*

[37] Lawson (n 36) 175.

[38] Lawson would have accepted this description of himself: FH Lawson, "Comparative Law: A Generalist's Apology" (1960-1961) American Bar Association Section on International and Comparative Law Bulletin 5.

Rechtswissenschaft, in which he identified a distinct role in Roman law studies for English lawyers:[39]

> Surely a comparison of the English forms of action with the remedies afforded by the formulary system is worth making. It might be of the utmost value in the detection of interpolations in the Digest. There are signs that this is already being realised in Germany.

It is striking to see here, so early in his career, the conviction – repeated in *Negligence in the Civil Law*[40] – that the Roman formulary procedure and English medieval forms of action were so deeply similar that they could be fruitfully compared at this level of detail. Lawson did not identify his potential *Mitarbeiter* for such a project, and it seems to have come to nothing.

Four years later, in an important two-part article on the *Basilica* in the *Law Quarterly Review*, Lawson included a sketch of English Roman law studies that was noticeably more troubled:[41]

> Except to some extent in Scotland and the countries of the Roman-Dutch Law, Roman Law has little practical value. The student reads it as part of his juristic training and for purposes of comparison, and may hope by means of it to bridge the gap between our English modes of legal thought and those in vogue on the Continent of Europe and in Latin America. The advanced student of Roman Law pursues a purely academic study unless, perhaps, he hopes by his research into the details of the classical law to show that certain misguided tendencies in

[39] FH Lawson, (1927) 17 *Journal of Roman Studies* 245, 246.

[40] See text to n17.

[41] FH Lawson, "The Basilica" (1930) 46 LQR 486, (1931) 47 LQR 536, 553.

> modern juristic development lack classical authority. In this country, at all events, we have no such hopes to add zest to our study.

The "purely academic study" of the "advanced student" is hardly made to sound very satisfying here, and the passage as a whole is an important early statement of one of Lawson's abiding preoccupations. He would return frequently to the theme that the study of Roman law was valuable because it provided an introduction to modern civil law;[42] in the 1950s this position became significantly more sophisticated as Lawson articulated the idea that Roman law contained a basic conceptual grammar, which civil law systems had inherited, and which had to be mastered before those systems could be properly understood.[43] The passage also embodies another important aspect of Lawson's ideas on Roman law, although rather less obviously than the point about Roman law as an introduction to civil law, and that is to talk of the reasons for "studying Roman law" in a way that tended to blur the distinction between teaching and research. The "student" in the second sentence of the quotation is obviously an undergraduate; the "advanced student", who initially sounds rather like a graduate student, is, in fact – as the end of the passage makes clear – an established academic. Indeed, if we take the "we" of the last sentence literally, the All Souls reader in Roman Law was an "advanced student" too.

Many of Lawson's views about the value of Roman law were expressed in lectures to students, reviews of books aimed at a student readership, or articles about teaching the subject, and that can make it especially difficult to distinguish pedagogical propositions from broader intellectual claims. For instance, Lawson's arguments about the underlying grammar

[42] E.g. FH Lawson, "The teaching of Roman Law in the United Kingdom" in *L'Europa e il Diritto Romano Studia in Memoria di Paolo Koschaker* (Milano, Giuffrè, 1954) vol 2, 271, 281.

[43] E.g. FH Lawson, *A Common Lawyer Looks at the Civil Law* (University of Michigan Law School, Ann Arbor, 1953) 4; FH Lawson, "The Approach to French Law" (1958-1959) 34 Indiana LJ 531, 533.

of Roman law in civil law were designed to encourage students, such as the audiences of his *A Common Lawyer Looks at the Civil Law* or "The Approach to French Law" to take up Roman law.[44] But, elsewhere, Lawson could be alert to the ideological commitments that a grammar of Roman law might entail: in a review of a book on Soviet civil law, in the *Slavonic Review*, he drew readers' attention to Russia's Roman law tradition, and was particularly struck by the way in which a Soviet code provision designed to create strict liability for damage had been reinterpreted by the courts to turn on fault. "No doubt there are very good socialist reasons for the change" he observed, surely ironically.

> We are not to think of the Soviet Courts as being unduly favourable to defendants; for in most cases where the damage is serious the plaintiff will have been in contact with some vehicle or machine, and most vehicles and machines are the property of the Soviet Government. None the less, it may be suspected that the change in standpoint was to some extent brought about by the steady tendency of professional lawyers to bring the Law under the categories with which they are familiar, and to persist in their secular habits of thought.[45]

VI.

A similar articulation between teaching and research can be made in relation to Lawson's views on patterns, as expressed in pedagogical and more scholarly contexts. He devoted an entire lecture at Boston University to the theme of "Roman Law as an Organizing

[44] FH Lawson, *A Common Lawyer Looks at the Civil Law* (University of Michigan Law School, Ann Arbor, 1953); FH Lawson, "The Approach to French Law" (1958-1959) 34 Indiana LJ 531.

[45] FH Lawson, review of Vladimir Gsovki, *Soviet Civil Law: Private Rights and their Background under the Soviet Regime* (1950) 28 Slavonic and East European Review 557, 560.

Instrument", going so far as to say that "the claims of Roman law depend… chiefly on the extraordinary services it has performed and may, yet, I hope, perform in organizing thought and action in the law."[46] There followed an elegant celebration of the way that the Romans, as "a people of engineers, or perhaps rather of grammarians, who were not interested in mathematics or philosophy"[47], had conceived of private law as a system of interlocking parts, as well as an overview of Roman law's importance in medieval Europe. Lawson's conclusion, however, was anxious to avoid anything other than modest pedagogical claims: "You will see that I am not making extravagant claims for Roman law in American legal education. I am asking for the average law teacher to teach it to the average law student as a teacher in a primary school would teach elementary English grammar."[48]

Lawson's interest in patterns and system went well beyond the pedagogical, however: it was central to his professional identity, and an impulse that visibly animated much of his best scholarship. Indeed, in an address to a breakfast meeting of the American Bar Association Convention in 1960, he came close to making such an interest the defining feature of legal scholarship: "cultivat[ing] the bird's eye view" was, he said, the "only" way an academic lawyer could make "his own peculiar contribution to legal study."[49] At its best, this kind of approach allowed Lawson to make some impressively original points: his overview of the principles of negligence liability, for instance, enabled him to point out that English law needed a duty of care concept not so much to define when claims could be brought as to

[46] FH Lawson, "Roman Law as an Organizing Instrument" (1966) 46 BULR 181, 182.

[47] Lawson, "Organizing Instrument" (n 46) 190.

[48] Lawson, "Organizing Instrument" (n 46) 203-204.

[49] F.H. Lawson, "Comparative Law: A Generalist's Apology" (1960-1961) American Bar Association Section on International and Comparative Law Bulletin 5. See also the reference to an "addiction to bird's eye views of comparative legal history" in Lawson's affectionate piece on Edward Jenks: "Jenksiana" (1961) 6 JSPTL (ns) 115.

define the circumstances in which negligence liability should cease.[50] Similarly, his approach to the Roman law of contract yielded some bold and compelling claims about the underlying concerns that had inspired the fourfold classification of consensual contracts.[51]

VII.

Quite how deeply committed Lawson was to the identification and elaboration of patterns can be seen in an extraordinarily revealing, but little-known, essay he published in 1956. Entitled "Reflections on a Thirty Years' Experience of Teaching Roman Law", this short contribution delicately blended pedagogy, scholarship and autobiography to produce the closest thing to an intellectual self-portrait that Lawson would ever write.[52] His starting point was the difficulty in sustaining students' interest in Roman law beyond their studies of the *Institutes*. Roman "case law", Lawson observed (referring, presumably, to the Digest),[53]

> is in a sense too grown-up, too dry, for students who have got through the Institutes. It certainly cannot compete with cases in the modern law reports, whether English or South African. It is also too terse and it deals with an unfamiliar world, so that the problems have to be restated in more modern terms to become real.

[50] Lawson, "Duty of Care" (n 27).

[51] Lawson, *Common Lawyer* (n 44) 121ff. The less convincing aspect of the "bird's eye view" approach can be seen in FH Lawson, "Some Paradoxes of Legal History" (1966-1967) 15 AJCL 101, where the analysis is unsatisfyingly sketchy. The bird could fly too high to be able to see things properly.

[52] FH Lawson, "Reflections on a Thirty Years' Experience of Teaching Roman Law" 1956 Butterworths SALR 16.

[53] Lawson, "Reflections" (n 52) 16.

The result was, that "the lawyer who has left Roman law for a more modern system usually does stay away from it unless for some reason he becomes a specialist in Roman law"[54]. Lawson, however, was not a usual lawyer – "I have come back to Roman law via comparative law and have found many things in it which could have meant little to me at an earlier stage."[55]

He then went on to explain "how I came to find renewed enjoyment in the study, or rather the contemplation, of Roman law."[56] The immediate inspiration had been Schulz's *Principles of Roman Law* and Jhering's *Geist des römischen Rechts*, in which Lawson perceived that the authors tried "to get below the surface of Roman law to see what the Romans were really driving at."[57] "In truth", Lawson continued, "Roman lawyers have usually been concerned, excessively so as I must think, to ascertain the actual rules of Roman law at different periods, and not enough with its importance in the scheme of world history and above all not enough with its real shape and pattern."[58] This was not a point that had occurred to him only recently: "I had almost from the start, over thirty years ago, suspected that in this shape or pattern lay the real fascination of Roman law, though it took many years for it to become at all clear except in a few places."

Lawson's early instincts had been affirmed, he made clear, by the salutary experience of writing on Roman law for the non-specialist readership of *Chambers Encyclopedia*:[59]

[54] Lawson, "Reflections" (n 52) 16.

[55] Lawson, "Reflections" (n 52) 16.

[56] Lawson, "Reflections" (n 52) 17.

[57] Lawson, "Reflections" (n 52) 17.

[58] Lawson, "Reflections" (n 52) 17-18.

[59] Lawson, "Reflections" (n 52) 18.

> I had to try to tell the ordinary man how and why Roman law is important and to disengage its main institutions and principles, especially if they are of permanent value, from antiquarian detail. It was largely an exercise in the art of omission; and in order to make the account run like a story I had to see what sort of a pattern Roman law could be made to exhibit… the task fascinated me and intensified my interest in Roman law.

"Perhaps", he concluded, "this concern with pattern has become an obsession. I have indulged in it more than once. But I think it is hard to be a lawyer and not to have it in some measure."[60]

Having set out this stirring, if perhaps slightly defensive, scholarly credo, the essay then takes a turn which, as we have already seen, is not uncharacteristic of Lawson's writing: it focuses the ideas back on teaching, arguing that "every attempt should be made to bring home such patterns to the student of Roman law, and I think that by such means the second, difficult stage in the study of Roman law has some chance of being bridged."[61]

The final section of the essay addressed an alternative way of making Roman law appealing to students who were already familiar with the *Institutes*: the comparative method. "In my experience", Lawson was happy to report, "this way of treating Roman law has captured the imagination of many of the most intelligent students, and has made Roman law fairly real to a large number of others."[62] Strikingly, given the title of the chair that Lawson held at the time, he made no claims for the underlying intellectual benefits of comparative law as a scholarly

[60] Lawson, "Reflections" (n 52) 18.

[61] Lawson, "Reflections" (n 52) 19.

[62] Lawson, "Reflections" (n 52) 19.

activity, but moved quickly to address the objection that comparative law was most appropriately undertaken with systems from the same historical period:[63]

> I think the best answer to this question is that the limited nature of the Roman sources enables one to keep the comparative study within bounds. How often is one not forced in comparative work on purely modern law to look for explanations outside pure law in the social habits or economic developments of different peoples? One can do very little of that with Roman law; one is kept down to pure law. However unsatisfactory that may be in the long run, it is good in the short run…

As Lawson acknowledged in the final sentence of the quotation, this was not an entirely happy justification. He had, previously, emphasised that social and economic conditions often illuminated Roman legal doctrines, and had taken to task the author of an introductory book (aimed at students) who had neglected such conditions.[64] Later he would make the same point in more emphatic and general terms:[65]

> Much that passes for comparative law is little more than a placing side by side corresponding pieces of different legal systems. It comes very near to pure description. Doubtless many, if not most, comparative lawyers have started by being merely curious about foreign law; they have developed into comparative lawyers when they have come to search for the reasons underlying resemblances and differences. This leads one away from any exclusive preoccupation with the

[63] Lawson, "Reflections" (n 52) 20.

[64] FH Lawson, review of HF Jolowicz, *Historical Introduction to the Study of Roman Law* 1933 JSPTL 40, 40-41.

[65] Lawson, "Generalist's Apology" (n 49) 5.

> history of technical devices or bodies of supposedly self-developing doctrine into the whole social, political and economic history of nations.

In "Reflections", however, he was taking the directly opposite approach to the use of the comparative method in teaching, and advocating a pedagogical position that risked arbitrarily closing off promising avenues of intellectual inquiry for no better reason than the convenience of the examiners. This was a rare, uncharacteristic instance of Lawson's broader intellectual commitments working against his philosophy of teaching, and it is worth pausing for a moment to ask ourselves what he felt was gained by this awkward self-contradiction. In the passage from "Reflections" quoted above there is an insistence on *purity* and, in particular, on "pure law" uncontaminated by socio-political or historical context; it is, surely, a return to the vision of legal rules as a series of abstract, eternal, intellectual puzzles on which all lawyers can test their wits, and which is prominent, as we have already seen, at key moments in *Negligence in the Civil Law*.[66] Lawson's position, as expressed in "Reflections", that this kind of analysis was good only "in the short run", invites us to read *Negligence in the Civil Law* as embodying an approach that even its own author did not believe held good "in the long run", and that makes the question of Lawson's authorial voice in *Negligence in the Civil Law* an intriguingly complicated one. At most he was only provisionally committed to the "pure law" view. But was he going further? Was he deliberately pushing the "pure law" approach to its limits in order to encourage intellectually inquisitive readers to become dissatisfied with it? Was the disorientating shuttling between different eras and places a way of exhibiting – almost satirising - the method's inherent shortcomings? Was he, in short, hoping to provoke in readers exactly the kind of responses that the German critics had expressed?

[66] See text accompanying n 17.

As well as raising questions about Lawson's authorial strategies in the *Negligence* book, "Reflections on a Thirty Years' Experience of Teaching Roman Law" is also particularly valuable for the light it casts on Lawson's sense of himself as a Roman lawyer. He certainly did not wish to be grouped with that body of scholars who were "concerned, excessively, so I must think, to ascertain the actual rules of Roman law at different periods", but nor did he identify himself as a comparatist. He was a seeker of patterns, a status which aligned him, rather winningly when we remember that he was nearly sixty and an Oxford professor, with second and third year undergraduates. He also shared, or at least sympathised with, such students' taste for the law they were studying to be "real", and it is worthwhile pausing for a moment to consider what, exactly, he understood by this cryptic adjective. One possibility, on which he published a full-length article shortly after "Reflections", was the correspondence between legal concepts and the factual reality to which they applied;[67] but this does not seem to have been a problem peculiar to Roman law. What Lawson seems to have had in mind can best be gathered by looking at two prominent instances of unreality that he identifies: the "unfamiliar world" of ancient Rome requires problems "to be restated in more modern terms to become real"[68]; and, "it is very easy to detach the more antiquarian and unreal parts [of Roman law from the syllabus], such as the texts dealing with manumission and the complications of classical marriage".[69] "Unreal" in these examples means unfamiliar by reason of remoteness in time and historical conditions, or having no direct counterpart in current English law. Lawson seems to have had rather low expectations – perhaps the bitter fruit of thirty years' experience – about his students' imaginative range and intellectual curiosity.

[67] FH Lawson, "The Creative Use of Legal Concepts" (1957) 32 NYULR 909.

[68] Lawson, "Reflections" (n 52) 16.

[69] Lawson, "Reflections" (n 52) 17.

Despite Lawson's upbeat account of the experience, the same note of constricting presentism resonates in his description of writing for "the ordinary man". When Lawson says, "I had to try to tell the ordinary man how and why Roman law is important"[70] we surely hear the sentence continuing "for him, today". The "ordinary man" is imagined from the outset as a somewhat sceptical, impatient individual, who will be receptive to a "story" so long as there is no "antiquarian detail".[71] Why such a person would be both curious about Roman law, and yet, at the same time, resentful of historical data is less than obvious, and it is difficult to avoid the feeling that Lawson's imagined "ordinary man" was a kind of caricature of his Oxford students, who, as a result of the structure of their course, had no choice about studying Roman law, but could sometimes be persuaded to like it. Lawson's main strategy for bringing this about was, essentially, to focus on topics where it could appear not to matter that some sources were two thousand years older than others: everybody could seem to be thinking about the same problems. For someone who "always wanted to be a historian", this professional commitment to an anti-historical methodology must have had its ironic moments.

VIII.

Lawson's insistence that Roman law should be seen "in the scheme of world history"[72], as part of a larger story, raises a further intriguing question about his own *Negligence in the*

[70] Lawson, "Reflections" (n 52) 18.

[71] Cf Stefan Collini, "Realists" in *Common Writing; Essays on Literary Culture and Public Debate* (Oxford, OUP, 2016) 123, particularly at 130: "The insistence on the perspective of the 'plain man' by writers who are, almost by definition, rarely plain themselves should always be suspect."

[72] Lawson, "Reflections" (n 52) 18.

Civil Law: what was that book's grand narrative? Lawson's own later description of the work as a "source book"[73] and reviewers' characterisations of it as, for instance, "a rich mine"[74] might suggest that it was nothing more than a collection of materials. But a closer examination of the book itself invites a more sophisticated interpretation.

Lawson very clearly did not envisage (or encourage the idea) that readers would begin at the beginning and read linearly. The Introduction, he explained, was "intended… to furnish the student with an intelligible order in which to read the texts".[75] True to his word, the opening page of the introduction informs readers that "one of the first steps for a student to take when studying a [Digest] title is to rearrange the fragments";[76] the subsequent exposition implicitly indicates the appropriate sequence. But the Preface also suggests, more tantalisingly, that this is a book with "an argument", even though that argument is never expressly set out.[77]

The allusion to an "argument" is made to explain the inclusion of extracts from Canadian legislation on road traffic accidents and an entire academic article on the Saskatchewan automobile accident scheme. What these provisions had in common was their rejection of a fault-based model of compensation for damage, although what they put in its place varied considerably: the Ontario legislation excluded all claims by gratuitous passengers in motor vehicles, for instance, while the Saskatchewan scheme ensured that a minimum of compensation was available to all motor vehicle accident victims irrespective of fault. Undoubtedly these statutes represented new ways of responding to personal injury and

[73] FH Lawson, "The Teaching of Roman Law in the United Kingdom" in *L'Europa e il Diritto Romano Studia in Memoria di Paolo Koschaker* (Milano, Giuffrè, 1954) vol 2, 271, 283.

[74] Arthur von Mehren, review of FH Lawson, *Negligence in the Civil Law* (1952) 66 Harvard LR 190.

[75] FH Lawson, *Negligence in the Civil Law* (Oxford, Clarendon, 1950) vi.

[76] Lawson, *Negligence* (n 75) 1.

[77] Lawson, *Negligence* (n 75) v.

property damage, but readers looking for "an argument", for which the Canadian materials were supporting evidence, may have been left feeling uncertain about what exactly that argument was.

There is, perhaps, a hint of Lawson's thought processes in the dustjacket text. "This book", it is said, "is designed as an instrument to be used in the comparative study of the Law of Torts, a subject which has everywhere remained less affected by governmental changes than almost any other branch of private law". The Canadian statutes represented an obvious exception to that statement, being very much governmental initiatives. Later in the same text the Canadian innovations are described as "some of the most advanced developments in the law of motor accidents", and "advanced" here may perhaps be meant to signal approval as well as denoting that these were the most recent materials.

A couple of years later, in a review of A A Ehrenzweig's *Negligence without Fault*, Lawson felt that he could be more outspoken.[78] Ehrenzweig's book had argued for the imposition of strict liability on business enterprises for damage caused by risks closely bound up with those enterprises' normal activities. Lawson approved: "the thesis is an interesting one and seems to point in the right direction"; but he also proposed applying something like the Saskatchewan road traffic scheme to business enterprises as a way to reach the same result.[79] A review of another of the prolific Ehrenzweig's books endorsed the importance of insurance-based solutions in road traffic cases, although Lawson added that "Perhaps each country will have to work out its own salvation."[80] This, we might notice, introduces a note of relativism, an acknowledgement that different jurisdictions could legitimately arrive at

[78] FH Lawson, review of AA Ehrenzweig, *Negligence without Fault* (1952) 1 ICLQ 112.

[79] Lawson, review of Ehrenzweig's *Negligence* (n 78) 113.

[80] FH Lawson, review of Albert A Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim* (1955) 4 ICLQ 585, 586.

different solutions to the same problem – and is the exact opposite of the "pure law" approach.

It seems strange, at first sight, that Lawson should feel unable to say in a book what he had no difficult in saying in book reviews, particularly when the statements in question went to the underlying narrative of the book as a whole. Lawson never explained why he had chosen to adopt such a cryptically light touch. Perhaps, this being a student text, he wanted to leave the students to work things out for themselves. But there is also a more intriguing possibility, which is that the political context in which the book was published made it embarrassing to express this argument in a book on Roman law. What Lawson would be saying, we should remember, was that the individualised focus on fault in Roman law was no longer appropriate for modern conditions, and should be replaced by collective schemes in which the priority was society's obligation to help the injured. This would have uncomfortably echoed the German National Socialists' antagonism to Roman law, as expressed in their party programme: "We demand that Roman law, which serves a materialist world order, be replaced by German common law".[81] The Nazis' central contention was that basic Roman legal principles such as absolute property rights, and the validity of contracts of sale despite the price not being a fair reflection of the value of the counter-performance, promoted selfishness at the expense of social welfare.[82] Leading German Roman law scholars, including Fritz Schulz and Max Kaser, had been at the forefront in arguing that Roman law, properly understood, was richly communitarian[83], and there was a danger that Lawson's

[81] Michael Stolleis, "Was There 'Progress in Legal History' during the Nazi Period?" in *Law Under the Swastika; Studies on Legal History in Nazi Germany* (Thomas Dunlap, trans) (University of Chicago Press, Chicago and London, 1998) 48, 49.

[82] James Q Whitman, "Long Live the Hatred of Roman Law!" *Rechtsgeschichte* 2/2003, 40.

[83] Stolleis (n 81) 53-56.

criticisms of fault would have sounded like a reiteration of the Nazi line. It would have been perfectly understandable if he had opted to avoid any possible confusion by omitting an outspoken treatment of the topic from his book.

IX.

Negligence in the Civil Law is little read today. Readers interested in its subject matter are more likely to consult the extensively revised version, *Tortious liability for unintentional harm in the Common law and the Civil Law*, which Lawson produced in collaboration with B.S. Markesinis in 1982.[84] But it would be a great pity if it disappeared entirely, because, as I hope I have shown, it embodies a distinctive (and distinctively British) engagement with classical Roman legal texts, in which fundamental questions (and anxieties) about the aims of Roman law teaching and scholarship are never very far from the surface. As an expression of what Kunkel called the "ganz andere Denkweise des englischen Juristen" [quite other ways of thinking of the English jurist] and of FH Lawson's own methods and ideas in particular, it remains a rich, rewarding and occasionally surprising source.

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