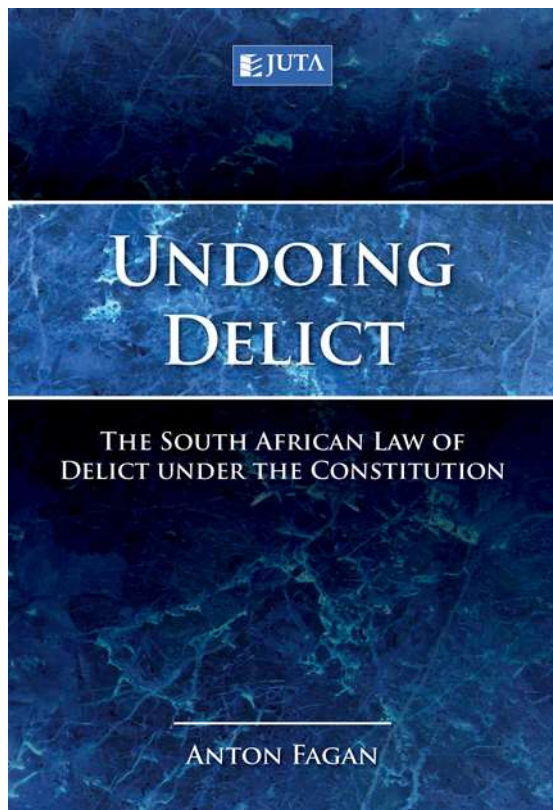


Book Review



UNDOING DELICT **The South African Law of Delict** **under the Constitution**

by Anton Fagan

(316 pages)

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www.jutalaw.co.za

"The common law is not to be trapped within the limitations of its past. It need not be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalised with the spirit of the constitutional values defined in ... the Constitution..."

– Justice Ismail Mahomed in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

The word *delict* remains persistently unfamiliar to the general public despite constant and extensive media coverage of delictual claims. Although delict is a fundamental pillar of our common law, it remains an elusive creature to pin down, even for lawyers who enter its territory.

Delict may be described as an unlawful and blameworthy act or omission which causes damage or injury and which entitles the injured party to damages or satisfaction in a civil suit. The wrongdoer has a personal duty to compensate the victim for the harm done, and, conversely, the victim has a personal right to claim reparation for the harm done from the wrongdoer.

A delict is a form of unlawful conduct and can be defined, in general terms, as a civil wrong, which gives rise to compensation for harm wrongfully caused. The harm caused could be financial, or the infliction of pain and suffering associated with bodily injury, or harm to the personality interests of the victim.

This new publication consists of a series of essays, most of which have previously been published, mainly in the *South African Law Journal* (Juta & Co.). Their collection into a single volume evidences an impressive body of scholarship and establishes a multi-faceted basis for further academic probing as well as a fruitful resource for legal practitioners and judicial officers who have to wrestle with the vexing questions that claims in delict always seem to produce.

The author, Anton Fagan BA LLB (UCT) MA DPhil (Oxon), is Professor in the Department of Private Law at the University of Cape Town and has published extensively on the law of delict and other topics for more than 20 years.

Each article explores crucial aspects of the law of delict in a thought-provoking examination of its elements such as how the wrongfulness of negligent harm-causing and intentional harm-causing are to be determined for purposes of delictual liability. Defamation and the main defences to defamation are unpacked, the vicarious liability of an employer for a delict committed by its employee is reviewed, and a fresh look is taken at how factual causation is to be established.

The author does not shirk from analytically upending traditional and well-entrenched approaches taken by our courts. Some of these views may be considered controversial but his spirited defence of those views cannot be ignored as this important branch of our common law develops. The impact of the Bill of Rights and certain Constitutional Court judgments are addressed.

The perhaps sometimes quixotic challenges to what is considered established law on the subject are a refreshing and well-considered prod to what could be a sluggish complacency in a branch of the law which is not short of academic and professional commentry (for example, over 400 pages in LAWSA).

In spite of having to navigate topics such as Aquilian liability and pure economic loss, Prof Fagan writes in a clear, direct and accessible style, building his arguments and making his points logically and persuasively.

This volume is an important contribution to the subject. Many of the questions posed are yet to be fully answered by our courts. The views so eloquently expressed here will help our courts to do so, even if they take a contrary approach.

*Review by Louis Rood BA LLB (UCT), Consultant at Fairbridges Wertheim
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