



## **Protection for Rights of Personality in Scots Law: A Comparative Evaluation**

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## 1. INTRODUCTION: A NEW IMPERATIVE

When the United Kingdom Parliament adopted the Human Rights Act 1998, and the European Convention on Human Rights (ECHR) became directly enforceable in the United Kingdom, the British government announced that it was doing no more than bringing “human rights home”.<sup>1</sup> And although a member of the Scots judiciary notably predicted a “field day for crackpots”,<sup>2</sup> his judicial brethren north and south of the border were on the whole more sanguine. In an address to the European Court of Human Rights (ECtHR) shortly after the Human Rights Act had come into force, Lord Woolf reported that the transition to a Human Rights culture had all gone “remarkably smoothly”, primarily because “the values to which the Convention gives effect are very much the same values that have been recognised by the common law for hundreds of years.”<sup>3</sup>

But notwithstanding these shared values, there has been scepticism in some quarters as to whether all of the Convention rights had in fact previously enjoyed a stable “home” in the United Kingdom. In 2003, Gavin Phillipson reflected that the English courts had “not even gone as far as enquiring explicitly whether the common law is in harmony with the Convention, let alone determining what should be done if it is not”.<sup>4</sup> While there may have been less doubt as to issues of accountability of public authorities,<sup>5</sup> a new imperative became clear with regard to private law. In the landmark case of *von Hannover v Germany*, the ECtHR ruled that Article 8 of the Convention may require states not only to ensure that there is no arbitrary interference in the individual’s private life by public bodies, but also to recognise a positive obligation “to secure respect for private life even in the sphere of the relations of individuals between themselves”.<sup>6</sup>

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<sup>1</sup> Per Lord Irvine of Lairg (then Lord Chancellor), House of Lords Debates 3 Nov 1997, col 1228, echoing the Labour Party’s 1997 manifesto pledge.

<sup>2</sup> Lord McCluskey, “The law laid bare part 1: Trojan horse at the gates of our courtrooms” *Scotland on Sunday*, 6 Feb 2000, at 12.

<sup>3</sup> Lord Woolf, “European Court of Human Rights on the occasion of the opening of the judicial year” (2003) *European Human Rights Law Review* 257 at 258; see also “Human Rights: have the public benefited?” (Thank-Offering to Britain Fund Lecture, 15 Oct 2002), at [http://www.britac.ac.uk/pubS/src/\\_pdf/woolf.pdf](http://www.britac.ac.uk/pubS/src/_pdf/woolf.pdf).

<sup>4</sup> “Towards a common law right of privacy” (2003) 66 *Modern Law Review* 726 at 731.

<sup>5</sup> See *Potter v Scottish Prison Service* 2007 SLT (*Scots Law Times*) 363 per Lord Glennie at para 10: the right to defend one’s private life against unwarranted intrusion by a public authority was a “civil right at common law regardless of the convention”. Moreover, “the incorporation of the Convention had “made a difference...not so much in creating rights which did not previously exist but more in fettering the power of both the legislature and the executive to interfere with such a right by insisting that any such interference must be not only in accordance with the law but also necessary and proportionate.” See also earlier dicta to the effect that the protections provided by the Convention were “already part of our municipal law”: *Moore v Secretary of State for Scotland* 1985 SLT 38, Opinion of the Court at 41.

<sup>6</sup> *von Hannover v Germany* (2005) 40 EHRR 1, judgment of the court at 25, para 57. The House of Lords in *Campbell v MGN* [2004] 2 AC (*Appeal Cases*) 457, at para 18 per Lord Nicholls, has similarly recognised that “the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities”.

In the 1970s, Lord Kilbrandon wrote that the topic of whether Scots law recognised a law of privacy was “a popular subject of professional conversation”.<sup>7</sup> Such a question has ceased to be a passing academic interest and is now a matter of immediate concern. The question is no longer *whether* municipal law should protect a right such as privacy, which is protected under Article 8 ECHR, but *how* it can develop in order to make good any deficit in the protection of those rights which fall within the ambit of the Convention. This paper therefore takes up in Scotland the enquiry which Phillipson posed for the common law in England. It assesses the extent to which Convention rights, in so far as they address rights of personality, already find protection in the Scots common law, and considers from a comparative perspective the means by which any gaps in that protection might be made good.

### **1.1 Personality rights: A working definition**

A full jurisprudential analysis of the term “personality rights” will not be attempted here, but a working definition is nonetheless required. “Personality rights” has become a convenient portmanteau term, increasingly used by Common Lawyers as well as Civil Lawyers,<sup>8</sup> to denote that bundle of rights which protect the integrity and inviolability of the person. The topic came to the fore in post-war Europe as a reaction against the gross infringements of those rights which had occurred in the preceding years, but the concept was hardly new. An obvious starting point is the Civil Law triad of interests protected by the *actio iniuriarum – corpus, fama, dignitas*<sup>9</sup> – encompassing physical, emotional and psychological integrity as well as reputation and dignity or honour. However, these categories clearly now require some amplification, since the social and political interactions within which such interests may be contested have altered immeasurably. While in Voet’s account,<sup>10</sup> for example, dignity might be offended by drenching a person with dung, debauching another’s handmaiden or laying hands upon a freeman as if he were a slave, a modern perspective extends to personality infringements never contemplated by Voet or indeed by the Scots Institutional<sup>11</sup> writers. Our reading of dignitary interests must include issues of confidentiality, privacy,<sup>12</sup> personal

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<sup>7</sup> “The law of privacy in Scotland” (1971) 2 *Cambrian Law Review* 35 at 35.

<sup>8</sup> In this paper, “Common Law” is capitalised when used in the sense of referring to the Anglo-American legal tradition, but lower case in the sense of rules of law not derived from statute. Similarly, “Civil Law” is capitalised when used in the sense of the Romanistic-European legal tradition, but lower case in the sense of private law.

<sup>9</sup> R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, reprinted 1996), pp 1083-1085; for further discussion, see *The Laws of Scotland: Stair Memorial Encyclopaedia*, reissue, “Medical Law” (2006) (M Earle and N R Whitty), para 6.

<sup>10</sup> *Commentarius ad Pandectas* 47.10.7-11.

<sup>11</sup> The term given to the authoritative Scots juristic writings of the seventeenth to the early nineteenth centuries.

<sup>12</sup> For a Scots inventory of privacy interests, see M Hogg, “The very private life of the right to privacy” (1994) 2(3) *Hume Papers on Public Policy* 1 at 2-4; for a US treatment, see D J Solove, “A taxonomy of privacy” (2006) 154 *U Penn LR* 477.

autonomy, identity and image.<sup>13</sup> Article 3 of the Quebec Civil Code provides a non-exhaustive listing:

Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy. These rights are inalienable.

A more detailed categorisation is offered by von Bar, who includes the right to protection of life and the right to be protected against injury to the body or health and against deprivation of liberty.<sup>14</sup> He also takes on board “the right to one’s name, the right to one’s image, and the right to honour and self-esteem”,<sup>15</sup> as well as protection against unlawful disclosure of personal information<sup>16</sup> and interference with family life.<sup>17</sup>

In summary, personality rights are the rights which “protect the attributes of the human person”, and thus concentrate upon “the être – the being – in contrast with the avoir – the having”.<sup>18</sup>

## **1.2 Extrapatrimonial or patrimonial?**

It is now impossible, however, to consider such “être” rights but ignore entirely the “avoir” rights which are derived from them. The developing legal framework for personality rights must reckon with the growing value of information and image as a commodity, given major advances in techniques for its capture, storage and dissemination, and with the commercialisation of the fruits of personality – the valuable economic interests which lesser-known individuals as well as “celebrities” may have in controlling exploitation of name, image, or even the “brand” of their personality.<sup>19</sup>

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<sup>13</sup> E.g., the relevant articles of the European Civil Code produced by the Study Group on a European Civil Code (at [http://www.sgecc.net/media/downloads/text\\_of\\_articles\\_final.doc](http://www.sgecc.net/media/downloads/text_of_articles_final.doc)), provide specifically for “Infringement of Personal Dignity, Liberty and Privacy”, “Loss upon Communication of Incorrect Information about Another”, and “Loss upon Breach of Confidence” (Arts 2:203-2:205).

<sup>14</sup> C von Bar, *The Common European Law of Torts* vol 2 (2000), pp 61 ff.

<sup>15</sup> *Ibid* p 94.

<sup>16</sup> *Ibid* pp 106 ff.

<sup>17</sup> *Ibid* pp 119 ff.

<sup>18</sup> A Popovici, “Personality rights – a Civil Law concept”, (2004) 50 *Loyola Law Review* 349 at 352.

<sup>19</sup> See H Beverley-Smith et al, *Privacy, Property and Personality* (2005), p 3.

While in the United States there is much debate on the related category of “publicity rights” and the “reification” of personality,<sup>20</sup> in Scotland such discussions remain largely hypothetical since case law is as yet sparse. Although there may be authority for interdict,<sup>21</sup> there has been no instance in recent years where damages have been obtained for false appropriation of an individual’s name or image per se – apart from actions for defamation or breach of confidence.<sup>22</sup> However, the framework is plain, given that in Scotland’s mixed legal system the classification of rights follows the Civil Law model.<sup>23</sup> Scots law is likely to distinguish between personality rights on the one hand, and the right to defend or control those rights by means of the law of contract or delict on the other. The former – the “être” rights – are clearly extrapatrimonial, while the latter – the contractual or delictual, or “avoir”, rights which derive from them – are clearly patrimonial. The former do not exhibit the characteristics of patrimonial rights. They are not part of the set of a person’s transferable assets and liabilities; one cannot assign one’s personal liberty, or bequeath the right to one’s own physical integrity. As provided in the Quebec Civil Code, they are “inalienable”. It follows that the right to personal liberty, for instance, is an extrapatrimonial right which is inalienable, but the right to sue for delictual damages if that right is infringed is a patrimonial right. One individual cannot assign image, name, or honour to another, as these are extrapatrimonial inalienable rights to which creditors cannot lay claim in the event of bankruptcy (in Scots law at least<sup>24</sup>). But the same individual can enter into a contract with another with regard to the use of his or her image, and the benefits of such a contract might, in turn, be assigned elsewhere.

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<sup>20</sup> See G M Armstrong, “The reification of celebrity: Persons as property” (1991) 51 *Louisiana Law Review* 443; E H Reiter, “Personality and patrimony: Comparative perspectives on the right to one’s image” (2002) 76 *Tulane Law Review* 673; M Jacoby and D L Zimmerman, “Foreclosing on fame: Exploring the uncharted boundaries of the right of publicity” (2002) 77 *New York University Law Review* 1322.

<sup>21</sup> *McCosh v George Crow & Co* (1903) 5 F (Fraser’s reports) 670; *X v BBC* 2005 SLT 796.

<sup>22</sup> While there are no recent reported Scots cases directly in point, there have been some missed opportunities. E.g., on 21 Jan 2005, the *Scotsman* newspaper reported that Cygnet Potato Breeders of Perthshire had launched an advertising campaign for a new type of potato, the “Cabaret”, for use in fish and chip shops. Their publicity used an image of Liza Minnelli, with legs replaced by deep-fried chips, and the slogan: “Life is a Cabaret. Worth making a song and dance about”. This was apparently withdrawn after it came to the attention of Minnelli’s New York lawyers. And on 8 Nov 2004, the same newspaper reported that Caledonian MacBrayne, the Scottish ferry operators, received protests after issuing a brochure which falsely represented a number of celebrities as having endorsed its routes. Again the matter was apparently resolved without litigation.

<sup>23</sup> See, e.g., J Neethling, J M Potgieter and P J Visser, *Neethling’s Law of Personality*, 2nd edn (2005), pp 11-14, para 3.2.1; P Kayser, “Les droits de la personnalité: Aspects théoriques et pratiques” (1971) *Revue trimestrielle de droit civil* 445; C Schmidt-König, *Introduction à la langue juridique française*, 2nd edn (2006), pp 185 and 203.

<sup>24</sup> For an alternative argument with regard to the US, see M Jacoby and D L Zimmerman, “Foreclosing on fame: Exploring the uncharted boundaries of the right of publicity” (2002) 77 *New York University Law Review* 1322.

## 2. EXISTING PROTECTION FOR PERSONALITY RIGHTS IN SCOTS LAW

Deficiencies in the protection of personality rights should not of course be exaggerated. Alongside the broad terminology of ECHR rights and the jurisprudence of the ECtHR there exists no single action – in any jurisdiction - which vindicates personality rights. But in Scotland, as elsewhere, they are protected using a range of legal mechanisms, of which a number are clustered in the law of delict, and in particular, in the so-called “intentional” delicts. The “tangle of crisscrossing categories” identified by Peter Birks as being at the heart of English tort law<sup>25</sup> is also observed in the various overlapping heads of delictual liability in Scots law. Some headings are relatively open-ended, based in general terms upon the interest infringed, such as assault or defamation, and in these cases malice or intention is often expressed as a necessary element. In others personality rights are protected by delicts which have evolved from the description of particular types of conduct. This latter category is in general more closely circumscribed, and the malice element is less likely to be expressly articulated – such as in wrongful arrest or breach of confidence. And of course in addition there are a growing number of statutory provisions, based upon a specific pattern of conduct, to which malice as such is usually irrelevant.<sup>26</sup> The main categories in these clusters of common-law delictual liability are as follows.

### 2.1 Protection of physical integrity: Assault

In the delict of assault we see very clearly the legacy of the *actio iniuriarum* from which protection for personality rights has largely developed. The notion of affront, regarded by Lee as the “gist”<sup>27</sup> of the *actio iniuriarum*, occupies equal prominence with the element of physical aggression. Thus assault may give rise not only to criminal prosecution, but also to a delictual claim against the assailant for damages to compensate for patrimonial loss suffered as well as solatium<sup>28</sup> for physical pain and injury to feelings.<sup>29</sup> In Hume’s lectures to his

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<sup>25</sup> “Harassment and hubris” (1997) 31 *Irish Jurist* 1 at 32.

<sup>26</sup> E.g. Protection from Harassment Act, 1997, ss 8-11; Data Protection Act 1998; Regulation of Investigatory Powers Acts 2000; Communications Act 2003.

<sup>27</sup> *An Introduction to Roman-Dutch Law*, 5th edn (1953) at p 335.

<sup>28</sup> Scots courts make an award of “solatium” to take account of compensatable elements of “physical pain and discomfort; physical injury and disfigurement; physical illness and disease; psychological suffering; wounded feelings and affront; loss of faculties; loss of amenities; loss of expectation of life” (R M White and M J Fletcher, *Delictual Damages* (2000), p 38.

<sup>29</sup> See *Anderson v Marshall* (1835) 13 S (Shaw’s Reports) 1130, in which solatium was awarded since a blow to the breast caused no lasting injury but was accompanied by verbal abuse. Cf *Rutherford v Chief Constable for Strathclyde Police* 1981 SLT (Notes) 119 in which damages were awarded for the physical injury but solatium for affront was deemed inappropriate. For the modern English position, see *Richardson v Howie* [2005] *Personal Injuries and Quantum Reports* Q3 per Thomas LJ at para 23: “It is and must be accepted that at least in cases of assault and similar torts, it is appropriate to compensate for injury to feelings including the indignity, mental suffering, humiliation or distress that might be caused by such an attack, as well as anger or indignation arising from the circumstances of the attack.” On the concurrence of the *actio iniuriarum* and the Aquilian action in

students on obligations *ex delicto*, assault figured as one of his first illustrations as follows:<sup>30</sup>

It is the general rule of our practice and is plainly founded in reason, and justice, that every wrong or criminal act which injures a neighbour in his property, or person, or other material concerns, gives rise to two sorts of action, the one criminal, *ad vindicatam publicam*, for the sake of example to others – and (if the conclusion is not capital) for the reformation of the offender –; the other civil, and at instance of the party injured, for reparation of his patrimonial damage, as also, in many instances, for an award of the trouble and distress he has suffered on the occasion...take the case of a tradesman who has been assaulted, and disabled from working at his trade. He has a claim to be indemnified of this patrimonial damage, and the expense of his cure, and even a claim for a sum of money *in solatium* of his pain and distress, though not capable of a precise estimation.

In the account of one of the Scots Institutional writers, Bankton, “injury” is perpetrated when the assailant “batter[s], by striking one”. In addition, assault “by holding up the fist, or any weapon, against one in a threatening manner is a real injury, because it tends much to the person’s *disgrace* who is so used”.<sup>31</sup> Similarly, Bell’s definition makes clear that “the civil claim of damage is not merely for damage sustained, but in solatium for affront and insult.”<sup>32</sup> Bankton’s distinction between assault and battery,<sup>33</sup> which survives in English law to distinguish mere threats from actual injury, has receded from modern Scots legal terminology. However, as David Walker pointed out in one of the leading treatises on delict in the twentieth century,<sup>34</sup> assault continues to encompass both direct physical injury and more indirect forms of attack. Walker identified three categories:

- a) “actual assault”, subtitled “battery”, where physical harm was the main element and where solatium might be claimed along with damages for loss of earnings and medical expenses.<sup>35</sup>
- b) “affronts i.e. notional assault” where there was no direct violence or contact, but threatening or alarming behaviour. This would include gestures such as riding a horse

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South African law in relation to cases of assault see PQR Boberg, *The Law of Delict*, vol 1 (1984), p 19.

<sup>30</sup> *Lectures*, vol III, p 120.

<sup>31</sup> *Institute*, 1.10.22.

<sup>32</sup> *Principles* § 2032.

<sup>33</sup> A terminology retained in the Court of Session Act 1825 s 28 (with regard to those actions appropriate for jury trial).

<sup>34</sup> *The Law of Delict in Scotland*, 2nd edn (1981), pp 490-492.

<sup>35</sup> D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981), p 491.

at the pursuer (the Scots term for claimant),<sup>36</sup> or discharging a gun in his or her direction.<sup>37</sup> Walker catalogued a number of cases of such threatened assault, drawn largely from the nineteenth century, such as snatching papers or making a “sign or gesture of an immodest nature” to a woman.<sup>38</sup> Neither such incident is likely to be regarded of sufficient gravity to give grounds for action to twenty-first-century litigants, who might be expected to demonstrate more phlegm. However, presenting a weapon at the pursuer in such a way as to suggest that it is about to be used, or otherwise instilling real physical fear, may still constitute an assault of this nature. Where the assault is by threatened rather than actual violence, a claim for solatium may be made even though no real physical harm or patrimonial loss is suffered.<sup>39</sup>

While one of the nineteenth-century Scots authorities stated that there “must be a physical bodily act; and ... words, or coming forward, or furious looks, do not amount to an assault”,<sup>40</sup> this restriction must now be reconsidered in the light of the reconceptualisation of the English crime of assault by the House of Lords in *R v Ireland*.<sup>41</sup> In that case the distinction between words and physical gestures, in terms of their potential to engender fear, was rejected as “unrealistic and indefensible”,<sup>42</sup> and the reasoning went one step further. The offensive interaction between assailant and victim had been by the medium of silent telephone calls. Not only was there no immediate proximity between the parties therefore, but also there had been no words. It was held, nevertheless, that a campaign of malicious silent calls which caused the recipient to “fear the *possibility* of immediate personal violence”<sup>43</sup> (and indeed to develop a psychiatric illness) was sufficient for a criminal charge of assault. Arguably, the same analysis might be applied to impose civil liability<sup>44</sup> where words or possibly silence, even if transmitted by electronic means, were such as to convey a sufficiently serious and direct threat.

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<sup>36</sup> *Ewing v Earl of Mar* (1851) 14 D (Dunlop’s Reports) 314.

<sup>37</sup> *Ewing v Earl of Mar* (1851) 14 D 314, as asserted by Lord President Boyle at 315.

<sup>38</sup> *The Law of Delict in Scotland*, 2nd edn (1981), p 490 (although the cases cited by Walker in this connection do not seem to support liability in precisely such circumstances).

<sup>39</sup> As in *Cruickshanks v Forsyth* (1747) Mor (*Morison’s Dictionary of Decisions*) 4034, where “though, strictly speaking, there was no damage other than the expense [of litigation], yet when a man is affronted and beat, something was thought to be due *in solatium*, and for encouraging persons to seek redress in this way, rather than to take it at their own hand.”

<sup>40</sup> *Lang v Lillie* (1826) 4 Mur (*Murray’s Jury Court Cases*) 82 at 86; see also *Anderson v Marshall* (1835) 13 S 1130 in which Lord President Hope remarked that the use of insulting epithets alone would not have given grounds for an action but for the infliction of a physical blow. The same principle applied in English Law: see *Rex v Meade and Belt* (1823) 1 Lew 184 per Holroyd J to the effect that “no words or singing are equivalent to an assault”.

<sup>41</sup> [1998] AC 147.

<sup>42</sup> Per Lord Steyn at 162.

<sup>43</sup> Per Lord Steyn at 162.

<sup>44</sup> The reasoning applied in *R v Ireland* was endorsed, at 166, by the Scots judge sitting in that case, Lord Hope.

It was a “notional” assault of this type which the pursuer allegedly suffered in *Ward v Scotrail Railways Ltd.*<sup>45</sup> A female railway ticket inspector claimed that a colleague was harassing her at work by following her and watching her. There was no question of physical blows, but the court accepted that the pursuer’s fear of the defender (the Scots term for defendant) had led to nervous illness. Her counsel argued that the concept of *iniuria* was wide enough to encompass this sort of non-physical harm, and Walker’s text was cited. These pleadings were rejected, on the basis that the infliction of emotional distress could be actionable only if deliberate,<sup>46</sup> whereas the pursuer had based her case upon negligence. However, the court appeared to accept that such an affront could be actionable if relevantly pled.

- c) “indirect assault” where the affront or insult element predominated. Walker suggested that an indirect assault occurred where indirect contact between the parties had resulted “in the person’s being affronted, *or* put in a state of alarm, *or* physically hurt”;<sup>47</sup> in other words, affront was actionable not only when it was concomitant with physical aggression or the threat of aggression, as in a) and b) above, but also independently. It is uncontentious that in some cases, especially where the physical attack is threatened rather than actual, the element of affront may be more significant than any element of physical injury, although susceptibility to affront may have diminished over the years. However, the more difficult question raised by Walker’s account is whether delictual liability arises independently on the basis of an indirect assault, where there has been no actual aggression or physical threat, and where the infliction of affront or insult was the *only* mode of wrongful conduct.<sup>48</sup>

Walker offered the hypothetical example of taking away a person’s clothes,<sup>49</sup> or soiling a towel which another is expected to use, for which the authority given is the *American Restatement (Second) of Torts*.<sup>50</sup> The Scots authority is slender, however. It

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<sup>45</sup> 1999 SC (*Session Cases*) 255. (The conduct in *Ward* preceded the introduction of the Protection from Harassment Act 1997. The case of *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 indicates that employers may now be held vicariously liable in terms of that legislation for harassment perpetrated at the workplace.)

<sup>46</sup> Per Lord Reed at 259.

<sup>47</sup> D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981), p 492 (emphasis added).

<sup>48</sup> It may be noted that neither of the earlier treatises on the Scots law of delict had included a category of affront without physical injury or threat: see J Guthrie Smith, *A Treatise on the Law of Reparation*, 1st edn (1863), Ch 2; A T Glegg, *A Practical Treatise on the Law of Reparation*, 1st edn (1892), Ch 6.

<sup>49</sup> At p 492.

<sup>50</sup> Walker’s footnote (*Delict*, at p 492, note 79) reads simply “§ 18” (on offensive contact, part of the Restatement chapter entitled “Intentional Invasions of Interests in Personality”). However, this example does not appear in the text of the *Restatement* itself but is offered as an illustration in the Reporter’s Notes at c). (The other example given in this section, pulling a chair from someone, coincides also with the Reporter’s Notes on this part of the *Restatement*.) This is also one of the examples of different forms of *iniuria* which Voet compiled from examples in the Digest, along with loading someone with too much wine so as to hold him up to mockery, laying hands on a free human being as though he was one’s own runaway slave, following the steps of a decent matron with

was held in one nineteenth-century case that the action of spitting at a person was an assault, even if this did not “actually take effect on his person”, but in the same incident the defender also physically threatened the pursuer.<sup>51</sup> There are no Scots examples of an action for assault being raised merely because of a soiled towel, or other such affronts to dignity without any element of threatened physical danger.<sup>52</sup> It is therefore doubtful whether the Scots authorities on assault would now support a claim for affront where the pursuer has not also been hurt (in terms of physical or psychiatric injury) or threatened,<sup>53</sup> although a claim may of course be made on alternative grounds if another protected interest has been invaded, such as liberty or privacy.<sup>54</sup>

One interesting aspect of Walker’s analysis is the range of sources upon which he drew. Although he took Bankton’s definition of *iniuria* as his starting point,<sup>55</sup> many of his examples were drawn from beyond Scotland. Numerous English, Canadian and South African cases were cited under the headings above, as was Prosser on Torts<sup>56</sup> and the American *Restatement (Second) of Torts*, § 18, on offensive contact, part of the Restatement chapter entitled “Intentional Invasions of Interests in Personality”.<sup>57</sup> A less adventurous geographical range is observed in the courts, however, where pleadings have been confined largely to Scots and occasionally English

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lustful intent or debauching another’s handmaiden (*Commentarius ad Pandectas* 47.10.7-11).

<sup>51</sup> In *Ewing v Earl of Mar* (1851) 14 D 314, as well as spitting, the defender rode his horse at the pursuer in such a way as to cause alarm and endanger his safety.

<sup>52</sup> A recent example which might be regarded loosely as an “affront”, and in which one garment at least was taken away, is *Henderson v Fife Police* 1988 SLT 361 (no physical contact occurred but the pursuer was required to remove her bra while in police custody). However, the terminology of affront is absent from the case. Basing his analysis largely on the authority of the English case of *Lindley v Rutter* [1981] 1 QB (*Queen’s Bench Reports*) 128 (regarding an inappropriate strip search), Lord Jauncey held this to be an “invasion of privacy and liberty” (at 367-368). The reference to liberty is doubtful since the pursuer’s freedom of movement was not compromised by removal of her underwear. As will be argued below, these circumstances are more logically characterised as infringing her privacy.

<sup>53</sup> There are no reported examples of damages being awarded without some kind of actual or threatened physical injury, or a representation of some kind (J Blackie, “Defamation”, in K Reid and R Zimmermann, *A History of Private Law in Scotland* (2000), vol 2, 633 at 666, although Sir George Mackenzie, *The Laws and Customs of Scotland, in Matters Criminal*, 2nd edn (1699), Part I, Title XXX, para 3 (pp 153-4), listed an assortment of “real injuries” which might attract criminal penalty: “by hindering a man to use what is his own by removing his Seat out of its place in the Church, by giving a man medicaments which may affront him, by Arresting his Goods unjustly, by wearing in contempt what belongs to another man as a mark of honour, by Razing shamfully [sic] a man’s Hair, or Beard, by offering to strike him in publick, or by strikeing him, or riving or abusing his Cloaths, or his House, and many otherways related by Berlich” (Matthias Berlichius, *Conclusiones practicabiles* (Lipsiae, first published 1614). In his listing of crimes Erskine also included real injuries where a person’s honour or dignity was impugned (such as by aiming a blow or “assuming a coat of arms or any mark of distinction proper to another”, *Institute* 4.4.81).

<sup>54</sup> See also the definitive study by C F Amerasinghe, “The protection of *corpus* in Roman-Dutch law” (1967) 84 *South African Law Journal* 56, 194, and 331 (in three parts) in which the *factum* of assault as “unlawful interference with another’s bodily integrity” (57) was subdivided into “application of force” (57) and “threat of force” (58) only.

<sup>55</sup> At 488, citing *Institute*, 1.10.22.

<sup>56</sup> E.g., at p 490 note 21.

<sup>57</sup> E.g., at p 491 note 43, p 492 note 79.

authority.<sup>58</sup>

## 2.2 Protection for reputation: Defamation

As with assault, the Civilian roots of the law of defamation are in the *actio iniuriarum*,<sup>59</sup> and in the early Scots case law proof of intention to harm was required. By the late eighteenth century, particularly with the advent of newspapers, Scots law had “slipped into strict liability”, so that fault started to be irrebuttably presumed.<sup>60</sup> In the modern law, one of the most pressing debates centres upon that presumption of fault, and the contexts in which statements attract “qualified privilege” whereby the presumption is displaced and malice must be proved. To that extent attention has turned towards the English Common Law and the issues raised by the “constitutionalisation”<sup>61</sup> of defamation, balancing Article 8 ECHR rights against Article 10 ECHR and the necessity to protect freedom of expression. In particular, it appears to have been accepted that the so-called “Reynolds defence”<sup>62</sup> might be applied in Scotland in relation to responsible media reporting of matters of public interest, although there has as yet been no formal ruling upon the ambit of that defence in the Scots courts.<sup>63</sup>

An obviously limiting factor with regard to defamation and protection of rights of personality is that defamation deals only with false allegations. The allegations which injure most grievously often do so precisely because they are true, but in the law of defamation the *veritas* defence trumps any considerations of privacy, protection for which will be considered further below.

## 2.3 Protection for personal liberty: Wrongful detention

Remedies for infringement of liberty were well-established in the Scots common law long before incorporation of the ECHR. There is ample Institutional authority for the importance of protecting liberty,<sup>64</sup> as well as recognition that “though liberty be a most precious right, yet it is not absolute”.<sup>65</sup> Indeed one of the earliest statutes protecting personality rights was passed by the Parliament of Scotland (before Union with the Parliament of England and Wales) in 1701 to address some of the procedural grievances set out in the Claim of Right Act of 1689.

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<sup>58</sup> See, e.g., *Henderson v Fife Police* 1988 SLT 361 *supra*.

<sup>59</sup> Thus in Scots law, unlike English law, there is no requirement that defamatory remarks be published or communicated to a third party, since damages may lie for the affront suffered, even where the remarks have reached the defamed person alone.

<sup>60</sup> See J Blackie, “Defamation”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000), vol 2, p 633 at p 662.

<sup>61</sup> See I Loveland, “The constitutionalisation of political libel in the English common law” 1998 *Public Law* 633.

<sup>62</sup> As originally elaborated in the English case of *Reynolds v Times Newspapers* [2001] 2 AC 127. Lord Nicholls set out ten specific criteria – the “Reynolds factors” – which the defence must address.

<sup>63</sup> *Adams v Guardian Newspapers* 2003 SC 425.

<sup>64</sup> E.g., Stair, *Institutions*, 1.9.4; Bankton, *Institute*, 1.2.69.

<sup>65</sup> Stair, *Institutions*, 1.2.5.

The Act “For preventing wrongous Imprisonments and against undue delays in tryals” provided for the award of damages (at a specified level dependent upon social status) if the appropriate procedure had not been observed in detaining those suspected of criminal offences. And alongside the many cases claiming “wrongous imprisonment” for criminal offences under the 1701 Act in the eighteenth and nineteenth centuries, at least an equivalent number alleging wrongful imprisonment for debt was brought at common law. There is therefore a significant seam of older Scots case law establishing the right to claim reparation for wrongful detention.

At the same time, the modern case law contains an element of uncertainty which casts doubt on the adequacy of protection as measured against Article 5 ECHR (protecting the right to liberty and security).<sup>66</sup> That uncertainty concerns the role of malice in actions for damages, as will be explained further below.

### **2.3.1 Cases against the police**

In modern times, most cases involving infringement of liberty have of course been brought against the police. Broadly speaking, there are three situations in which such detention may take place. The first is where there was due authority in terms of a formal warrant to arrest; the second is where there was no warrant but there was due authority at common law or in terms of a statute (reasonable justification); and the third is where there was no warrant and no due authority of any other sort.

#### *Arrest with warrant*

It is rare for a person arrested under the authority of a warrant to assert that the police officers concerned have acted wrongfully. Indeed it is difficult to conceive of circumstances in which the police officers themselves could be shown to have acted wrongfully in implementing a warrant duly granted, no matter what their personal motivation.<sup>67</sup> *Beaton v Ivory*,<sup>68</sup> a nineteenth-century authority, is still frequently cited in this context as illustrating the heavy onus on any litigant who alleges malice against police officers.<sup>69</sup> The case is, however, of

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<sup>66</sup> The impact of Art 5 ECHR has yet to be fully tested. The only reported Scottish case in which the detention by the police occurred after incorporation of the ECHR is *Beck v Chief Constable Strathclyde Police* 2005 1 SC 149, in which Art 5 was apparently not considered. Cases involving detention in psychiatric institutions are considered further below.

<sup>67</sup> See, e.g., *McKie v Chief Constable of Strathclyde* 2003 SC 317 in which the pursuer was arrested in circumstances that were undoubtedly humiliating, but she was unable to establish that the officers concerned were motivated by malice (although, given that a warrant had been duly issued for the arrest, her claim for damages was based upon assault rather than wrongful arrest.)

<sup>68</sup> (1887) 14 R 1057.

<sup>69</sup> Cited, e.g., in *Woodward v Chief Constable, Fife Constabulary* 1998 SLT 1342; *McKinney v Chief Constable, Strathclyde Police* 1998 SLT (Sh Ct) 80; *Dahl v Chief Constable, Central Scotland Police* 1983 SLT 420; as well

questionable relevance since the defender was the local Sheriff (judge), who the pursuer asserted had acted oppressively by giving oral instructions to police officers to arrest an entire township after a fracas during the Skye clearances.<sup>70</sup> In other words, the primary question concerned the judicial process by which the warrant was issued, rather than the lawfulness of the police conduct in implementing it.

### *Arrest with reasonable justification*

In practice many arrests of course are made without a warrant, and this category is much more likely to lead to litigation than the first. The general principle is that if an arrest is made without a warrant, the onus is upon the police to establish appropriate justification in the event of challenge.<sup>71</sup> Nonetheless, successful challenge is rare.<sup>72</sup> Police officers are empowered to arrest an individual whom they see committing an offence or attempting to do so, or threatening violence,<sup>73</sup> or if they have “credible evidence”<sup>74</sup> that this is occurring.<sup>75</sup> Given the varied circumstances in which such decisions must be made, a broad construction is given to the reasonableness of grounds for arrest without warrant. In assessing whether arrest was justified, the court does not adopt an entirely objective stance, applying the benefit of hindsight, but looks at the likely “state of mind and knowledge of the arresting officer”.<sup>76</sup> Thus allowances have been made for a mere “error of judgment which could be made in dangerous or difficult, fast moving circumstances”.<sup>77</sup>

If it is accepted that detention or arrest without warrant was indeed justifiable, the authorities indicate that an action may lie only if the officers have acted maliciously. But, as with the first category above, it is hard to imagine the type of situation where such an action might be successful. If an arrest is justifiable on the type of grounds outlined above, then it is not clear how the arrest itself may be deemed wrongful, no matter what the mindset of the officers carrying it out. If, on the other hand, the officers concerned did bear malice towards the pursuer, then this might raise the issue that this was the reason for the arrest, rather than “credible evidence” that an offence had been committed or reasonable grounds for

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as in *Robertson v Keith* 1936 SC 29 (a defamation case arising out of over-zealous surveillance).

<sup>70</sup> The “clearances” is the term given to the forced removal of the rural population from areas of Scotland during the nineteenth century.

<sup>71</sup> See Renton and Brown, *Criminal Procedure*, 6th edn (looseleaf) (available Westlaw), para 7–02 and the authorities cited therein.

<sup>72</sup> Renton and Brown, *Criminal Procedure*, 6th edn (looseleaf), para 7–02.

<sup>73</sup> Renton and Brown, *Criminal Procedure*, 6th edn (looseleaf), para 7–05.

<sup>74</sup> Renton and Brown, *Criminal Procedure*, 6th edn (looseleaf), para 7–05.

<sup>75</sup> In addition, modern statute authorises police officers to detain where there are “reasonable grounds” for suspecting the individual has committed or is about to commit an offence: Criminal Procedure (Scotland) Act 1995, ss 13 and 14. Power to detain on suspicion was similarly contained in earlier provisions, e.g., the Criminal Justice (Scotland) Act 1980, s 2.

<sup>76</sup> See *McLeod v Shaw* 1981 SLT (Notes) 93 at 94.

<sup>77</sup> *Woodward v Chief Constable, Fife Constabulary* 1998 SLT 1342 per Lord Kingarth at 1350.

anticipating further danger, but in such a situation the arrest would fall within the third category below.

### *Arrest without justification*

An arrest may have occurred without justification – because a warrant existed but did not extend to the circumstances in question,<sup>78</sup> or because there was inadequate basis for common law powers of arrest and/or detention (as detailed above). Fortunately, such instances are rare.<sup>79</sup> It is difficult to justify malice as a requirement in obtaining damages for unlawful detention, but nonetheless there are conflicting dicta in the Scots cases as to whether proof of malice is an additional requirement where the pursuer *has* established the arrest to be unjustified.<sup>80</sup> These may perhaps be attributed to conflation of the concepts of absence of reasonable justification on the one hand and presence of malice on the other. A right to redress regardless of malice is consistent with analysis both in Common Law systems<sup>81</sup> and in other mixed jurisdictions<sup>82</sup> where “neither intention nor negligence is required for liability – the wrongfulness of the deprivation of liberty is sufficient”.<sup>83</sup> Any requirement to establish malice in addition also appears to contravene Article 5(5) ECHR, which provides for a right to “compensation” where arrest or detention has been unlawful, irrespective of malice or any other form of motivation on the part of those who carried it out.<sup>84</sup>

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<sup>78</sup> Early cases include examples of warrants disputed as beyond the jurisdiction of the sheriff who granted it (*McCrone v Sawyers* (1835) 13 S 443), or because the warrant was “to do an illegal act” (*Bell v Black and Morrison* [1865] 3 M (Macpherson’s Reports) 1026 per Lord Justice Clerk Inglis at 1081). See also *Pringle v Bremner and Stirling*, (1867) 5 M (HL) 55, in which the police officers possessed a warrant, but this authorised them only to search the pursuer’s premises for wood, not to remove private correspondence, and not to arrest him.

<sup>79</sup> But see, e.g., *Downie v Chief Constable, Strathclyde Police* 1998 SLT 8.

<sup>80</sup> See *Woodward v Chief Constable, Fife Constabulary* 1998 SLT 1342 in which Lord Kingarth held that the pursuer’s arrest had been unlawful but was not “without probabilis causa”, and damages would not therefore be awarded without proof of malice. This decision is commented upon by Sheriff Principal Cox in *McKinney v Chief Constable, Strathclyde Police* 1998 SLT (Sh Ct) 80 at 82 ff; see also P W Ferguson, “Malice and negligence” 2007 SLT (News) 127. Sheriff Principal Cox’s statement in *McWhinney*, at 82, is more categorical: “...the decided cases can be divided between those in which the pursuer avers that he or she has been deprived of liberty unlawfully — in which case averments of malice are unnecessary — and those in which the pursuer concedes that the constable had the power to arrest or detain but that the exercise of that power on the particular occasion was unwarranted — in which case malice must be averred and proved.”

<sup>81</sup> The level of intent required “is intentionally to do the act which causes the imprisonment. Added malice towards the imprisoned plaintiff is not necessary” (per Ralph Gibson LJ in *Weldon v Home Office* [1990] 3 WLR (Weekly Law Reports) 465 at 470, under reference to *Halsbury’s Laws of England*, 4th edn, vol 45, p 606, para 1325); see also WVH Rogers (ed) *Winfield & Jolowicz on Tort*, 17th edn (2006), para 4–13. The US *Restatement (Second) of Torts*, § 44 provides that “If an act which causes another’s confinement is done with the intention of causing the confinement, the actor is subject to liability although his act is not inspired by personal hostility or desire to offend.”

<sup>82</sup> On South Africa, see *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (ECD) esp per Jones J at 133D-H; M I Schwartzman, “Tortious liability for false imprisonment in Louisiana” (1942) 17 *Tulane Law Review* 81 at 84.

<sup>83</sup> J Neethling et al, *Neethling’s Law of Personality*, 2nd edn (2004), p 119, para 2.3.

<sup>84</sup> But although the substantive right to compensation is guaranteed by Article 5(5) ECHR, in some cases the

### 2.3.2 Detention in psychiatric institutions

Wrongful detention of a patient in a psychiatric institution similarly founds an action in damages.<sup>85</sup> The pattern established in nineteenth century case law is comparable to that outlined above; where the appropriate statutory procedures have been observed, then malice must be proved, but this is not required if they have not.<sup>86</sup> There is little modern case law,<sup>87</sup> and the impact of incorporation of the ECHR has yet to be fully tested. Since incorporation there have been no Scots cases in which delictual damages have been awarded for wrongful detention in a psychiatric institution.<sup>88</sup> However, in *Storck v Germany*,<sup>89</sup> the ECtHR has stated clearly the “positive obligation” of member states, in terms of Articles 5 and 8 ECHR, to protect those considered to be psychiatrically ill against unlawful deprivation of liberty. *Storck*, and the European jurisprudence upon which that case is based,<sup>90</sup> reinforce the common law right to raise an action in damages against public and private institutions alike where there has been failure to implement appropriate procedural safeguards or to observe statutory procedures compliant with Article 5 ECHR.

### 2.3.3 Detention by private parties

While in the above contexts deprivation of liberty may sometimes be justifiable, there are few circumstances in which a private individual may legitimately detain another. Aside from the limited circumstances where certain types of official are empowered by statute to detain individuals for statutory offences,<sup>91</sup> private citizens may do so only if they have witnessed a

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ECtHR has held that a finding of a violation of Art 5 is adequate “just satisfaction” for non-pecuniary damage (as observed by the Law Commissions in their joint Report on Damages under the Human Rights Act 1998 (LC 266, Scot Law Com No 180, 2000), at paras 6.79-6.80). See, e.g., *Szeloch v Poland* (2003) 37 EHRR 46; Application no 39510/98, *AS v Poland*, 20 June 2006; but cf Application No 29798/96, *Lloyd v United Kingdom*, 1 Mar 2005, in which pecuniary and non-pecuniary damages were awarded in relation to wrongful deprivation of liberty by magistrates.

<sup>85</sup> Bell, *Principles*, § 2042.

<sup>86</sup> See *Strang v Strang* (1849) 11 D 379; *Mackintosh v Fraser* (1859) 21 D 783, (1860) 22 D 421, aff’d (1863) 1 M (HL) 37.

<sup>87</sup> Perhaps reflecting a practice of close adherence to the statutory requirements. Moreover, the Mental Health (Scotland) Act 1984 s 122(1) provided that no person was liable to civil or criminal proceedings in respect of any act purporting to be done in pursuance of the legislation, unless the act was done in bad faith or without reasonable care. This replicated the provision in the Mental Health (Scotland) Act 1960, s 107. There is no equivalent provision in the Mental Health (Scotland) Act 2003.

<sup>88</sup> But see *Reid v United Kingdom* (2003) 37 EHRR 9, in which the patient successfully claimed damages for a breach of Art 5(4) ECHR (requiring that an individual who is deprived of his liberty has the right to have the lawfulness of that detention reviewed by a court), although the detention itself was found to be justified.

<sup>89</sup> (2006) 43 EHRR 6. On the “positive obligation” to secure compliance with Art 5 ECHR in this context, see A Campbell, “Positive obligations under the ECHR: Deprivation of liberty by private actors” (2006) 10 EdinLR 399.

<sup>90</sup> See *Storck*, para H35.

<sup>91</sup> E.g., the transport officials in *Percy v Glasgow Corporation* 1922 SC (HL) 144, in relation to fare-dodgers,

crime, or have a “moral certainty” that a crime has been committed.<sup>92</sup> If an official exceeds his or her statutory authority,<sup>93</sup> or a private individual detains another without sufficient cause, an action lies in damages. It has been stated in Institutional writings that “matters of utility or profit” could not provide a pretext for deprivation of liberty,<sup>94</sup> and there is authority that even brief detention for such utilitarian purposes may be actionable.<sup>95</sup>

## 2.4 Protection for name image and brand: Passing off

In recent years English law has developed the use of passing off to deal with cases where, in marketing its own product, the defendant has allegedly appropriated the “brand” which the claimant has built up around his or her name or image. The question for present purposes is whether Scots law is likely to provide the same mode of protection.

The complex evolution of the English doctrine of passing off through the courts of Law and Equity<sup>96</sup> has no Scots equivalent (since Scots law does not recognise the institutional separation between Law and Equity). In Scots law “the action for passing off is based on the general right which everyone possesses not to have published about him or his goods, statements which are both untrue and prejudicial to his pecuniary interests.”<sup>97</sup> Nonetheless, considerable weight has traditionally been accorded to English authority in this field.<sup>98</sup> Modern Scots cases<sup>99</sup> have incorporated the “classic trinity” which forms the basis for a successful action in the English courts, namely: goodwill or reputation attached to the goods

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although in that instance the officials were found to have exceeded their authority.

<sup>92</sup> *The Laws of Scotland: Stair Memorial Encyclopaedia*, reissue, “Criminal Procedure” (2002) (D Dickson), para 98. See also *Neville v C&A Modes* 1945 SC 175, in which the pursuer raised an action in defamation against shop employees who [had] detained her wrongfully on suspicion of shoplifting.

<sup>93</sup> E.g., *Mackenzie v Young* (1902) 10 SLT 231; *Percy v Glasgow Corporation* 1922 SC (HL) 144.

<sup>94</sup> *Institutions*, 1.2.5.

<sup>95</sup> In *Mackenzie v Cluny Hill Hydropathic Co* 1908 SC 200, an action was held relevant where a hotel guest had been detained by the manager for fifteen minutes in order to pressurise her into apologising to a fellow guest after a dispute.

<sup>96</sup> See, e.g., C Wadlow, *The Law of Passing Off*, 3rd edn (2004), paras 1–24 ff. An interpretation grounded in property rights has run through the English case-law and has been attributed partly to the need in earlier times to ground jurisdiction in the courts of Equity in cases where there had been no fraud. See C Wadlow, *The Law of Passing Off*, 3rd edn (2004), paras 1–33–1–37; D Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), p 186: “So long as property was involved, the courts of Equity might also intervene; hence situations that might have been described differently at Common law began to be treated in proprietary terms in order to activate the Chancery”. (The example given by Ibbetson is that of trademarks.)

<sup>97</sup> E M Clive, “The action for passing off” 1963 *Juridical Review* 117 at 134; see also *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 18, s v “Intellectual property”, para 1364 (H L MacQueen).

<sup>98</sup> As, e.g., in *Cellular Clothing Co Ltd v Maxton & Murray* (1899) 1 F (HL) 29; *Dunlop Pneumatic Tyre Co Ltd v Dunlop Motor Co Ltd* 1907 SC (HL) 15; and see discussion in E M Clive, “The action for passing off” 1963 *Juridical Review* 117 at 117; W Stewart, *Reparation* (2000), para 7–10; *Lang v Goldwell* 1980 SC 237 per Lord Wheatley at 245.

<sup>99</sup> E.g., *Treadwell's Drifters Inc v RCL Ltd* 1996 SLT 1048; *Gleneagles Hotels Ltd v Quillco 100 Ltd* 2003 SLT 812; *William Grant v Glen Catrine Bonded Warehouse* 2001 SC 901. See also *Lang v Goldwell* 1980 SC 237 accepting the statement of the doctrine in the English case of *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 per Lord Diplock at 742.

or services which the claimant supplies; misrepresentation by the defendant to the public leading consumers to believe that goods or services offered by the defendant are the goods or services of the claimant; and damage, or likelihood of damage, as a result of that misrepresentation.<sup>100</sup>

The leading recent English authority is *Irvine v Talksport*,<sup>101</sup> in which a famous Formula 1 driver sued a radio station after a brochure circulated to around 1000 recipients featured a doctored image of the driver listening to a radio with the radio station's logo. The action was successful, but in contrast with, for example, recent German case law,<sup>102</sup> no "character right" as such was recognised.<sup>103</sup> Instead, the decision was based upon passing off, or, more specifically, misappropriation not of personality in itself, but of the intellectual property right in the goodwill which derives from celebrity status: Irvine had "a property right in his goodwill which he [could] protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third party's goods or business".<sup>104</sup>

In applying the doctrine of passing off, the decision in *Irvine* purported to apply the trinity of elements as outlined above. Nonetheless, in order to accommodate the "realities of the marketplace",<sup>105</sup> it expanded the doctrine significantly as follows.

- a) *Goodwill*. The reasoning in *Irvine* relied upon a construction of goodwill as existing independently of the claimant's prime area of activity, or any broad category of goods or services provided by the claimant to consumers. Instead, goodwill attached entirely to the personal "fame or notoriety"<sup>106</sup> which Irvine could exploit by means of endorsing the products of others.
- b) *Misrepresentation*. In traditional passing off cases, the element of misrepresentation created customer confusion as to whether the defendant's product had been produced by the claimants, or as to whether there was a link between the products offered by the parties.<sup>107</sup> In *Irvine* there was no confusion of that nature – indeed Laddie J dispensed altogether with the need for a "goods for goods substitute"<sup>108</sup> in consumer perception.

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<sup>100</sup> *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 per Lord Oliver at 499.

<sup>101</sup> [2002] 2 All ER (All England Reports) 414, [2003] 2 All ER 881 (damages).

<sup>102</sup> See *The Times* 23 Feb 2006 at 83, reporting an award of €1.2 million damages against the *Frankfurter Allgemeine Sonntagszeitung* newspaper for unauthorised use of Boris Becker's image, alongside an unflattering slogan, in promoting the launch of its new edition in 2001.

<sup>103</sup> [2002] 2 All ER 414 per Laddie J at para 11, citing Simon Brown LJ in *In re Elvis Presley Trade Marks* [1999] RPC (Reports of Patent, Design and Trade Mark Cases) 567 at 597-598.

<sup>104</sup> [2002] 2 All ER 414 per Laddie J at para 75.

<sup>105</sup> [2002] 2 All ER 414 per Laddie J at para 43.

<sup>106</sup> [2002] 2 All ER 414 per Laddie J at para 39.

<sup>107</sup> *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 above, and see, e.g., *Pebble Beach Co v Lombard Brands Ltd* 2002 SLT 1312.

<sup>108</sup> At para 18. He also expressly rejected (at para 29) the approach adopted in *McCulloch v May* (1948) 65 RPC 58, in which the claim had failed due to the lack of a "common field of activity".

Any element of misrepresentation, if such existed, was purely to the effect that Irvine had endorsed the production of Talksport's 1000 brochures. However, it has been noted<sup>109</sup> that the focus was more upon *misappropriation* rather than *misrepresentation* – Talksport's "unlicensed appropriation"<sup>110</sup> of goodwill by "squatting"<sup>111</sup> on Irvine's reputation.

- c) *Damage*. Little harm appeared to have been caused to Irvine's pecuniary interests. The impact was "negligible in direct money terms" since the "misrepresentation" had not caused custom to be transferred away from him. While the "potential long-term damage" was said in general terms to be "considerable",<sup>112</sup> an analogy drawn with *Taittinger SA v Allbev Ltd*, where the damage to the plaintiffs was "incalculable but severe",<sup>113</sup> seems unconvincing. The latter case involved erosion of a brand image by similar rival products, and the effect upon future sales, as yet unquantified, was nevertheless plain. The main emphasis in Laddie J's judgment was not in fact damage to Irvine but the fact that Talksport had been enriched by pirating his image for its own purposes: "Manufacturers and retailers recognise the realities of the market place when they pay for well known personalities to endorse their goods. The law of passing off should do likewise."<sup>114</sup> The importance attributed to the element of enrichment was implicitly recognised in the mode of calculating damages in the court above<sup>115</sup> – fixed by reference not to any loss suffered by Irvine, but to the amount which Talksport would have expected to pay in order to obtain his genuine endorsement of the brochure.

A relative lack of resident "celebrities" means that Scotland has little case law of this particular type (a much greater proportion of passing off claims have involved the drinks, and in particular the whisky, industry). It remains to be seen therefore whether the Scots courts will find the decision in *Irvine* to be a step too far in dealing with bogus celebrity endorsements. However, the final paragraph of Laddie J's judgment in *Irvine* merits further consideration. He noted that at trial he had referred counsel to Article 8 ECHR and Article 1 of the First Protocol:<sup>116</sup>

Had I come to the conclusion that passing off had not developed sufficiently to cover

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<sup>109</sup> H Carty, "The Common Law and the quest for the IP effect" 2007 *Intellectual Property Quarterly* 237 at 257.

<sup>110</sup> Para 75.

<sup>111</sup> Para 34.

<sup>112</sup> Per Laddie J at para 74.

<sup>113</sup> [1993] FSR 641 per Sir Thomas Bingham at 678, cited by Laddie J at para 37 in *Irvine*.

<sup>114</sup> Para 43.

<sup>115</sup> [2003] 2 All ER 881.

<sup>116</sup> Para 77.

false endorsements it would have been necessary to go on to consider whether this new strand of law was effective, to use the words of Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967, 998, para 111, to “give the final impetus” to reach that result.

It is arguable that it would be more straightforward, and certainly no more taxing upon judicial creativity, to use the “impetus” of Article 8 ECHR and Article 1 of the First Protocol in order to reconceptualise such cases of commercial plagiarism.<sup>117</sup> In this connection it might also be noted that such appropriation of name or likeness falls squarely within Prosser’s fourfold categorisation of breach of privacy in the United States,<sup>118</sup> and also represents one of the actionable invasions of privacy outlined in the Privacy Bill recently laid before the Irish Parliament.<sup>119</sup> Possible directions for the law of privacy in Scotland will be discussed further below.<sup>120</sup>

## 2.5 Protection for confidential information: Breach of confidence

The obligation of confidentiality is well-established in Scots law.<sup>121</sup> Breach of confidence is located in the law of delict<sup>122</sup> – not in a category of “equitable wrongs” as in English law.<sup>123</sup> Nevertheless, English authority is persuasive in so far as it addresses protection of the

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<sup>117</sup> See Q Stewart, “The law of passing off – a Scottish perspective” (1983) 3 *European Intellectual Property Review* 64 at 65: “...passing off in Scotland is not a particular wrong or tort but merely a label that is applied to those cases, in which liability arises ex delictu [sic], whose facts would found an action under the English tort of passing off.” Stewart argued (at 66) for a reconceptualisation of passing off, suggesting that “recognition of a delict of unlawful competition – or to be more accurate, the recognition that the law of delict gives a right of action where unlawful competition has occurred – would release Scots law from the straightjacket of the action of passing-off, which it has unnecessarily donned.” For further English comments on the merits of dealing with commercial plagiarism by way of a general law of unfair competition, see P Walsh, “Customers as powerful competitors: the implications for litigation” University of Oxford Centre for Competition Law and Policy, Symposium 9 Jun 2005 (at <http://www.competition-law.ox.ac.uk/>). (I am grateful to James McLean for this last reference.)

<sup>118</sup> “Privacy” (1960) 48 *California Law Review* 383.

<sup>119</sup> Bill no 44 of 2006 (available at [www.oireachtas.ie](http://www.oireachtas.ie)), clause 3(2)(c)(i).

<sup>120</sup> At 3.2.

<sup>121</sup> Stair noted in his account of witnesses that “Advocates, agents factors, trustees ... are not obliged to depone as to any secret committed to them” (*Institutions*, 4.43.9), but Bankton went further, stating that “Advocates are bound by their office not to reveal the secrets of their clients causes” and that clerks to the signet were “sworn at their admission ... not to reveal what they write or do for their employers” (*Institute*, 4.3.27; 4.4.10). In nineteenth-century cases a relationship of confidentiality was found, e.g., on the part of former employees in possession of trade secrets (*Rutherford v Boak* (1836) 14 S 732; *Roxburgh v McArthur* (1841) 3 D 556), and professional advisors (*Whyte v Smith* (1851) 14 D 177 (doctor diagnosing date of conception)), and in relation to publication of private letters (*Cadell and Davies v Stewart* (1804) Mor App, Literary Property No 4). More generally, Bell set out the jurisdiction of the Court of Session to protect reputation and private feelings “from outrage and invasion” where there had been “breach of epistolary confidence” (*Commentaries*, I, 111-112).

<sup>122</sup> See, e.g., *The Laws of Scotland: Stair Memorial Encyclopaedia*, reissue, “Medical Law” (2006) (M Earle and N R Whitty), para 299.

<sup>123</sup> See P M North, “Breach of confidence: Is there a new tort?” 1972 (12) *JSP TL* 149; D Capper, “Damages for breach of the equitable duty of confidence” (1993) 14 *Legal Studies* 313; *Seager v Copydex Ltd (No 1)* [1967] 1 *WLR* 923 per Lord Denning at 931.

confidential. Scots courts<sup>124</sup> have drawn unashamedly upon Mr Justice Megarry's classic exposition in *Coco v AN Clark (Engineers) Ltd* of the three factors which the doctrine requires (the information must have the necessary quality of confidence; it must be imparted in circumstances importing an obligation of confidence; and there must be an unauthorised use of that information to the detriment of the party communicating it).<sup>125</sup>

### 2.5.1. Confidentiality and privacy

The question arises, however, how Scots law places itself with regard to recent English developments whereby breach of confidence has been extended into protection of matter which is not truly confidential in the natural sense of the word.<sup>126</sup> English commentators have written at length on the use of breach of confidence to protect in general terms against intrusive use of private information – in effect to make good the absence of a tort of breach of privacy.<sup>127</sup> In brief, three areas of difficulty are encountered if breach of confidence is expanded in this way:

- a) *Content*. The terms “private” and “confidential” may overlap to an extent but are not synonymous. All that is private and worthy of protection in terms of Article 8 ECHR, is not necessarily confidential. If, for example, the subject's privacy has been invaded in a public place,<sup>128</sup> there is a high degree of artificiality in arguing that the wrong suffered is that confidentiality has thus been breached. Alternatively, private information may have been published, and thus lost its quality of confidentiality, but may still be sufficiently sensitive to merit protection.
- b) *The obligation of confidence*. Where privacy is breached, the intruder has often obtained the information (or image) in question by subterfuge or, at the very least, has not

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<sup>124</sup> See, e.g., *Levin v Caledonian Produce (Holdings) Limited* 1975 SLT (Notes) 69; *Hardey v Russel and Aitken*. 2003 GWD (*Greens Weekly Digest*) 2-50.

<sup>125</sup> [1968] FSR 415 at 419.

<sup>126</sup> As, e.g., in *Douglas v Hello* [2006] QB 125, aff'd by *OBG Ltd v Allan* [2007] UKHL 21, [2007] 2 WLR 920, where the dispute concerned photographs taken in the presence of 350 guests and numerous hotel staff, and photographs with very similar subject matter were published in the world press; or in *Campbell v MGN* [2004] 2 AC 457, where the photographs were taken in a public street. In neither case had there been any kind of pre-existing agreement between the rogue photographer and the unwilling subjects.

<sup>127</sup> Or “shoe-horning” privacy into the law of confidentiality. This term, used by A Sims in the conclusion of her article, “‘A shift in the centre of gravity’: the dangers of protecting privacy through breach of confidence” 2005(1) *Intellectual Property Quarterly* 27 at 51, is taken up by Lord Phillips in *Douglas v Hello* [2006] QB 125 (aff'd by *OBG Ltd v Allan* [2007] UKHL 21, [2007] 2 WLR 920) at para 53. On this theme, see, e.g., G Phillipson, “Transforming breach of confidence? Towards a common law right of privacy under the Human Rights Act” (2003) 66(5) *Modern Law Review* 726; J Morgan, “Privacy, confidence and horizontal effect: ‘Hello’ trouble” (2004) 62(2) *Cambridge Law Journal* 444; R Mulheron, “A potential framework for privacy? A reply to *Hello!*” (2006) 69 *Modern Law Review* 679.

<sup>128</sup> E.g., *Peck v UK* (2003) 36 EHRR 41 (events in a public street); *X v BBC* 2005 SLT 796, in which the pursuer sought to interdict the broadcasting of film showing her behaving in an embarrassing way, mostly in the environs of Glasgow Sheriff Court.

accepted any kind of obligation of confidence implied or otherwise. Confidentiality can only do the work of privacy if, in truth, it dispenses with the limitations of the need for a pre-existing confidential relationship.

- c) *Protection of the trivial*. If we accept Lord Goff's analysis in *Attorney-General v Guardian Newspapers* (the "Spycatcher" case), the law of confidentiality "applies neither to useless information, nor to trivia".<sup>129</sup> Yet what is useless or trivial in objective terms may nevertheless be regarded as private by the individual.<sup>130</sup>

### **2.5.2 Confidentiality in Scots law: Third parties appropriating information**

In addition to these general difficulties, more specific problems arise in Scots law if confidentiality is adapted to do the work of privacy. It is generally recognised that in *Attorney-General v Guardian Newspapers* (the "Spycatcher" case) the obligation of confidence as set out in *Coco v AN Clark* was significantly extended by Lord Goff (admittedly in obiter remarks). He stated that a duty of confidence could arise "in equity" between parties where there was no contractual or similar relationship:<sup>131</sup>

[T]he duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers - where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public...

These remarks made clear that the duty of confidentiality was not entirely restricted to situations where there was some kind of prior relationship between the parties. In *Campbell v MGN*, the seal was set on this reasoning. The following statement by Lord Nicholls can be read more or less as discarding the need for a prior confidential relationship altogether:<sup>132</sup>

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<sup>129</sup> [1990] 1 AC 109 at 282

<sup>130</sup> Such as the teenage pursuer carrying a baby's dummy in *X v BBC* or the bride eating cake in *Douglas v Hello*: see Sims, "A shift in the centre of gravity" at 46.

<sup>131</sup> [1990] 1 AC 109 at 281.

<sup>132</sup> At para 14.

This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship... Now the law imposes a “duty of confidence” whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.

These developments thus remove a significant barrier to the use of confidentiality in protecting private information generally, although they have not been greeted with universal enthusiasm.<sup>133</sup>

We cannot pretend that we find it satisfactory to be required to shoehorn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion.

Shortly after the decision in *Attorney-General v Guardian Newspapers*, a similar Scots case was heard in the House of Lords (with a similar outcome). In *Lord Advocate v Scotsman Publications*<sup>134</sup> (an attempt to interdict publication of the memoirs of a former member of MI6), it was accepted that the obligation of confidentiality might be extended. Referring to comments made from the Court of Session bench,<sup>135</sup> Lord Keith noted the convergence of English and Scots Law “in particular as respects the circumstances under which *a person coming into possession of confidential information knowing it to be such*, but not having received it directly from the original confider, himself comes under an obligation of confidence”.<sup>136</sup> He did not, however, press further issues of Scots and English similarity or dissimilarity.

The point was taken up a decade later by Lord Kingarth, sitting in the Outer House in *Quilty v Windsor*,<sup>137</sup> in which damages were claimed for alleged wrongful disclosure of medical records. His Lordship held that in any event breach of confidentiality had not been relevantly pled, but he further observed that he would be<sup>138</sup>

... slow to suggest that the law in Scotland at least was wholly in accordance with the somewhat broader statement made by Lord Goff or in accordance with counsel's own reference to any document “of a confidential nature”, particularly where it seems to me substantial difficulty would attach to what is meant by such a phrase. It seems to me that

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<sup>133</sup> *Douglas v Hello* [2006] QB 125 (aff'd by *OBG Ltd v Allan* [2007] UKHL 21, [2007] 2 WLR 920) per Lord Phillips at para 53.

<sup>134</sup> 1989 SC (HL) 122.

<sup>135</sup> Lord Justice Clerk Ross had maintained, at 143, that “there is ample justification for the conclusion that ... the laws of England and Scotland are to the same effect”.

<sup>136</sup> At 164 (emphasis added).

<sup>137</sup> 1999 SLT 346.

<sup>138</sup> At 356.

any development of the law in England at least to this extent would appear to rest on and take its force from different underlying principles, being based apparently on an obligation of conscience or an equitable right of property... In this case, therefore, I would not have been inclined to accept that the pursuer had made a relevant case against the first defender in the absence of any clear averments that he, the first defender, knew that the documents had been transmitted in confidence by the hospital authorities. Further there are no relevant averments in my view to the effect that the circumstances of the first defender obtaining the documents were such as to indicate that he knew that they were communicated to him in breach of an obligation of confidence.

In sum, there is Scots authority for the extension of confidentiality to a third party receiving information *knowing* it to be confidential. But there is no clear Scots authority to extend it in the rather more open-ended way suggested for English law by Lord Goff in *Attorney General v Guardian Newspapers* and accepted by the House of Lords in *Campbell v MGN*, and there is at least Outer House authority doubting the basis for such extension.<sup>139</sup> If, therefore, the Scots courts were minded to follow the English courts in developing the law of confidentiality as a general means of protecting private information, this significant point of principle would require to be confronted.

### **2.5.3. Confidentiality and privacy in Scots law: Third parties attempting to protect information**

A further area of possible cross-border difference becomes apparent from the House of Lords judgment in the long-running litigation arising out of *Douglas v Hello*.<sup>140</sup> Reversing the judgment of the Court of Appeal<sup>141</sup> on this point, their Lordships held that not only the aggrieved couple, but also the magazine with whom they had entered into an exclusive agreement, had title to sue for breach of confidentiality when photographs of their wedding were pirated by a rival publication. The reasoning was that when the recipient of information knows that a third party has put in place measures to keep that information confidential, and has a financial interest in maintaining such confidentiality, an obligation is owed to that third party as well as to the subject of the information. As Lord Hoffmann stated:<sup>142</sup>

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<sup>139</sup> I.e., Lord Kingarth in *Quilty v Windsor* as cited above. More recently, the issue was not raised for discussion in *X v BBC* 2005 SLT 796, although in *Hardey v Russel and Aitken* 2003 GWD 2-50, Lord Johnston made the bland statement, at para 11, that "As a matter of the general law, it is clear to me that both England and Scotland have recognised the principle that a third party obtaining information which is confidential to another person and who thereafter uses it, may breach a duty owed by him to the original confider so not to do."

<sup>140</sup> *OBG Ltd v Allan* [2007] UKHL 21, [2007] 2 WLR 920.

<sup>141</sup> [2006] QB 125.

<sup>142</sup> [2007] 2 WLR 920 at para 117.

‘OK!’ had paid £1m for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of *any* photographs of the wedding. That was quite clear. Unless there is some conceptual or policy reason why they should not have the benefit of that obligation, I cannot see why they were not entitled to enforce it. And in my opinion there are no such reasons. Provided that one keeps one's eye firmly on the money and why it was paid, the case is...quite straightforward.

And just as the Douglas' right to protect their position arose in "equity",<sup>143</sup> the right of third parties to confidentiality was also "equitable";<sup>144</sup> there was apparently "no question of creating an 'image right' or any other unorthodox form of intellectual property".<sup>145</sup>

This decision is no doubt pragmatic in recognising the valuable commercial arrangements which commodification of celebrity has made commonplace. However, were such a case to come before the Scots courts, the basis upon which title to sue could be extended to a third party is problematic. The English framework, to which the law of equity is fundamental, gives limited assistance, and if an obligation between A and C is to be recognised in Scots law, it may require a more secure foundation than the assertion that A has paid a great deal of money to B.<sup>146</sup>

### 3. PROTECTION FOR PRIVACY: CLOSING THE GAP?

Long before the ECHR became part of domestic law, it was ventured that the position of privacy was "more favourable" in Scotland than in England.<sup>147</sup> Nonetheless, considerable uncertainty has persisted. Scots pleaders, like their counterparts in England, have advanced cautiously, preferring to confine themselves, for example, to the concept of confidentiality rather than invoking privacy as a free-standing interest.<sup>148</sup>

It is uncontroversial that the right to protect one's privacy from invasion may be asserted in the form of a "shield" – an underlying consideration in the adjudication of other issues. It is accepted as relevant, for example, in relation to the admissibility of evidence,<sup>149</sup> and in relation to the pursuer's right in a personal injuries action to resist examination by a person who is not medically qualified as a doctor.<sup>150</sup> In another recent case, *Response Handling Ltd v*

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<sup>143</sup> [2006] QB 125 per Lord Phillips at para 113.

<sup>144</sup> [2007] 2 WLR 920 per Lord Hoffmann at para 1.

<sup>145</sup> Per Lord Hoffmann at para 124.

<sup>146</sup> It may indeed be more relevant to consider debates already underway in Civil Law systems: see, e.g., H Beverley-Smith et al, *Privacy Property and Personality* (2005) at pp 156 ff (France) and pp 129-130 (Germany).

<sup>147</sup> K W B Middleton, "A right to privacy?" 1963 *Juridical Review* 178 at 189.

<sup>148</sup> E.g., *X v BBC* 2005 SLT 796.

<sup>149</sup> *Martin v McGuinness* 2003 SLT 1424 (evidence obtained by private investigators' surveillance); *Connor v HMA* 2002 JC 255 (evidence obtained by police surveillance); *Edgley v Barbour* 1995 SLT 711 (evidence obtained from search without warrant).

<sup>150</sup> *Rawlinson v Initial Property Maintenance Ltd* 1998 SLT (Sh Ct) 54; *Mearns v Smedvig Ltd* 1999 SC 243.

*BBC*,<sup>151</sup> the court appeared to accept as axiomatic, and the defenders did not dispute, that a corporate right to privacy of possessions existed, on the authority of Article 1 of the First Protocol to the ECHR and European jurisprudence.<sup>152</sup> However, such right to privacy as existed was “trumped” by the public interest right to freedom of expression on matters of public concern, and the company was unsuccessful in interdicting a broadcast which revealed details of its working practices.

On the other hand, the effectiveness of privacy as a “sword” – as an independent basis of liability – has been little tested. At least one dictum, by Lord Justice Clerk Thomson in an unreported case in the 1950s, points away from it being so used: “I know of no authority to the effect that mere invasion of privacy however hurtful and whatever its purpose and however repugnant to good taste is itself actionable.”<sup>153</sup> Nevertheless, the modern authorities are not as clear-cut as this remark suggests.

Lord Thomson’s account of the Scots authorities does not entirely square with the subsequent Outer House case of *Henderson v Fife Police*.<sup>154</sup> Although this case predates incorporation of the ECHR into domestic law, it remains the Scots case which points most directly to an actionable right of privacy.<sup>155</sup> In that case the pursuers had been detained, with others, during a sit-in at their workplace. The circumstances of the arrest and detention were such that these were held not to be wrongful, but the female pursuer, who at all times had cooperated fully with the police, had been asked to remove her bra in police custody, and the male pursuer had been handcuffed. For these indignities both were awarded damages. Lord Jauncey’s judgment is not elaborated in extensive detail, but he took the view that the request to remove the pursuer’s bra was “an interference with her liberty which was not justified in law”. Unlike in *Martin v McGuinness*, considered below, it did not appear that the court heard arguments based on the Roman law, and the terminology of *iniuria* and affront does not appear in Lord Jauncey’s judgment. Indeed he noted no “Scottish case in which it had been held that removal of clothing forcibly or by requirement could constitute a wrong” but instead relied upon English authority. Taking a broad brush approach, he stated that “since such removal must amount to an infringement of liberty I see no reason why the law should not protect the individual from this infringement just as it does from other infringements and indeed as the law of England did in very similar circumstances in *Lindley v Rutter*”.<sup>156</sup> (In *Lindley*<sup>157</sup> a detainee similarly had her underwear forcibly removed.) On this basis, damages

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<sup>151</sup> [2007] CSOH 103, 2007 GWD 22-367.

<sup>152</sup> By reference to *Hoechst AG v Commission of the European Communities* [1989] ECR 2859 [1991] 4 CMLR 410.

<sup>153</sup> *Murray v Beaverbrook Newspapers Ltd*, Second Division Court of Session, 18 Jun 1957, unreported, quoted in T B Smith, *A Short Commentary on the Law of Scotland* (1962), 655.

<sup>154</sup> 1988 SLT 361.

<sup>155</sup> See H L MacQueen, “Protecting privacy” (2004) 8 EdinLR 249.

<sup>156</sup> At 367.

<sup>157</sup> 1981] 1 QB 128.

were awarded in *Henderson* for invasion of “privacy and liberty”.<sup>158</sup>

It is interesting that the terminology of affront was used in *Lindley*. Lord Donaldson reviewed extensive English authority in recognising the implications of body searches as an “affront to the dignity and privacy of the individual”.<sup>159</sup> Both *Lindley* and *Henderson* were cited in *Wainwright v Home Office*, the English case involving the inappropriate strip-searching of prison visitors, where the assertion of an independent right to privacy and dignity found little support in the House of Lords<sup>160</sup> (although this was subsequently given recognition when the *Wainwrights* took their case to the ECtHR<sup>161</sup>). There is no specific indication in the *Wainwright* judgments why these earlier cases did not persuade their Lordships.

More recently, in *Martin v McGuiness*<sup>162</sup> the pursuer argued that evidence obtained for the defender by a private investigator watching the pursuer’s home should be declared inadmissible. He also claimed damages in respect of the invasion of privacy which this had represented. Since the evidence was in any event ruled admissible,<sup>163</sup> the case for damages was irrelevant and was not fully discussed, but there was debate between counsel as to the applicability of the *actio iniuriarum* to deal with this type of invasion of privacy, with reference to the *Digest*<sup>164</sup> and to Zimmermann’s *The Law of Obligations*.<sup>165</sup> Since the point did not require to be decided, Lord Bonomy merely noted the arguments in the briefest of terms and observed that “[i]t may, however, be only a short step from an assault on personality of the nature of an insult to the dignity, honour or reputation of a person, causing hurt to his feelings, to deliberate conduct involving unwarranted intrusion into the personal or family life of which the natural consequence is distress.”<sup>166</sup> And while half a century previously Lord Thomson noted no case in which privacy had been actionable, Lord Bonomy pointed out that there was none in which privacy had been ruled irrelevant. Noting the defender’s argument that all previous cases involving unjustifiable intrusion into private and

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<sup>158</sup> At 367-368.

<sup>159</sup> At 135. Cf also *Wilkinson v Downton* [1897] 2 QB 57 per Wright J at 59, involving the intentional infliction of mental distress, in which the concept of *iniuria* was used to develop the English law.

<sup>160</sup> [2004] 2 AC 406.

<sup>161</sup> (2007) 44 EHRR 40. The ECtHR found that the applicants’ rights had been infringed by inadequate protection for their dignity during the searches. In so far as the action against the prison officers in negligence did not ground civil liability in the English courts – in the absence of tort of invasion of privacy – the ECtHR held that there had also been a violation of Art 13 ECHR (protecting the right to an effective remedy).

<sup>162</sup> 2003 SLT 1424.

<sup>163</sup> In this regard *Martin* follows a very similar English case, *Jones v Warwick University* [2003] 3 All ER 760, in which the Court of Appeal ruled that evidence regarding a claimant’s true disability was improperly obtained and therefore contravened Art 8 ECHR, but was nonetheless admissible in a personal injuries claim. This case was decided two months previously and does not appear to have been cited to the Scots court.

<sup>164</sup> Noted in Lord Bonomy’s judgment at para 29 as “*Digest of Justinian*, Mommsen (ed), at para 21.7 and 21.18”, although it is not clear which passages are indicated by this reference.

<sup>165</sup> R Zimmermann (the author’s name is misspelt in the report), *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, reprinted 1996), 1053–1059 (on “The different forms of *iniuria*”).

<sup>166</sup> Para 29.

personal affairs had involved established heads of liability (e.g., copyright, breach of contract, or defamation) he observed:<sup>167</sup>

Of course it does not follow that, because a specific right to privacy has not so far been recognised, such a right does not fall within existing principles of the law. Significantly my attention was not drawn to any case in which it was said in terms that there is no right to privacy.

In short, therefore, although some support for a freestanding right of privacy can now be found in the modern Scots authorities, lack of direct authority means that there is continuing uncertainty as to the basis on which this right might be asserted. As in England, this presents one of the most serious obstacles to ensuring appropriate protection for the rights enshrined in Article 8 ECHR.

### 3.1 Comparative law models?

One obvious problem in Scotland, a small jurisdiction, is the infrequency of case law in this area.<sup>168</sup> Even when Scots “celebrities” complain of intrusive media coverage, litigation often takes place in England or elsewhere because publication, or threatened publication, is out of the jurisdiction: in the 1960s the Duke of Argyll, for example, famously divorced the Duchess of Argyll in Scotland,<sup>169</sup> but the Duchess sued for breach of confidence in England over publication of his memoirs of the marriage in the English-based *The People* newspaper.<sup>170</sup> The shortage of native material as a basis for this developing area of the law means that comparative study is of particular importance.

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<sup>167</sup> Para 28.

<sup>168</sup> See H McKechnie, “Delict and Quasi-Delict”, in G C H Paton (ed), *Introduction to Scottish Legal History* (Stair Soc vol 20, 1958), p 265 at p 279: “Intentional injuries bulk very small in our courts today as opposed to faults of omission, fraud alone being a usual ground of action, breach of promise rare and defamation infrequent” (as compared with the nineteenth century). Lord Kilbrandon in his survey of the law of privacy in the early 70s also noted the rarity of defamation actions as compared with in England (“The law of privacy in Scotland” (1971) 2 *Cambrian Law Review* 35 at 38). The shortage of cases may be due partly to a greater tendency to settle potential disputes prior to litigation: for a practitioner perspective, see R Mackenzie, “Navigating the media maze” (2001) 46(12) *JLSS* 30; A Bonnington, “The aliens have landed” (2006) 10 *EdinLR* 140.

<sup>169</sup> 1962 SC (HL) 88.

<sup>170</sup> [1967] Ch 302. See also *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17 [2006] HRLR 13: the claimant was a Glasgow MP at the time of the impropriety alleged in the offending article, but sued for libel in England because publication was in *The Telegraph*. See also *Murray v Express Newspapers Plc* [2007] EMLR (*Entertainment and Media Law Reports*) 22 in which the claimant (the infant son of the author J K Rowling) raised proceedings in the English courts in an attempt to restrain publication in a UK newspaper of photographs taken of him in Edinburgh.

### 3.1.1 South Africa and the *actio iniuriarum*

As a fellow mixed legal system with which many interesting parallels have already been drawn,<sup>171</sup> South Africa is, as always, a focus of special comparative interest for the Scots. There is much valuable material to be considered in terms of the content of personality rights,<sup>172</sup> but there is less to be drawn from South African law in regard to how protection for such rights may be structured. The primary medium for the protection of personality rights in South Africa, the *actio iniuriarum*, is rooted in the strong presence of the Roman-Dutch tradition in the modern law of delict.<sup>173</sup> Moreover, a rich and dynamic case law has allowed the *actio iniuriarum* to evolve so as to operate in modern conditions.<sup>174</sup> Scots law does not replicate this and could not appropriate it, not least because the South African Bill of Rights<sup>175</sup> does not precisely mirror the ECHR.

The *actio iniuriarum* as received into Scots law is summarised by T B Smith as follows:<sup>176</sup>

The proper scope [of the *actio iniuriarum*] has always been to deal with those many situations where there has been deliberate affront to the pursuer (or negligence so gross as to be the equivalent of intent) and the pursuer's feelings have consequently been hurt. Damages are for non patrimonial loss (*solatium*) and the malicious purpose of the defender is always relevant.

As such the *actio iniuriarum* must clearly be acknowledged as an important legal "ancestor" (just as "the Roman ancestor of our action of reparation is *lex Aquilia*"<sup>177</sup>). But although there is no doubting its importance as a source, it is questionable whether it offers a sustainable model for the modern development of personality right protection, just as it is not now suggested that the *lex Aquilia* should be reasserted as the primary means of focussing the complex policy considerations in developing the law relating to physical damage.<sup>178</sup> There are

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<sup>171</sup> See, e.g., R Zimmermann, D Visser, and K G C Reid, *Mixed Legal Systems in Comparative Perspective* (2004).

<sup>172</sup> See J Neethling, J M Potgieter and P J Visser, *Neethling's Law of Personality* (2nd edn, 2005).

<sup>173</sup> By contrast, Voet, for example, whose writings are routinely cited in the South African courts, was cited in only twenty cases reported in *Scots Law Times* since 1893.

<sup>174</sup> In its Memorandum on Confidential Information (No 40, 1977) at paras 48-58, the Scottish Law Commission used the modern South African cases to indicate the potential application of the *actio iniuriarum* in Scots law. (The subsequent Report on Breach of Confidence (No 90, 1984) did not pursue these references further.)

<sup>175</sup> Chapter 2 of the Constitution of the Republic of South Africa, available at <http://www.concourt.gov.za/site/yourrights/thebillofrights.htm>.

<sup>176</sup> "Designation of delictual actions – damn *injuria* damn" 1972 SLT (News) 125 at 126. A dustier treatment was found in R W Lee, *An Introduction to Roman-Dutch Law*, 5th edn (1953) at p 335: the "*actio iniuriarum* unquestionably exists in Scots law though it is not an action which one would wish to see encouraged".

<sup>177</sup> T B Smith, "Designation of delictual actions – damn *injuria* damn" 1972 SLT (News) 125 at 126.

<sup>178</sup> See remarks of Lord Rodger of Earlsferry in which he counselled against "yearn[ing] to make Scots law into some kind of civil law theme park in which visitors can inspect the last working model of an *actio communi*

few modern Scots cases in which the *actio iniuriarum* has been asserted,<sup>179</sup> and none in which the court has accepted it as occupying such an extensive role, although in one recent Outer House case proof was allowed on the issue of whether the pursuer might recover on this basis for injury to feelings consequent upon removal of organs from her child at post mortem.<sup>180</sup> Without such modern development of the doctrine, it is difficult to see how the *actio iniuriarum* could now be applied directly not only to the traditional concerns on which the Roman law concentrated in terms of *corpus*, *fama* and *dignitas*, but also, for example, to the potential intrusions into privacy made by modern technology in collecting and disseminating information and images. Moreover, the stated focus of the *actio iniuriarum* on deliberate affront<sup>181</sup> would limit its effectiveness in the development of the modern law, as will be discussed further below.

### 3.1.2. Looking beyond England to Europe

It is uncontroversial that there has been substantial convergence between English and Scots law particularly in relation to negligence.<sup>182</sup> Nonetheless, significant differences remain in the “intellectual superstructure”<sup>183</sup> of the law of delict/tort. As Bernard Rudden famously noted, “The key word is in the plural”<sup>184</sup> in the English law of torts – a collection of compartmentalised “torticles”.<sup>185</sup> Gordley’s account of protection for personality rights in English law suggests that “it was only in the 19<sup>th</sup> century that jurists tried explicitly to identify rights that the traditional forms of action were supposed to protect. The result of that effort was to leave unexplained gaps in the rights protected.”<sup>186</sup> The crucial question in English law is whether an existing remedy applies to the situation in hand, and it is apparently beyond the reach of judicial creativity to create a new category, even with an impetus such as the Human

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*dividundo*” (“The use of the Civil Law in Scottish Courts”, in D Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997), p 225 at p 231).

<sup>179</sup> See *Hardey v Russel and Aitken*, 2003 GWD 2-50, in which the party litigant attempted to invoke the *actio iniuriarum*, but since there was a clear case based on confidentiality, this was not explored by the court; *Martin v McGuinness* 2003 SLT 1424, in which this aspect of the case was in any event dismissed as irrelevant and where the *actio iniuriarum* was noted but not discussed in the judgment. *Hardey* was discussed in J Tunney and J Jameson-Till in “Do you want to know a secret? Exploring the boundaries of non-contractual confidence” (2003) 71(1) SLG 2003 7, in which, at 11, the authors counselled against “over-admiring the glass case of historical concepts”.

<sup>180</sup> *Stevens v Yorkhill* [2006] CSOH 143 (Temporary Judge MacAulay). For commentary on this issue, see N R Whitty, “Rights of personality, property rights and the human body in Scots law” (2005) 9(2) EdinLR 194.

<sup>181</sup> See section 3.2.1. below.

<sup>182</sup> See H L MacQueen and W D H Sellar, “Negligence”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000), vol 2, p 517 at pp 544 ff.

<sup>183</sup> *Ibid* at p 547.

<sup>184</sup> B Rudden, “Torticles” (1991–1992) 6/7 *Tulane Civil Law Forum* 105 at 109.

<sup>185</sup> B Rudden, “Torticles” (1991–1992) 6/7 *Tulane Civil Law Forum* 105 (the listing of “torticles” at 111-120 included breach of confidence under “B”, but not breach of privacy under “B” or “P”).

<sup>186</sup> J Gordley, *Foundations of Private Law* (2006) 241. On the early history of *iniuria* in English law, see J S Beckerman, “Affronts to Honor and Origins of Trespass”, in M S Arnold et al (eds), *On the Law and Customs of England. Essays in Honor of Samuel E Thorne* (1981), p 159 at pp 176-181.

Rights Act 1998.<sup>187</sup> Although other Anglo-American Common Law jurisdictions have managed protection for personality rights more creatively, notably in the United States, and most recently in New Zealand,<sup>188</sup> the English approach remains “that when new needs arise it is better to deal with them by perverting existing institutions rather than creating new ones”.<sup>189</sup>

In Scotland, as in England, protection for personality interests in the modern law has been largely through the medium of discrete categories of delictual/tortious liability, but the historical constraints of the forms of action clearly have no relevance north of the border. As Peter Birks once noted, the “true difference” between English and Scots law is not in regard to the content of particular rules, but in regard to structure. The latter retains a “commitment to the institutional scheme or, in other words, to a more systematic approach”.<sup>190</sup> In keeping with its Civilian roots, the Scots law of delict is not a remedy-based, but a rights-based, system, and specific categories of delictual liability are underpinned by general principle.<sup>191</sup> There are no structural reasons for fettering judicial discretion with regard to the list of protected rights, and this list may exceptionally be capable of further development if there are cogent reasons why a particular category should be recognised. As summed up by Lord Dunedin:<sup>192</sup>

Of course, different actions have different names, but the question in Scotland was never as to the remedy – it was always as to the right. You ask for what you want in your summons... You may not get what you want, but that will be because you failed to show that you had the right to get it.

This feature has important implications for the developing areas of delictual liability. Thus, for example, in *Micosta SA v Shetland Islands Council*,<sup>193</sup> Lord Ross considered that there was no constraint, even in the absence of specific Scots precedent, upon his recognition of a delict of deliberate misuse of statutory powers by a public body, and his Lordship quoted David Walker’s textbook on delict to the effect that “[t]he decision to recognise a particular

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<sup>187</sup> *Campbell* per Baroness Hale at para 132.

<sup>188</sup> Decision of the New Zealand Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1. Note also that a draft Privacy Bill was laid before the Irish legislature in July 2006 (Bill no 44 of 2006, available at [www.oireachtas.ie](http://www.oireachtas.ie)).

<sup>189</sup> B Markesinis, “The familiarity of the unknown”, in W Swadling and G Jones (eds), *The Search for Principle* (1999) p 59 at p 65. Of the law of torts Peter Birks lamented that “Darwin would have got nowhere with so muddled a taxonomy” (“Harassment and hubris” (1997) 31 *Irish Jurist* 1 at 32).

<sup>190</sup> “More logic and less experience”, in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition in Scots Law* (1997), p 167 at p 174.

<sup>191</sup> On the development of general principle from the writings of the Institutional writers, see D W McKenzie and R Evans-Jones, “The development of remedies for personal injury and death”, in R Evans-Jones (ed) *The Civil Law Tradition in Scotland* p 277 at pp 286 ff.

<sup>192</sup> “The divergencies and convergencies of English and Scottish law” (Fifth lecture on the David Murray Foundation in the University of Glasgow, 21 May 1935).

<sup>193</sup> 1986 SLT 193.

interest, and consequently to grant a remedy for its infringement, is a question of social policy, and the list recognised has grown over the years.”<sup>194</sup>

Accordingly, there is little historical basis in Scots law for the kind of structural difficulties which have constrained the English remedies-based system in incorporating the ECHR, a rights-based document. As Quintin Stewart once argued in relation to the reconceptualisation of passing off, “the foundation upon which the Scottish lawyer is free to build is...wider than that available to his English brother”.<sup>195</sup> If it is accepted that privacy is an interest worthy of protection in terms of Article 8 ECHR, and that the common law must develop so as to achieve this, there is no reason in principle why Scots law should be obliged to “shoehorn” privacy into confidentiality – or indeed into any other model of uncertain fit.

In giving express recognition to protection of privacy as a necessary development in the common law, Scotland can look beyond England to the jurisprudence of other European jurisdictions, where the *actio iniuriarum* may also be an acknowledged legal ancestor<sup>196</sup> although it is not now articulated as representing the modern law.<sup>197</sup> Even in codified systems, the law protecting personality interests has often grown up through the “interstices”<sup>198</sup> of the Code, as courts have responded to changing social and cultural expectations. Few of the issues of privacy and confidentiality which so concern us today troubled Portalis, or the fathers of the German Civil Code. In effect Article 9, inserted into the French *Code civil* in 1970,<sup>199</sup> simply gives recognition to the law as made by the judges who had for some time been using the general provisions of Article 1382 to develop extensive protection for the private sphere.<sup>200</sup> As Lindon describes in his classic account of *Les droits de la personnalité*, the notion of personality rights “n’a pas, à la façon de Minerve sortie tout armée du cerveau de Jupiter, été enfantée soudain par un juriste de génie.”<sup>201</sup> Instead, he traces the gradual development of solutions for particular types of infringement through the medium of judicial

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<sup>194</sup> At 198, citing *The Law of Delict in Scotland*, 2nd edn (1981), p 9.

<sup>195</sup> “The law of passing off – a Scottish perspective” (1983) 3 EIPR 64 at 65.

<sup>196</sup> In relation to German law, see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, reprinted 1996), pp 1085-1094; “The Civil Law in European Codes”, in H L MacQueen et al (eds), *Regional Private Laws and Codification in Europe*, (2003), p 18 at p 58. On French law, see H Beverley-Smith et al, *Privacy, Property and Personality* (2005), p 149. But cf also, on the significance of *iniuria* in the development of English law, J S Beckerman, “Affronts to Honor and Origins of Trespass”, in M S Arnold et al (eds), *On the Law and Customs of England. Essays in Honor of Samuel E Thorne* (1981), p 159 at pp 176-181.

<sup>197</sup> See J Gordley, “Reconceptualizing the Protection of Dignity in Early Modern Europe: Greek Philosophy Meets Roman Law”, in *Ins Wasser geworfen und Ozeane durchquert: Festschrift für Knut Wolfgang Nörr* p 281 at pp 303-304.

<sup>198</sup> The term used, in relation to the penetration of Roman law in modern Civil Codes, in R Zimmermann, “Civil Code and Civil Law” (1995) 1 *Columbia Journal of European Law* 63 at 94 ff.

<sup>199</sup> Law 70-643 of 17 Jul 1970. (Article 9 reads: “Chacun a droit au respect de sa vie privée. Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l’intimité de la vie privée...”.)

<sup>200</sup> This process is analysed in R Lindon, *Les droits de la personnalité* (1974), pp 64-67; H Beverley-Smith et al, *Privacy, Property and Personality* (2005), pp 147-153. Such cases would include, e.g., CA Paris, 13 Mar 1965, *Olivier Philippe*, 1965 *JurisClasseur Périodique* II 14223; CA Paris, 27 Feb 1967, *Bardot*, D 1967 *jur*, 450.

<sup>201</sup> *Les droits de la personnalité* (1974) 2-3.

decisions rather than legislation or secondary literature.<sup>202</sup> In Germany similarly, it was the courts which gave the lead: first in recognising the general right of personality as being one of those protected in terms of §823(1) BGB (*Bürgerliches Gesetzbuch*, German Civil Code);<sup>203</sup> and second in pushing open the restrictions contained in § 253 BGB on recovery for injury to non-pecuniary interests, by awarding damages for serious invasion of personality interests.<sup>204</sup>

### 3.2 Closing the privacy gap

The coherence of the law has already been compromised in England and in Scotland by forcing protection for privacy upon other areas of delictual liability, such as confidentiality<sup>205</sup> or nuisance<sup>206</sup> in England, or defamation<sup>207</sup> in Scotland. There is clear merit in calling privacy exactly that – pronouncing the “P word” which cannot be spoken in the English courts<sup>208</sup> – and recognising it as a protected interest in the law of delict. This allows us to conceptualise privacy without obfuscation, and provides a solid basis for a taxonomy of privacy interests,<sup>209</sup> directly informed by jurisprudence in other jurisdictions bound by the ECHR. Furthermore, and equally importantly, it assists us to articulate clearly how other considerations should be weighed against privacy – issues of legitimate public interest and, perhaps most notably,

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<sup>202</sup> The introduction to *Les droits de la personnalité* (at 8) promised that it would contain “une profusion de jugements et d’arrêts, dont le nombre permet de mieux suivre l’évolution des tâtonnements et des progrès de la pensée des juges”.

<sup>203</sup> As being within the meaning of “any other right”. See in particular BGHZ 13, 334 (the case of Schacht, 1954, English translation by F H Lawson and B S Markesinis at [http://www.utexas.edu/law/academics/centers/transnational/work/german-cases/cases\\_bundes.shtml?25may1954](http://www.utexas.edu/law/academics/centers/transnational/work/german-cases/cases_bundes.shtml?25may1954)).

<sup>204</sup> In cases from 1958 onwards such as that of the unfortunate *Herrenreiter* [BGHZ 26, 349](#) (English translation by F H Lawson and B S Markesinis at [http://www.ucl.ac.uk/laws/global\\_law/german-cases/cases\\_bundes.shtml?14feb1958](http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bundes.shtml?14feb1958)); a development which Zimmermann characterises as “blatantly contra legem”, but which demonstrates that “a codification as monumental as the BGB is not completely detached from the ebb and flow of legal development” (*The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990, reprinted 1996), p 1094 ). H Beverley-Smith et al, *Privacy, Property and Personality* (2005), p 113 in relation to the “open-textured” nature of the provisions relating to personality rights in the BGB: “The vague language of these [codified] provisions makes them impossible to apply by mere reference to the wording. Rather, these rules provide a frame for case-law the development of which has, in terms of legal methodology, a striking resemblance with the application of common law rules and principles.” On the importance of academic influence, see also S Vogenauer, “An Empire of Light? II: Learning and lawmaking in Germany today” (2006) 26 *Oxford Journal of Legal Studies* 627 at 647-648.

<sup>205</sup> Section 2.5.1 above.

<sup>206</sup> *Khorasandjian v Bush* [1993] QB 727 (overruled in part by *Hunter v Canary Wharf Ltd* [1997] AC 655); see P Birks, “Harassment and hubris” (1997) 31 *Irish Jurist* 1.

<sup>207</sup> E.g., *Robertson v Keith* 1936 SC 29.

<sup>208</sup> In the account of Lord Justice Sedley, “Towards a right to privacy” *London Review of Books*, 8 Jun 2006 (text of the Blackstone Lecture, delivered at Oxford on 13 May 2006).

<sup>209</sup> Compare for this purpose Irish Privacy Bill 2006, s 3(2), which provides that it is a violation of privacy: (a) to subject an individual to surveillance; (b) to disclose information, documentation or material obtained by surveillance; (c) to use the name, likeness or voice of the individual, without the consent of that individual, for the purpose of (i) advertising or promoting the sale of, or trade in, any property or service, or (ii) financial gain; (d) to disclose letters, diaries, medical records or other documents concerning the individual or information obtained therefrom; or (e) to commit harassment.

freedom of expression as enshrined in Article 10 ECHR.

In giving express recognition to privacy, we may wish to be cautious of balkanising<sup>210</sup> protection for personality interests in the law of delict, a phenomenon which, in Peter Birks' perception, had occurred in the United States as a result of Prosser's four-part categorisation as between separate privacy torts.<sup>211</sup> But in the same article Birks recognised the utility of lower-level headings such as privacy.<sup>212</sup> He noted that subdivision into separate interests was "bound to go on" as it had done in Roman law, and that it "helps clear thinking", without necessarily threatening general principle.<sup>213</sup>

### 3.2.1 The basis of liability

The *actio iniuriarum* required malice in the sense of intention to injure – "deliberate affront" in Smith's account<sup>214</sup> – and absence of ill intent was generally presumed on the part of those fulfilling professional or public office.<sup>215</sup> However, it is evident that if personality interests generally, and privacy in particular, are to be protected adequately in terms of Article 8 ECHR, liability cannot be restricted to malicious infringement. If that were so, individuals such as Mr Peck,<sup>216</sup> who complained that inappropriate use had been made of closed-circuit television footage taken of him in a public street, would remain without a remedy in the common law – the local authority against whom proceedings were instituted clearly had no intention to harm him. And indeed in the modern law, as noted above, the other delicts which protect against infringement of personality interests do not always express malice as a requirement. In actions for damages for breach of confidence, for example, intention to injure need not be specifically established.<sup>217</sup>

A further important question following from recognition of privacy is therefore the basis on which breach of privacy should be actionable. Unlike delicts perpetrated by physical

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<sup>210</sup> "Harassment and hubris" (1997) 31 *Irish Jurist* 1 at 2, referring to E J Bloustein, "Privacy as an aspect of human dignity: An answer to Dean Prosser" (1964) 39 *New York ULR* 962.

<sup>211</sup> See W L Prosser, "Privacy" (1960) 48 *California Law Review* 383.

<sup>212</sup> "Harassment and hubris" (1997) 31 *Irish Jurist* 1 at 44 ("privacy, sexual autonomy, equal opportunity and so on").

<sup>213</sup> *Ibid* at 44.

<sup>214</sup> Note 176 above. Deliberate affront was regarded as central to *iniuria* also in *Ward v Scotrail*, note 45 above.

<sup>215</sup> Voet, *Commentarius ad Pandectas* 47.10.20.

<sup>216</sup> In *Peck v UK* (2003) 36 EHRR 41 (an English case) the offending images revealed the applicant brandishing a knife, but in an attempt to commit suicide rather than to injure others. These were released to the local press and to a television station in order to publicise the utility of closed-circuit television cameras. The council's actions were held by the European Court of Human Rights to be an infringement of the applicant's Art 8 ECHR rights for which the domestic courts had provided inadequate remedy.

<sup>217</sup> See, e.g., *Brown's Trs v Hay* (1898) 25 R 1112. Malice was not stated as essential in *Quilty v Windsor* 1999 SLT 346, although the action failed on other grounds, and it was not discussed as a requirement in the Report on Breach of Confidence (Scot Law Com No 90, 1984). See also *Seager v Copydex Ltd* [1967] 1 WLR 923. As noted above, intention to injure similarly does not require to be addressed expressly in relation to wrongful detention without authority.

blows or defamatory remarks, infringement of privacy is often not malicious in the sense of any specific intention or desire to harm the pursuer.<sup>218</sup> The real motivation may be the defender's wish to serve a conflicting interest which he or she believes to be legitimate, for example public interest in the case of media intrusion, or the interests of crime prevention in the case of intrusive surveillance by law enforcement agencies. In *Robertson v Keith*,<sup>219</sup> for instance, the pursuer sued the local police inspector for mounting an over-zealous surveillance operation on her house when in fact his target was a third party. She sued primarily in defamation although today this would be likely to be refocused on privacy and Article 8 ECHR. Lord Hunter remarked: "It is abundantly clear that the defender in acting as he did was not in any way influenced by a desire to punish the pursuer. He did not even know her. I think it is impossible to affirm that the action taken by the defender was so extravagant as to afford evidence of malice."<sup>220</sup>

Moreover, notwithstanding obiter remarks to the contrary by Lord Hoffmann in *Wainwright v Home Office*,<sup>221</sup> it is important to consider whether negligent breach of privacy might in some circumstances be actionable. Indeed the ECtHR held that the absence of civil liability for the prison officers' negligent breach of the Wainwrights' privacy infringed their rights to an effective remedy under Article 13 ECHR.<sup>222</sup> A further example of such circumstances might be if an employee of an agency charged with protecting the new identities of individuals such as Venables and Thompson (the released prisoners who had in childhood committed a heinous crime)<sup>223</sup> negligently allowed those identities to be disclosed.

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<sup>218</sup> Cf *Restatement (Second) of the Law of Torts* § 8A: "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."

<sup>219</sup> 1936 SC 29.

<sup>220</sup> At 53.

<sup>221</sup> [2004] 2 AC 406 at para 51: "Although article 8 guarantees a right of privacy, I do not think that it treats that right as having been invaded and requiring a remedy in damages, irrespective of whether the defendant acted intentionally, negligently or accidentally. It is one thing to wander carelessly into the wrong hotel bedroom and another to hide in the wardrobe to take photographs. Article 8 may justify a monetary remedy for an intentional invasion of privacy by a public authority, even if no damage is suffered other than distress for which damages are not ordinarily recoverable. It does not follow that a merely negligent act should, contrary to general principle, give rise to a claim for damages for distress because it affects privacy rather than some other interest like bodily safety..."

<sup>222</sup> (2007) 44 EHRR 40 at para 55.

<sup>223</sup> See *Venables v News Group Newspapers Ltd* [2001] 2 WLR 1038. (See also the South African case of *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), in which negligence was recognised as sufficient to meet the fault requirement in the case of defamation by the mass media, as an exception to the general rule that defamation required *animus iniuriandi*.)

Thus in this area, as with nuisance<sup>224</sup> (the other branch of the law of delict by which Article 8 ECHR interests are protected), a spectrum of relevant degrees of fault must be recognised, ranging from malice to negligence, and also encompassing situations where in the pursuit of other interests the defender has wilfully<sup>225</sup> disregarded the pursuer's privacy. And as in the law of nuisance, the cogency of those other interests is a parallel consideration, along with the gravity of the harm suffered by the pursuer. In *Wainwright v Home Office* Lord Hoffmann suggested that there should be no remedy where, for example, the defendant had "wander[ed] carelessly into the wrong hotel bedroom".<sup>226</sup> But the reason why there should be no liability in those circumstances is not only because the level of fault is slight. It is also because the harm suffered by the claimant, mere temporary embarrassment, is relatively minor, as compared with, say, the threat to life made by infringement of privacy in the Venables and Thomson example above.

This complex balancing process – between level of fault, degree of harm suffered, and the persuasiveness of the countervailing interests served by the defender – prompted Lord Kilbrandon to comment, in 1971, that "Privacy law affords an excellent example of how legal doctrines have to compromise between lawful but contradictory interests."<sup>227</sup> The nature of that "compromise" now demands fuller and clearer articulation.

#### 4. CONCLUSION

Incorporation of the ECHR compels a review of existing safeguards for personality rights in Scots law, together with a reappraisal of those interests which may weigh against such rights. Scotland is not unprepared for this enterprise, given the protection traditionally available in the common law of delict and those more recently provided by statute.<sup>228</sup> However, an important gap may be revealed between Article 8 ECHR obligations and domestic law if there is a failure to build a coherent law of privacy. In determining how this may be done, the Scots need not be hindered by the rigidity of the English law of torts, but nor are they assisted by the flexibility of the law of equity. England is no doubt the jurisdiction closest in terms of the cultural perception of privacy and its legitimate boundaries. But in determining how privacy may be given adequate recognition in the Scots common law, it is instructive to look beyond England to judicial development of the doctrine in other European jurisdictions.

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<sup>224</sup> For the "continuum" of shades of fault in nuisance, see *The Laws of Scotland: Stair Memorial Encyclopaedia*, reissue, "Nuisance" (2001) (N R Whitty), para 89; *Kennedy v Glenbelle* 1996 SC 96 per Lord President Hope at 100-101.

<sup>225</sup> Cf the Irish Privacy Bill 2006, s 2, which requires that the tortfeasor "wilfully and without lawful authority, violates the privacy of an individual".

<sup>226</sup> [2004] 2 AC 406 at para 51.

<sup>227</sup> "The law of privacy in Scotland" (1971) 2 *Cambrian Law Review* 35 at 35.

<sup>228</sup> Such as the Protection from Harassment Act 1997, the Data Protection Act 1998, the Regulation of Investigatory Powers Acts 2000, and the Communications Act 2003 (all UK statutes).

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