

# Searching for Privacy in a Mixed Jurisdiction

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## I. INTRODUCTION

Reviewing *A History of Private Law in Scotland* in the *Tulane Law Review* in 2004, Shael Herman explained how the collection (published in 2000) left him with an impression of the “eclectic, open-textured character of Scots legal evolution”, even if sometimes he had a “a sense of having toured a juridical Australia or Galapagos Islands inhabited by exotic flora and fauna not found elsewhere”.<sup>1</sup> He noted the complexity of the relationship between Scots and English law, and observed:

To be sure, between Scotland and England there are striking political and cultural commonalities too numerous to detail. It could hardly be otherwise for two island nations that share a language, a currency, and a border. Yet, as the collection under review shows, the countries’ legal systems have diverged so considerably that Scots private law should be seen as an autonomous creation irrigated by its own wellsprings of inspiration. Although Scots law may episodically follow English law or inspire it, patterns of reciprocal influence are not assured. On a given issue, the two national laws may have little to exchange with one another, and each legal system may decide to go its own way. As several papers in the collection show, Scots lawyers march to their own drummers—or even

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1. Shael Herman, Book Review, 78 TUL. L. REV. 1755 (2004), quotations at 1757, 1761. The book under review is *A HISTORY OF PRIVATE LAW IN SCOTLAND* (Kenneth Reid & Reinhard Zimmermann eds., Oxford: OUP 2000).

to the drummers of Roman legions. They highly prize independent reflection upon the course of legal development.<sup>2</sup>

This Essay in honour of Shael Herman attempts to analyse the likely course of Scots law in an area in which it is currently being offered two contrasting possibilities for development: one from England, the other ultimately from the Civilian tradition. The specific issue is the individual's right to privacy, with particular reference to its protection against actors other than the State. The English model is provided by the Common Law on breach of confidence; the Civilian one by the development of the *actio iniuriarum* in line with its development in other mixed jurisdictions such as South Africa and, less prominently, Louisiana. Of critical importance is the stimulus to legal development provided by human rights jurisprudence, lately made directly relevant to Scots law by the Human Rights Act 1998 (HRA).

## II. PROTECTING PRIVACY IN SCOTS LAW TO 2000

In 1957 Lord Justice-Clerk Thomson stated of Scots law in the unreported case of *Murray v. Beaverbrook Newspapers Ltd.* "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>3</sup> Five years later T.B. Smith, Professor of Civil Law at Edinburgh University, argued that, on the contrary, Scots law remedied "the infliction of affront upon an individual by invading his privacy" by way of the *actio iniuriarum* received from Roman law.<sup>4</sup> This argument for the existence of a general remedy for affront to individual feelings called *animo iniuriandi* also gained the support of Professor David Walker of Glasgow University in the first edition of his book on *Delict*, published in 1966.<sup>5</sup> Walker would later summarise the *actio* as follows: "An *actio injuriarum* is one claiming compensation for affront, dishonour or disgrace, naturally causing hurt feelings, though not necessarily any

2. Herman, *supra* note 1, at 1756. The particular subject he has in mind is the feudal land law finally abolished in November 2004 under the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

3. *Murray v. Beaverbrook Newspapers Ltd.*, Second Division Court of Session, 18 June 1957 (unreported), *quoted in* T.B. SMITH, A SHORT COMMENTARY ON THE LAW OF SCOTLAND 655 (Edinburgh 1962).

4. SMITH, *supra* note 3, at 653-56. On the general historical background to the *actio iniuriarum* of Roman law, see R. ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1050-74 (Cape Town 1990); 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 281 (M. Ascheri et al. eds., Cologne, Weimar and Vienna 2003).

5. 2 D.M. WALKER, THE LAW OF DELICT IN SCOTLAND 708 (Edinburgh 1966).

actual patrimonial loss. The compensation due is accordingly entirely or predominantly *solatium* for the intangible loss suffered in the shape of hurt to feelings”.<sup>6</sup>

Smith founded his approach on the idea that the Scots law of delict, unlike the English law of torts, is general in nature, providing a right of reparation for all unlawful harms or losses. The concept of harm or loss is not confined to the patrimonial but extends also to the “sentimental”—damage or injury to feelings. While categories emerge within the overarching generalisation—such as negligence in relation to patrimonial loss, or defamation in relation to injured feelings—it is always possible to deal with new situations outside those categories, giving the law “a desirable flexibility to meet new social conditions and unforeseen situations”.<sup>7</sup>

The subject of privacy protection was highly topical as Smith and Walker wrote. 1961 had seen the failure in the Westminster Parliament of an attempt to introduce a Right of Privacy Bill, the first in a long line of such failures.<sup>8</sup> In 1972 a Committee appointed by the Scottish as well as the Home and Lord Chancellor’s Offices and chaired by Kenneth Younger concluded that there was weighty authority against a general right of privacy in Scots law, and (over-riding the dissents of two Scottish members of the Committee<sup>9</sup>) that the creation of such a general right would be conducive to undesirable uncertainty. The Committee recommended instead the creation of two new specific torts (unlawful surveillance and disclosure or other use of information unlawfully acquired), and reference to the Law Commissions of England & Wales and Scotland of the law of breach of confidence with a view to its clarification and statement in legislative form, the idea being that together these three measures might better protect the areas of privacy giving rise to the most significant concern. In particular the law of confidence was seen as having the potential to become a means of protecting privacy generally.<sup>10</sup>

On Scots law specifically, the Younger Report considered the potential of the *actio iniuriarum*, only to dismiss it in the light of *Murray*

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6. CIVIL REMEDIES 986 (Edinburgh 1974).

7. SMITH, *supra* note 3, at 655.

8. For a brief overview, see R. WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 39-41 (Oxford 1989).

9. The dissentients were Alexander Lyon, who as a Scots MP had in 1967 introduced one of the earlier abortive privacy bills, and Donald Ross QC of the Scots bar.

10. REPORT OF THE COMMITTEE ON PRIVACY, CHAIRMAN THE RT. HON. KENNETH YOUNGER (Cmnd 5012: July 1972) [hereinafter YOUNGER REPORT].

*v. Beaverbrook Newspapers*.<sup>11</sup> The views of Smith and Walker were “no doubt true in theory, but it is much in doubt if the Court would give a remedy except perhaps in an extreme case.” There was a concession, however: “On the other hand, in Scotland it has been said that the remedy depends upon the right rather than the right upon the remedy as in England, and, the Scottish Court might grant a remedy in an extreme case even though the remedy had never been granted before.”<sup>12</sup> Perhaps these comments reflected the view of the Scots lawyer on the committee, Donald Ross QC (who would later rise to the Court of Session bench and become Lord Justice Clerk).

In line with the Younger recommendations, the Scottish Law Commission (where T.B. Smith was by now a Commissioner) subsequently procured from the Secretary of State for Scotland a request that, “with a view to the protection of privacy”, it should consider Scots law relating to breach of confidence. The Chairman of the Commission, Lord Kilbrandon, had already published his carefully nuanced view that there was no remedy for invasion of privacy as such; but “there are nevertheless in Scotland some instances of remedies given for wrongs which seem more dependent on infringements of privacy than on any of the other known grounds of action.”<sup>13</sup> He too had drawn attention to the possibilities of the *actio iniuriarum*, commenting that “though the attack may be either physical (real) or verbal, the nature of the wrong is the same, namely an insult offered to a man whose dignity forms part of his rights in law”.<sup>14</sup> The Commission produced a consultative Memorandum in 1977, and ventilated once more T.B. Smith’s argument about the potential of the *actio iniuriarum* as a basis for protecting privacy, bolstered by reference to developments in South Africa.<sup>15</sup> Alternatively, a statutory delict, consisting of the use or disclosure of information amounting to substantial and unreasonable infringement of a right of privacy, might be introduced; or one of disclosure or other use of unlawfully obtained information.<sup>16</sup>

But by the time the Commission produced a Report on Breach of Confidence in December 1984, T.B. Smith had retired, and the proposals about the *actio iniuriarum* and the alternative statutory delicts were

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11. SMITH, *supra* note 3.

12. YOUNGER REPORT, *supra* note 10, at 306 (both quotations).

13. The Hon. Lord Kilbrandon, *The Law of Privacy in Scotland*, 2 CAMBRIAN L. REV. 35-46 (1971) (quotation at 36).

14. *Id.* at 37.

15. SCOTTISH LAW COMMISSION MEMORANDUM NO. 40 CONFIDENTIAL INFORMATION (14 Apr. 1977), especially at paras. 28-35.

16. *Id.* paras. 90-98.

quietly dropped. Against the background of the passage in 1984 of a new Data Protection Act applying throughout the United Kingdom, the Commission carefully confined itself to the civil obligation of confidentiality, without seeking to define whatever differences there might be between that and wider questions of privacy.<sup>17</sup> No legislation ever followed from this report, and arguably much of the necessary legal development has now been effected by the courts.<sup>18</sup>

In the early 1990s the issue of a general right to privacy resurfaced in public debate in Britain, creating a climate in which once again the state of Scots law came under review.<sup>19</sup> The major issue at this time was media intrusion on private lives, especially those of celebrities, coupled with an English Court of Appeal affirmation of the absence of a right to privacy in English law.<sup>20</sup> The broad legal consensus in both England and Scotland was that privacy was protected only incidentally or indirectly, not only through breach of confidence, but also by way of actions such as defamation, nuisance and copyright infringement.<sup>21</sup> But as before no legislation was brought forward by government other than a statute (the Protection from Harassment Act 1997) to deal with a social problem clearly lying beyond the scope of breach of confidence, namely personal harassment by “stalking”.<sup>22</sup> In Scotland no major cases arose to give the courts opportunity to clarify some of the many doubts and uncertainties on the subject of a general privacy right.

### III. THE IMPACT OF DOMESTICATED HUMAN RIGHTS LAW

While the discussion of the legal protection of privacy never really abated, it was revitalised by the passage of the HRA, which from 2 October 2000 required the courts to act to protect the rights enumerated

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17. REPORT ON BREACH OF CONFIDENCE 3-4 (Scot Law Com. No. 90, Dec. 1984).

18. See H.L. MacQueen, *Breach of Confidence*, in 18 THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPAEDIA paras. 1492-1500 (1993).

19. See CALCUTT REPORT ON PRIVACY AND RELATED MATTERS (Cm 1102: 1990); CALCUTT REVIEW OF PRESS SELF-REGULATION (Cm 2135: 1993).

20. *Kaye v. Robertson*, [1990] FSR 62 (CA).

21. See A.J. Bonnington, *Privacy: Letting the Right Alone*, 1992 SLT (News) 289; M.A. Hogg, *Privacy: A Valuable and Protected Interest Under Scots Law*, 1992 SLT (News) 349; J.A. McLean, *Privacy, Scots Law, Human Rights and Europe*, 38 JLSS 21 (1993); M.A. Hogg, *The Very Private Life of the Right to Privacy*, 2(3) HUME PAPERS ON PUBLIC POLICY 1 (1994). For a more recent argument about how copyright can protect against invasions of privacy, see H.L. MacQueen, “*My Tongue Is Mine Ain*”: *Copyright, the Spoken Word and Privacy*, 68 MLR 349 (2005).

22. For a judicial attempt to remedy the problem by way of the law of private nuisance, ultimately unsuccessful, see *Khorosandjian v. Bush*, [1993] Q.B. 727; *Hunter v. Canary Wharf*, [1997] AC 655. For use of the Act to protect article 8 ECHR privacy, see *Howlett v. Holding*, [2006] EWHC 41 (Q.B., Eady J.).

under the European Convention on Human Rights (ECHR), not only for the individual against the state, but also horizontally, between individuals.<sup>23</sup> In his dissent from the conclusions of the Younger Report against a general right of privacy Donald Ross QC had drawn attention to the United Kingdom's membership of the leading human rights conventions, all of which, unlike the United Kingdom jurisdictions, recognised a general right of privacy (in article 8 of the ECHR, for example). "This means," said Ross, "that the United Kingdom's acceptance of the Declaration of Human Rights is at least to some extent a sham."<sup>24</sup> Later case law in both England and Scotland recognised that the common law of breach of confidence should be developed in accordance with the European Convention on Human Rights, albeit emphasising in this context the right of freedom of expression (article 10 ECHR) rather more than privacy (article 8 ECHR).<sup>25</sup> It was clear during the Parliamentary debates on the Human Rights Bill that the protection of privacy would be one of the first battlegrounds on which to test the effects of the legislation.

No doubt encouraged by a 1998 decision of the European Commission on Human Rights that breach of confidence provided adequate protection of privacy,<sup>26</sup> the English courts reacted to the new world created by the HRA by using the action to remedy infringements of privacy.<sup>27</sup> The most prominent of the many cases are *Campbell v. Mirror Group Newspapers*<sup>28</sup> and *Douglas v. Hello!*<sup>29</sup> In the former the well-known "super-model" Naomi Campbell was successful before the House of Lords in claiming a remedy against a newspaper in respect of its publication of an article and photograph exposing the falsity of her earlier public denials of drug addiction. The publication revealed that in fact Campbell was undergoing a course of treatment with Narcotics Anonymous; the surreptitiously-taken photograph showed her emerging from the London premises of the organisation. The *Hello!* case was a damages claim by two film-stars and a celebrity magazine (*OK!*) against

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23. See generally H.L. MacQueen & J.D. Brodie, *Private Rights, Private Law and the Private Domain*, in HUMAN RIGHTS AND SCOTS LAW 141 (A. Boyle, C. Himsworth, A. Loux & H. MacQueen eds., Oxford 2002).

24. YOUNGER REPORT, *supra* note 10, at 213.

25. Attorney-General v. Guardian Newspapers Ltd (No 2), [1990] 1 AC 109, 256 (Lord Keith of Kinkel), 273 (Lord Griffiths), 291 (Lord Goff of Chieveley); Lord Advocate v. Scotsman Publ'ns Ltd. 1989 SC (HL) 122 at 166, 167, 172 (Lords Keith, Templeman & Jauncey).

26. (1998) 25 EHHR CD 105.

27. For an overview of the earlier cases, see H.L. MacQueen, *Human Rights and Private Law in Scotland*, 78 TUL. L. REV. 363, 370-76 (2003).

28. [2004] 2 AC 457.

29. [2005] 3 WLR 881 (CA).

another celebrity magazine (*Hello!*), which had published surreptitiously taken photographs of the stars' New York wedding celebrations. The film-stars had previously sold exclusive rights to photography at their wedding to *OK!* The Court of Appeal held that the film-stars were entitled to damages for breach of confidence: £3,750 each for the loss of their personal privacy and £7,000 for the damage to their commercial interest in the images of their wedding. But the publishers of *OK!* had no claim under the law of confidence. The case is subject to a further appeal to the House of Lords.

These cases entailed significant development of the law of breach of confidence. Classically obligations of confidence only arose between parties who enjoyed some existing relationship of confidence, and only information that was confidential in the sense of either being deliberately kept from others, or known only to a deliberately confined group of people, could be protected. Its most characteristic application was in the commercial and industrial sphere, with regard to matters such as trade secrets, know-how and so on.<sup>30</sup> In neither of the cases could it be convincingly argued that there was a pre-existing relationship of confidence between the surreptitious photographers and their targets; while Campbell's presence in a public place and the film-stars' wedding (about which there had been enormous advance publicity) could hardly be treated as matter being deliberately kept from others.

The basis upon which the courts in the two cases moved forward was however provided by the pre-HRA "Spycatcher" case,<sup>31</sup> in which the law of confidence was applied to the relationship which existed between a government and its secret agents in an effort to prevent the publication of memoirs written by the latter. Here the first difficulty was that the information to be rendered confidential could not really be said to have been "confided" by the government to the spy; indeed, it was rather the other way round. The House of Lords accordingly downplayed the importance of the confidential relationship, or at least the notion that such a relationship necessarily entailed a confider and a confidant, with only the latter being subject to the obligation. Instead the duty of confidence was held to arise when confidential information came to the knowledge of a person in circumstances where that person had notice, or had agreed, that the information was confidential. This could extend to third parties altogether outside the confidential relationship: *in casu*, newspapers who wished to serialise the agent's memoirs. So once it was

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30. The classic treatment of English law is F. GURRY, *BREACH OF CONFIDENCE* (Oxford 1984).

31. *Attorney-General v. Guardian Newspapers Ltd* (No 2), [1990] 1 AC 109.

accepted that personal information about such matters as one's health or appearance at one's wedding could be seen as confidential in the sense of being either a secret or a matter information about which was limited, or being kept, to a restricted group of people, breach of confidence could provide a remedy against invasions of privacy.

This development of breach of confidence as a privacy tort has not gone without criticism, however. Academic writing has pointed up fundamental distinctions between confidentiality and privacy: in particular that while confidentiality protects the secrecy of information, privacy is not necessarily about either information or secrets. Confidentiality is more about the use and disclosure of information than its publication necessarily, while privacy interests extend beyond the informational, to reach at least protection from surveillance and intrusion (the spatial), and probably further still into wider aspects of personal dignity.<sup>32</sup> In addition, the *Spycatcher* case held that confidentiality is destroyed by publication, even if unauthorised. A potentially severe limitation is thus placed upon the ability of the action to protect privacy, in which an individual has an ongoing interest even after intrusion and publicity has taken place.<sup>33</sup>

The English judiciary show awareness of this criticism and some consequent unease. In *Douglas*, Lord Phillips of Worth Matravers, Master of the Rolls, observed: "We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion."<sup>34</sup> In *Campbell* Lord Nicholls commented: "Information about an individual's private life would not, in ordinary usage, be called confidential. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information".<sup>35</sup> He also noted, however, that this would still not encompass all forms of intrusion upon privacy, having in mind, no doubt, another decision of the House of Lords issued late in 2003. In *Wainwright v. Home Office*,<sup>36</sup> the facts of which occurred

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32. See, e.g., WACKS, *supra* note 8, *passim*; G.T. LAURIE, GENETIC PRIVACY: A CHALLENGE TO MEDICO-LEGAL NORMS 211-51 (Cambridge 2002); G. Phillipson, *Transforming Breach of Confidence? Towards a Common Law of Privacy Under the HRA*, 66 MODERN L. REV. 726 (2003); J. Morgan, *Privacy, Confidence and Horizontal Effect: "Hello" Trouble*, 62 CAMBRIDGE L.J. 444 (2003); N.A. Moreham, *Privacy in the Common Law: A Doctrinal and Theoretical Analysis*, 121 LAW Q. REV. 628 (2005).

33. See the problem addressed in *McKennitt v. Ash*, [2005] EWHC 3003 (Q.B., Eady J.), especially at paras. 79-81.

34. [2005] 3 WLR 881 (CA), para. 53.

35. [2004] 2 AC 457 para. 14.

36. [2004] 2 AC 406.

before 2 October 2000, prison visitors who had been strip-searched in humiliating fashion by prison officers before admission to the prison had no claim in relation to their consequent distress because English law knew no general right of privacy.

Lord Nicholls may also have had in mind the decision of the European Court of Human Rights in *Peck v. United Kingdom*.<sup>37</sup> Here, plaintiff's privacy rights under article 8 ECHR were held infringed in circumstances very difficult to bring even within the extended idea of breach of confidence. A local authority published closed-circuit television (CCTV) camera pictures of plaintiff carrying a knife in a public street, while failing to disguise his identity. The context in which this had occurred was plaintiff's attempt, while suffering from clinical depression, to commit suicide in the street by slashing his wrists with the knife. The authority's publication of the material had been intended to show how the use of CCTV could deal with dangerous situations; the police had been prompted to arrest plaintiff (and so save his life) after sighting the images. The Court observed further that "a zone of interaction of a person with others, even in a public context, . . . may fall within the scope of 'private life'"; this could include "activities of a professional or business nature".<sup>38</sup>

Shortly after the decision in *Campbell*, the European Court extended its concept of privacy as a human right still further, by holding in *Von Hannover v. Germany*<sup>39</sup> that the article 8 ECHR rights of Princess Caroline of Monaco were infringed by the publication of unauthorised photographs of her engaged in private activities, even when the accompanying coverage was favourable or anodyne. She did not have to retire to a secluded place to enjoy this right of privacy; the Court in this context again deployed the concept of the protected zone of interaction with others within a public context. The Princess was not a public figure involved in any political or public debate of general interest to society, and "in these conditions freedom of expression calls for a narrower interpretation".<sup>40</sup> The Court's conceptualisation of private life extended to aspects of personal identity, such as a person's name or picture, and to physical and psychological integrity.<sup>41</sup>

In a significant further paragraph, the Court also elaborated the horizontal effect to be given to article 8 ECHR:

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37. (2003) 36 EHRR 41.

38. *Id.* at 57.

39. (2005) 40 EHRR 1.

40. *Id.* para. 66.

41. *Id.* para. 50.

The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, *there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations between individuals themselves.* . . . The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.<sup>42</sup>

The Court also cited in full Resolution 1165 of the Council of Europe, published in 1998 in the aftermath of the death of Princess Diana in a Paris car crash in August 1997, widely attributed at the time to the pursuit of the Princess' vehicle by *paparazzi* press photographers.<sup>43</sup> The main message of the Resolution was that a balance fell to be struck between freedom of expression and privacy, and that the ECHR did not privilege either over the other. Paragraph 12 of the Resolution emphasised the horizontal as well as vertical effect of article 8 ECHR, while paragraph 14 was a call to ECHR member States "to pass legislation, if no such legislation yet exists, guaranteeing the right to privacy [and] containing the following guidelines". First amongst the guidelines is the following: "the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy".

All this raises difficult questions for English and Scots law. While the horizontal effects of the HRA in the courts are not disputed, their exact nature is. In general the English courts have held that Convention rights do not become directly enforceable in their own right as a result of the 1998 Act; rather the existing law has to be developed in a way that takes the rights into account as key underlying values. So the judicial creation of a new tort of invading privacy seems impossible; the protection of privacy outside the realm of personal information will have to find a vehicle within other existing torts, just as informational privacy has taken over the breach of confidence wagon.<sup>44</sup> The Council of Europe

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42. *Id.* para. 57 (emphasis supplied).

43. Available at <http://assembly.coe.int/Documents/AdoptedText/TA98/eres1165.htm>.

44. Note that a pre-HRA attempt to extend the common law of private nuisance to deal with "stalking" (*Khorosandjian v. Bush*, [1993] Q.B. 727) was later over-ruled by the House of

Resolution has often been referred to in this process, for example in the finding in *Campbell* that in balancing freedom of expression and privacy neither right had any pre-eminence over the other;<sup>45</sup> but the courts do not see themselves in a position to make the kind of wholesale change that paragraph 14 envisages. Giving the leading speech in the *Wainwright* case, for example, Lord Hoffmann argued that privacy was too protean a concept to lend itself to other than specific and detailed types of protection, together with appropriate defences, such as could only be achieved by legislation.<sup>46</sup> But on the other hand relief cannot be realistically expected from the legislature, which has a long history of failure to *guarantee* that invasion of privacy is civilly actionable as such, and is unlikely to want the inevitable confrontation with a highly hostile media which such attempts to legislate have always invited in the past.<sup>47</sup> In Scotland too the Scottish Parliament is likely to be similarly shy of tackling the issue, and the development of the law will most probably be left to the courts.

#### IV. SCOTS LAW: MAKING CHOICES

Shortly after the passage of the HRA, the Court of Session judge Lord Reed commented in a case involving personal harassment that privacy “is an area where the development of the common law should have regard to the European Convention on Human Rights”.<sup>48</sup> What then are the choices open to the courts in Scotland with regard to the protection of privacy at common law? Are they as confined as the English courts seem to be? Will they have to work with privacy as an important value underpinning the development of specific common law actions under headings such as breach of confidence, defamation and

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Lords (*Hunter v. Canary Wharf*, [1997] AC 655). Contrast *Hosking v. Runting*, [2004] NZCA 34, where a New Zealand court felt able to move towards a tort of invasion of privacy within the common law tradition.

45. *Campbell v. MGN Ltd.*, [2004] 2 AC 457 para. 113 (Lord Hope of Craighead), 138 (Baroness Hale of Richmond) (despite Human Rights Act 1998 s 12(4)); *see also* *A v. B & C*, [2003] Q.B. 195; *Douglas v. Hello!*, [2003] 3 All E.R. 996 (Lindsay J.). For a Scottish case in which the Convention right of freedom of expression prevailed against the private interests of a law firm, *see Dickson Minto WS v. Bonnier Media*, 2002 SLT 776; *compare* *Howlett v. Holding*, [2006] EWHC 41 (Q.B., Eady J.), where the right of privacy prevailed over freedom of expression. The Scottish courts have been more reluctant to allow privacy an over-riding quality in criminal cases: *see, e.g.*, *Henderson & Marnoch v. HM Advocate*, 2005 JC 301.

46. *Wainwright v. Home Office*, [2004] 2 AC 406 para. 33.

47. *See* in support of this conclusion the Government’s negative response (Cm 5985: Oct 2003) to the Fifth Report of the House of Commons Culture, Media and Sport Select Committee on Privacy and Media Intrusion (HC 458-1, June 2003) and its recommendation of the introduction of a new privacy law against media intrusion.

48. *Ward v. Scotrail Railways Ltd.*, 1999 SC 255, 262.

nuisance, as well as the interpretation of statutes like the Data Protection and the Protection from Harassment Acts? Or is there a basis already within the common law for a wider, more general approach to a right of action for invasion of privacy such as the Council of Europe and the European Court of Human Rights seem to want to see?

A. *Breach of Confidence*

Of the various common law possibilities for protecting privacy, breach of confidence has enjoyed the greatest prominence in Scotland as in England since 2000. Breach of confidence seems to have emerged as a category within the Scots law of delict (insofar as it was not an obligation created by contract) in the course of the nineteenth and early twentieth centuries.<sup>49</sup> The few cases made it difficult to state the law with any great certainty when the Scottish Law Commission first examined it in the 1970s. But it did seem to depend upon the existence of a relationship between the parties which was either contractual or very close to being so.<sup>50</sup> In 1984 the Commission recommended that the obligation of confidence should arise where a recipient (1) agreed or undertook to treat the information as confidential; (2) acquired it by illegal or improper means; or (3) should as a reasonable person have realised in all the circumstances that the information should be treated as confidential.<sup>51</sup> Only with regard to the third category did it matter that the information so acquired was actually confidential. So the second category appeared to give what was really protection against intrusion (and thus of privacy) by way of an artificial form of confidentiality, while the first perhaps overlooked the possibility of public policy limitations upon the freedom to contract to prevent freedom of expression.

Five years later, however, the possibility of legislation was effectively pre-empted by the case of *Lord Advocate v. Scotsman Publications Ltd*,<sup>52</sup> where in a Scottish appeal the House of Lords followed its own earlier decision in the English Spycatcher case. This established beyond question the existence of obligations of confidence outside contract in Scots law, and also that persons coming into the possession of information *knowing* it to be confidential could come under the obligation. In both the House of Lords and the Second Division of the Court of Session below, the judges affirmed, in the words

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49. The earliest identified case is *Kerr v. Duke of Roxburgh*, (1822) 3 Murr 126. See also *AB v. CD*, (1851) 14 D 177.

50. See Scot Law Com. Memo No. 40, paras. 7-43.

51. Scot Law Com. No. 90 (1984).

52. 1989 SC (HL) 122.

of Lord Justice-Clerk Ross, that “there is ample justification for the conclusion that in this respect the laws of England and Scotland are to the same effect”.<sup>53</sup> It was thus possible in 1993 to construct an analysis of the Scots law of breach of confidence for the *Stair Memorial Encyclopaedia* which, although built around the law reform proposals of the Scottish Law Commission published in 1984, drew quite freely on English authorities and writings in so far as they seemed to manifest general principles of use to Scots lawyers.<sup>54</sup>

The essence of that analysis was as follows. Obligations of confidence arise when the reasonable recipient knows or should realise from the circumstances that information is confidential. A key element in this is the relative inaccessibility of the information. Confidentiality is destroyed when the information is published: although the publisher may be liable for that act, further circulation cannot be prevented. The obligation is not to use or disclose the information. Defences include disclosure in the public interest, and remedies available included interdict, damages for patrimonial loss and claims for the infringer’s gains. But hesitation was expressed about extending breach of confidence into the domain of privacy and personal information: “particular difficulty may be posed by defining what personal information a reasonable person ought to recognise as confidential when the information has become public knowledge . . . . [I]t is clear that confidentiality is not a complete substitute for privacy, and that there may be various problems which the law of confidence cannot reach”.<sup>55</sup> None the less, provided that the concept of confidential information extended beyond the commercial and the governmental into the personal realm, the model could be applied to protect privacy:

A good example of the inaccessibility of the information being enough to impose the obligation of confidence would be the personal secret about, for example, marriage, sexual orientation or health. If information about such aspects of a person’s life is not generally known and is discovered by means other than open disclosure by the person himself, the reasonable man would regard it as confidential.<sup>56</sup>

The way is therefore open for the Scottish courts to use breach of confidence to protect privacy should an appropriate case arise—and indeed arguably some have already done so.<sup>57</sup> But these judicial

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53. *Id.* at 143 (approved by Lord Keith at 164).

54. 18 STAIR MEMORIAL ENCYCLOPAEDIA paras. 1451-1492.

55. 18 *id.* para. 1456.

56. 18 *id.* para. 1465.

57. See further below, text accompanying notes 59-63.

decisions may however show some of the limitations of breach of confidence as a means of protecting privacy. The liability of the person who knows or ought to realise that information coming to hand is private, or confidential in the language of the action, is a key element of privacy protection. But there is genuine doubt whether Scots law goes quite so far as was proposed in the *Stair Memorial Encyclopaedia* with regard to third parties who come into possession of the confidential information by a route other than provision by the person claiming confidentiality. Probably the leading case, inasmuch as it was decided by an Extra Division of the Court of Session, is *Osborne v. BBC*.<sup>58</sup> In essence this was a case about whether a confidentiality agreement between a local authority and one of its employees bound a third party (the BBC) which, having come into possession of the confidential information, proposed to broadcast it. For the employee to get an interdict against the third party, the court ruled, she would have to show that the information had been transmitted to the third party by the person subject to the obligation of confidence under the agreement.

Cases involving this third party issue in contexts clearly raising privacy rather than mere confidentiality concerns, have so far arisen only in the Outer House. In *Quilty v. Windsor*<sup>59</sup> a prisoner lodged in court and with officials the medical records of a prison officer against whom he was making a complaint. The prison officer claimed that his medical records were confidential, and must have been obtained from his ex-wife (to whom the prisoner was now married), since she had recovered the records during her divorce action against him. There was argument about the extent to which Scots law recognised a duty of confidence in a third party coming into possession of confidential information. Lord Kingarth dismissed the action on the basis of insufficient specification of the nature and content of the medical records, but also remarked that, while a third party coming into possession of confidential information could be subject to a duty of confidence, it was not clear law that this would arise unless the third party *knew* that the material was confidential. Further, the averments by the prison officer in this case did not show clearly that the circumstances were such that the prisoner knew the materials had been transmitted to him in breach of confidence.

A contrasting approach is apparent, however, in *Hardey v. Russel & Aitken*.<sup>60</sup> Hardey sued the solicitors of a party with whom he had been

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58. 2000 SC 29. The case is procedurally tangled but did involve elements of privacy (the petitioner's sexuality) as well as confidentiality.

59. 1999 SLT 346.

60. 9 Jan. 2003, Lord Johnston.

litigating in an earlier series of actions. During process in the earlier actions, Hardey's medical records had been accidentally bundled up with those of the other party by their mutual general practitioner while responding to a process of specification of documents for use in the case. They had then been received by the solicitors, copied, and shown to counsel who used them in the later course of the case. While the principal documents were returned to Hardey, the solicitors retained copies. Lord Johnston held that Hardey's claim against the solicitors was relevant and should go to proof. He said:

I am not prepared to rule at this stage that confidentiality cannot remain attached to the documents, which in turn may depend on how they are used. . . . 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>61</sup>

Both *Quilty* and *Hardey* concern individual medical records, clearly pertaining to the private sphere of the individuals concerned; but the uncertainty of the law of confidence with relation to third-party havens meant that protection of their privacy was far from assured in either case. Of course, as Lord Kingarth recognises in *Quilty*, the law is developing; and now it will have to develop, in appropriate cases, having regard to the article 8 ECHR right to privacy. But the present lack of clarity on the matter is unfortunate.

Another issue is presented by *X v. BBC*.<sup>62</sup> The pursuer, a private individual, succeeded in obtaining an interim interdict on the basis of breach of confidence, to prevent the BBC broadcasting a TV documentary showing her intoxicated and behaving in unusual ways in a public place. Temporary Judge Malcolm Thomson QC followed *Peck* and *Campbell* in reaching his decision. The individual initially consented in writing to being filmed for the documentary, but then withdrew her consent. What seems especially significant is that the information (surely private rather than confidential) was (1) behaviour in a public place and (2) material contained in a social inquiry report read out in open court, i.e. in some sense published. Temporary Judge Thomson's difficulty in the law of confidence arose from the Spycatcher rule that, once published, information is no longer confidential and its further publication cannot be stopped, albeit there may be remedies such as

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61. Paras. 10-11.

62. 2005 SCLR 740.

damages or account of profits for the wrong of the initial disclosure. In the end Judge Thomson overcame his difficulty by reference to the rules of interim interdict: the petitioner had raised questions to try on which she had real prospects of success, and the balance of convenience was in her favour, with a real risk of serious harm to her if the broadcast went ahead as planned.<sup>63</sup>

### B. *The Actio Iniuriarum*

The other element of the common law brought into play in the courts to protect privacy since the passage of the HRA is the *actio iniuriarum* as proposed by T.B. Smith forty years before. The judicial reaction to date has been at best tentative, probably reflecting the nature of the arguments being put to them by counsel not wholly familiar with the concepts involved.

The *actio iniuriarum* has a somewhat uncertain history in Scotland, despite Smith's bold claims for it.<sup>64</sup> John Blackie has shown that the concept of *iniuria* as the wrong of affront to a person's honour and reputation was indeed received and well understood in Scotland by 1500,<sup>65</sup> with the main source of reception being the medieval canon law. But only in the eighteenth century were cases of *iniuria* brought within the jurisdiction of the Court of Session, and so there is no significant treatment in the writings of Stair, apart from a reference to fame, reputation and honour as one of the "several rights and enjoyments" by which "damages and delinquences may be esteemed".<sup>66</sup> The first substantial analysis came from the pen of Bankton in the mid-eighteenth century, drawing heavily on Voet, but his emphasis fell on *iniuria* by representations, or defamation;<sup>67</sup> and so, Blackie suggests, a wider concept of the *actio iniuriarum* as a protection against forms of affront other than defamatory statements failed to take deep root. Suitable cases

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63. In the end the documentary in question was broadcast on BBC Scotland on 31 January 2006, following a settlement between *X* and the BBC just before a three-week court proof was due to commence. Under the settlement, *X* appeared in the programme but was identified only by her first name. No money changed hands under the settlement. I am grateful to Alistair Bonnington and Rosalind McInnes of the BBC for this information.

64. For what follows, see J. Blackie, *Defamation*, in A HISTORY OF PRIVATE LAW IN SCOTLAND, *supra* note 1, at 633-707.

65. Note further here the reference to "*accione iniuriarum*" in legislation of 1318, discussed in H.L. MacQueen, *Some Thoughts on Wrang and Unlaw*, in *idem* (ed.), MISCELLANY V, 52 STAIR SOCIETY 13 (Edinburgh 2006), and to "ilk small iniure" in another statute of 1496 (2 ACTS OF THE PARLIAMENT OF SCOTLAND ch. 3, at 238 (T. Thomson & C. Innes eds., Edinburgh 1844-1875)).

66. *Institutions*, I, 9, 4.

67. Bankton, I, 10, 21-39.

for such development of the law none the less occurred in the nineteenth and earlier twentieth centuries, involving, for example, the injuries to feelings resulting from wrongful disruption to one's brother's funeral,<sup>68</sup> the unauthorized post-mortem removal of organs from the body of a deceased relative,<sup>69</sup> the unauthorized display in the window of a photographer's shop of wedding photographs commissioned from him,<sup>70</sup> and the unwarranted inclusion of one's photograph and fingerprints in a "rogues' gallery" collection of such material held by the police;<sup>71</sup> but while the injured party in these cases was often successful in making claims for damages compensating injury to feelings (*solatium*), the judges typically offered little by way of juristic analysis of their results, and received no assistance from authors. Indeed, the term *actio iniuriarum* was frequently misapplied to actions of reparation for personal injuries generally.<sup>72</sup> Bell's statement, that "in Scotland the Court of Session is held to have jurisdiction by interdict to protect not property merely, but reputation and even private feelings, from outrage and invasion", gave only the unauthorized publication of personal correspondence as an example,<sup>73</sup> and was deployed only in that specific context in subsequent case law.<sup>74</sup>

In 1931, however, Hector McKechnie affirmed the continued existence of a general delict of "assault" based upon insult or affront rather than physical attack.<sup>75</sup> The two most significant mid-twentieth-century cases were *Robertson v. Keith*<sup>76</sup> and *Murray v. Beaverbrook Newspapers Ltd.*<sup>77</sup> In the former, the pursuer raised what was initially a defamation action against the local chief constable of police in respect of his force's continuous and obvious surveillance of her house. Although she changed her ground of action to be simply the affront this caused her,

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68. Crawford v. Mill, (1830) 5 Murr 215.

69. Pollok v. Workman, (1900) 2 F. 354; Conway v. Dalziel, (1901) 3 F. 918; Hughes v. Robertson, 1913 SC 394.

70. McCosh v. Crow & Co., (1903) 5 F 670.

71. Adamson v. Martin, 1916 SC 319.

72. This usage was still not wholly eliminated by the end of the twentieth century, despite Lord Kilbrandon in *McKendrick v. Sinclair*, 1972 SC (HL) 25, 67; see further T.B. Smith, *Designation of Delictual Actions: Damn Injuria Damn*, 1972 SLT (News) 125; idem, *Damn injuria again*, 1984 SLT (News) 85.

73. Bell, *Commentaries*, I, 3, 111 (7th ed.).

74. White v. Dickson, (1881) 8 R. 896; see also Cadell & Davies v. Stewart, (1804) Mor 'Literary Property', Appendix no 4 (the love letters of the poet Robert Burns to 'Clarinda', published after his death by her consent; case mainly concerned with common law copyright).

75. H. McKechnie, *Reparation*, in 12 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND paras. 1124-1130 (1931).

76. 1936 SC 29.

77. SMITH, *supra* note 3.

she was unsuccessful because she could not establish that the chief constable had acted either unlawfully, or maliciously and without probable cause. In *Murray* a newspaper published a letter from a local judge in which he advocated heavier penalties for certain motoring offences. A journalist for another newspaper discovered that about a year before the publication the judge had himself been convicted of a road traffic offence. Having interviewed the judge and been asked not to publish the story, the journalist went ahead and did so, lacing his story with ironical comment on the situation. The judge's defamation action was unsuccessful and, as already noted, the court also denied the existence of a general right to privacy. But Lord Justice-Clerk Thomson left open the possibility that invading privacy might be an ingredient in showing malice where it was necessary to a cause of action, and added: "No doubt there are cases where the digging up of old skeletons will be frowned on by the law, but it must be a question of circumstances."<sup>78</sup>

If neither *Robertson* nor *Murray* amounts to more than at best obiter support for the survival of the *actio iniuriarum*, perhaps more weight can be attached to *Henderson v. Chief Constable of Fife*.<sup>79</sup> Mrs. Henderson was in police custody, subject to a lawful detention; but the police, following a normal practice for which there was no statutory authority, required her to remove her brassiere while she remained in a police cell. This was to prevent her using the garment to harm herself, even although there was no indication of any danger of this being at all likely in the particular situation. Lord Jauncey held that the police action was a clear invasion, without justification, of Mrs Henderson's liberty, from which it followed that she had a remedy in damages. He continued, in a statement clearly contrasting with the approach of the House of Lords in the otherwise very similar case of *Wainwright*:

I should perhaps add that the researches of counsel had disclosed no Scottish case in which it had been held that removal of clothing forcibly or by requirement could constitute a wrong but 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. . . . I consider that an award of £300 would fairly reflect the invasion of privacy and liberty which Mrs Henderson suffered as a result of having to remove her brassiere.<sup>80</sup>

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78. Found quoted in *id.* at 655.

79. 1988 SLT 361.

80. *Id.* at 367.

Since the passage of the HRA, there have been at least three cases referring directly or indirectly to the *actio iniuriarum*.<sup>81</sup> *Ward v. Scotraif*<sup>2</sup> was an attempt to recover damages in respect of alleged sexual harassment of a female by a male colleague at work. A proof was allowed although the pursuer's pleadings were unclear on whether the case rested on negligence or some other legal basis. Lord Reed noted that in a negligence action emotional distress was insufficient for recovery in delict; there had to be physical injury, which none the less included "recognizable psychiatric illness".<sup>83</sup> But he did not dissent from the pursuer's argument that "damages are recoverable for conduct which deliberately causes fear and alarm, even in the absence of personal injury: damages are recoverable in respect of the affront".<sup>84</sup>

In *Martin v. McGuiness*,<sup>85</sup> the issue was the admissibility of evidence procured by private investigators through intrusions upon an individual's privacy contrary to article 8 ECHR by way of unasked-for visits to his home and surveillance of his house from a neighbouring property. Lord Bonyon recognised that the investigators' conduct might infringe article 8 ECHR, but that its objective, to test whether the individual's claims of a back injury suffered as the result of a road accident, in respect of which he was seeking reparation from the investigator's employers, were exaggerated, was justified by considerations of, not only the employer's protection of his own interests, but also his right to a fair trial (article 6 ECHR). Counsel for the pursuer, arguing that the court had a duty to develop the existing law to be compatible with the ECHR and referring to *Robertson v. Keith*, submitted that the *actio iniuriarum* provided a basis for the protection of the pursuer's privacy in this case. Lord Bonyon noted that counsel's "rather cautious submission" was not elaborated or supported by any reference to authority,<sup>86</sup> whereas counsel for the defender, citing the Digest<sup>87</sup> and Reinhard Zimmermann's book on obligations,<sup>88</sup> argued that

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81. There may be a fourth, currently at *avizandum*: *Stevens v. Greater Glasgow Health Board* (on retention of children's organs at post mortem).

82. 1999 SC 255. The case is the Scottish equivalent of the English case of *Khorosandjian v. Bush*, [1993] Q.B. 727, to which much reference is made in Lord Reed's opinion.

83. 1999 SC 255, 261.

84. *Id.* at 260.

85. 2003 SLT 1424, 2003 SCLR 548.

86. Para. 27.

87. The reference given in Lord Bonyon's opinion is to "the Mommsen edition, at paras. 21.7 and 21.18". What this means is obscure to the present writer, but presumably the passages in question are to be located within D 47.10, the principal treatment of the *actio iniuriarum* in the Digest (possibly D 47.10.7 and 18-19).

“the *actio iniuriarum* provides redress only where deliberate conduct involves an attack on personality for an unlawful purpose”.<sup>89</sup> While Lord Bonomy confined himself merely to recording these arguments, he did respond to the defence submission with the comment 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>90</sup> He also noted of a defence argument, that Scots law has never recognized a specific right to privacy, that “[o]f course it does not follow that, because a specific right to privacy has not so far been recognized, such a right does not fall within existing principles of the law”.<sup>91</sup>

The facts of the third case, *Hardey v. Russel & Aitken*, have already been referred to in the discussion of breach of confidence.<sup>92</sup> The pursuer submitted that his action was based, not upon breach of confidence, but “on the *actio iniuriarum* claiming damages for a delictual wrong committed by the defenders to him in respect of the records”, thus getting round the possible limitation of the breach of confidence claim in respect of third party acquirers of confidential information. Lord Johnston simply did not address this point since, as already noted, he was content that the law of confidence was applicable in the case.

The significance of all the decisions since *Henderson* in 1988 is that in none of them has the argument about the *actio iniuriarum* been rejected outright, and that the actual decisions in the cases are broadly consistent with an extension of the principles of the action beyond the realm of the purely verbal injury. The question is how far it can be taken: is it, as Professor Whitty would argue, that “the development of private law rights of personality through the *actio iniuriarum* can be at the same time the vehicle for giving horizontal effect to the constitutional right of privacy conferred by ECHR, Article 8”?<sup>93</sup> Or is it rather the case, as Professor Norrie would have it, that the cases are merely illustrations of the existence in Scots law of a number of disparate wrongs each partly

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88. ZIMMERMANN, *supra* note 4, ch. 31.

89. Para. 29.

90. Para. 29.

91. Para. 28.

92. Above, text accompanying *supra* note 60.

93. N.R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, 9 EDINBURGH L. REV. 194, 207 (2005).

explicable by the need to protect individuals from affront, but not actually flowing from a general principle to that effect?<sup>94</sup>

If it is accepted that breach of confidence does not, and cannot, provide all the answers to privacy questions, the great attraction of a generalized *actio iniuriarum* is that it can tackle intrusions other than the publication of private information, such as *Wainwright*-style physical intrusion, and it allows proper consideration of the kind of issues which so troubled the court in *X v. BBC*, i.e., that in a privacy rather than a confidentiality matter, the public nature of the information concerned was of very limited relevance.

But otherwise the cases on the *actio iniuriarum* in Scotland, whether before or since the HRA, cannot yet be said to form a very solid platform of principle for further development of the law. However, the banner has been picked up in academic writing which may yet reinforce the assurance with which practitioners and courts approach the subject. This writing has especially emphasized the value of comparative law, and in particular of comparison with South Africa, where the *actio iniuriarum* had become the basis for a strong law of personality rights, founded on the concept of an individual's right to dignity which included privacy even before that was reinforced by the enshrinement of dignity and privacy as constitutional rights in 1996. The model is thus very similar in some ways to the structure within which Scots law must now operate.<sup>95</sup> Lessons may be learned from the experience of other mixed legal systems, not least Louisiana, which has also recognized privacy amongst rights of personality derived from its general codal provisions on delict.<sup>96</sup> In addition, the extensive jurisprudence of the European Court of Human Rights must be taken into account,<sup>97</sup> and through that the experience of other European jurisdictions also subject, in their different ways, to the ECHR.<sup>98</sup> A last possibility is to take advantage of European private law

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94. J. Burchell & K. Norrie, *Impairment of Reputation, Dignity and Privacy*, in *MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA* 570 (R. Zimmermann, D. Visser & K. Reid eds., Oxford 2004).

95. *Id.* at 568-75; Whitty, *supra* note 93, at 199, 201, 206.

96. See F.F. Stone, *Tort Doctrine* (Louisiana Civil Law Treatise vol. 12, 1977), ch. 9; P.N. Broyles, *Intercontinental Identity: The Right to the Identity in the Louisiana Civil Code*, 65 *LOUISIANA L. REV.* 823, 849-57 (2005).

97. HRA 1998, s 2(1)(a). There are several accounts of the European Court's privacy jurisprudence: see, e.g., D. Feldman, *The Developing Scope of Article 8 of the European Convention on Human Rights*, [1997] *EHRLR* 265; C. Warbrick, *The structure of Article 8*, [1998] *EHRLR* 32; Phillipson, *supra* note 32; Morgan, *supra* note 32.

98. A very useful short survey, concentrating on continental Europe and South Africa, is J. Neethling, *Personality Rights: A Comparative Overview*, 38 *COMP. INT'L L.J. OF S. AFR.* 210 (2005). Note also the comparative Personality Database project being conducted at the

projects,<sup>99</sup> amongst which the Study Group on a European Civil Code has identified as a wrongful act giving rise to civil liability infringement of a natural person's right to respect for his or her personal dignity, such as the rights to liberty and privacy.<sup>100</sup> It must be acknowledged, however, that the Scottish courts have not hitherto demonstrated any great eagerness to engage in comparative law exercises to develop the common law of Scotland,<sup>101</sup> or indeed much enthusiasm for the adoption of expansive general principles opening up considerable new tracts of potential liability.<sup>102</sup>

## V. ANALYSIS AND QUESTIONS

Comparative study suggests that if Scots lawyers are to respond to the pressure from the Council of Europe and the European Court of Human Rights by way of a generalized *actio iniuriarum*, a number of issues must be addressed, many inchoate in the present state of the authorities but others never yet touched upon. Professors Burchell and Norrie have pointed out the need to determine the basis of liability: "whether *animus* or *culpa*, intent or negligence".<sup>103</sup> Upon whom will the onus lie in this regard: upon the pursuer to establish that the defender's conduct had the necessary character, or upon the defender to establish that it did not? Or will there be some invasions of privacy where liability will be strict?<sup>104</sup>

Again, what forms of affront will be recognized as worthy of protection? In *Campbell*, the House of Lords recognized that "the law of privacy is not intended for the protection of the unduly sensitive",<sup>105</sup> but rejected the idea that to be actionable an invasion of privacy had to be highly offensive;<sup>106</sup> it was enough that it occurred where there was a

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Edinburgh Law School's AHRC Research Centre for Studies in Intellectual Property and Technology Law, available at <http://www.law.ed.ac.uk/ahrb>.

99. See, e.g., 1 C. VON BAR, *THE COMMON EUROPEAN LAW OF TORTS* 272-74, 585-88 (Oxford 1998); W. VAN GERVEN, J. LEVER & P. LAROCHE, *CASES, MATERIALS AND TEXT ON TORT LAW* 141-68 (Oxford and Portland, Oregon 2000).

100. See the Study Group's Web site, <http://sgecc.net>, article 2:203 of the Tort Law text.

101. H.L. MacQueen, *Mixing It? Comparative Law in the Scottish Courts*, 11 EUR. REV. PRIV. L. 735 (2003).

102. H.L. MacQueen, *Judicial Reform of Private Law*, 3 SCOTTISH L. & PRAC. Q. 134 (1998).

103. Burchell & Norrie, *supra* note 94, at 574. See also thoughtful comments by K. Norrie, *The Intentional Delicts*, in 2 A HISTORY OF PRIVATE LAW IN SCOTLAND, *supra* note 1, at 478-480.

104. Neethling, *supra* note 98, at 218-20.

105. Lord Hope of Craighead, para. 94.

106. The test proposed by Gleeson C.J. in the Australian case of *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd.*, (2001) 185 ALR 1 (HCA).

reasonable expectation of privacy. The majority in *Campbell* was also against the minority view that, since the photographs in the case were not in themselves depictions of the subject in an embarrassing or undignified state, no wrong had been committed; what mattered was that the newspaper must have acquired its information through betrayal by a fellow-patient of Narcotics Anonymous or a member of Campbell's entourage. The case (and also *X v. BBC*) are also consistent with the European Court's emphasis in *Peck* and *Von Hannover* that a private zone may still exist even in public space.<sup>107</sup>

The foundation of the law on the affront of the victim, or their reasonable expectations of privacy, also creates some difficulties beyond mere scope. A question of growing significance is whether current legal concepts can extend to the "right not to know", especially significant with regard to genetic information about individuals which they would choose not to discover or seek out, but may be required to disclose, for example as a condition of obtaining employment, insurance or medical treatment.<sup>108</sup> Then again, what if any protection is to be offered to the juristic as opposed to the natural person? And what about natural persons who are perhaps incapable of feeling affront or having reasonable expectations of privacy, such as very young children, the comatose (or nearly so), the hopelessly drug addicted, or the senile and demented? The wider, more objective concept of dignity may perhaps have a role to play here.<sup>109</sup>

Another fundamental question can be drawn from Neethling's comparative observation:

There is general consensus that personality rights are private law (subjective) rights which are by nature non-patrimonial and highly personal in the sense that they cannot exist independently of a person since they are inseparably bound up with his personality. From the highly personal and non-patrimonial nature of personality rights it is possible to deduce their juridical characteristics: they are non-transferable; unhereditary; incapable of being relinquished or attached; they cannot prescribe; and they come into existence with the birth and terminated by the death of a human being. As such, personality rights form a separate category of rights,

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107. See above text accompanying notes 38-40. Note also the South African Constitutional Court in *Bernstein v. Bester NO*, 1996 (2) SA 751, holding that the right to privacy shrinks (but does not necessarily disappear) as a person moves into communal relations and activities such as business and social interaction.

108. See generally LAURIE, *supra* note 32.

109. See Neethling, *supra* note 98, at 225.

distinguishable from real, personal and immaterial property rights which are patrimonial rights that can exist independently of the personality.<sup>110</sup>

This is certainly the kind of overall conceptualization of which judicial decision-making is incapable, at least working alone from the near blank slate that is the modern Scots *actio iniuriarum*.<sup>111</sup> On the other hand, the questions involved may not arise so sharply if a right of privacy can also become a right of publicity; that is, if it is accepted, as it is in much of the United States and increasingly elsewhere in the world, that privacy is a commodity that can be sold—as it was, for example, in *Douglas v. Hello!*<sup>112</sup> Indeed, many examples (of whom only Marilyn Monroe, Elvis Presley, and Princess Diana need be named to give the general idea) show that the commercial value of a personality can long outlive the person.<sup>113</sup> For Scots law, the most immediate issue may lie in remedies. The case law shows an emphasis on interdict and damages, with the latter measured typically as solatium for injured feelings.<sup>114</sup> But there is as yet no clearly stated limitation of damages to that head; nor has the possibility been excluded of a financial remedy linked to the profits made by the invader of privacy.<sup>115</sup>

A final question concerns the defences or justifications to be available to the alleged invader of privacy. The Scottish cases give some pointers: for example, lawful authority and absence of malice in *Robertson v. Keith*, consent in *X v. BBC*, the human right to a fair trial in *Martin v. McGuinness*. In *Murray v. Beaverbrook Newspapers*, as T.B. Smith noted, “the learned sheriff, having deliberately entered the arena of controversy and having attracted publicity to himself, could scarcely justify his demand for immunity from comment, even if of dubious taste”.<sup>116</sup> It may be that some of the defences already found in the law of confidence and of defamation could be translated into the context of privacy without undue difficulty. Perhaps the most significant—

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110. *Id.* at 223.

111. But note the complex rules on death and defamation: 15 STAIR MEMORIAL ENCYCLOPAEDIA para. 478.

112. See generally H. BEVERLEY-SMITH, A. OHLY & A. LUCAS-SCHLOETTER, *PRIVACY, PROPERTY AND PERSONALITY: CIVIL LAW PERSPECTIVES ON COMMERCIAL APPROPRIATION* (Cambridge 2005); Neethling, *supra* note 98, at 239-40; Broyles, *supra* note 96.

113. For a possible early example of publicity rights in Scots law, see *Wilkie v. McCulloch & Co.*, (1823) 2 S 413 (NE 369).

114. See, e.g., *Ward v. Scotrail*, 1999 SC 255, 259; *Hardey v. Russel & Aitken*, 9 Jan. 2003, para. 12.

115. Note that in the breach of confidence case, *Levin v. Caledonian Produce (Holdings) Ltd.*, 1975 SLT (Notes) 69, Lord Robertson overcame doubts as to the relevancy of a claim in recompense and allowed a proof before answer.

116. SMITH, *supra* note 3, at 655-56.

certainly from the point of view of the media—would be the public interest defence.

## VI. CONCLUSION

Privacy is an area of law where the “political and cultural commonalities” between England and Scotland have clearly had an effect outweighing any tendency there might have been towards divergent development arising from their different origins. Both have preferred to approach the question incrementally and through the medium of specifically defined and limited wrongs, rather than from some broad idea of a general right or principle from which specific results could be deduced. The legal position has been transformed, however, by the HRA 1998, and it is Scots law which appears better placed to deal properly with the fallout. Nor is this any more merely a matter of making Scots law more Civilian, the reproach to which T.B. Smith’s arguments often fell victim in his lifetime. But the courts will scarcely be able to do the necessary work from just their own resources. The question now is whether Scotland will follow the English lead, wherever that may go, or extend their comparative horizons and (adapting Shael Herman’s evocative phrase) march there to their own drummers.