

BOOK REVIEW

RIGHTS OF PERSONALITY IN SCOTS LAW: A COMPARATIVE PERSPECTIVE. By Niall R. Whitty & Reinhard Zimmermann (eds.). Dundee University Press 2009. 614 pp. with foreword by Ld. Hope of Craighead.

Reviewed by Vernon Valentine Palmer*

This is an important, beautifully constructed book with a straightforward aim. It attempts to consider how best to develop a right of privacy and other rights of personality in Scots private law. As Niall Whitty and Reinhard Zimmermann explain in the first chapter, one of the present shortcomings of Scots law is that rights of personality are relatively undeveloped and even the expression itself has only recently come into use. Furthermore, due to the United Kingdom's adherence to the European Convention on Human Rights, this deficiency has become far more apparent and there is an urgent need to assess Scots law in terms of privacy and other rights which the European Convention on Human Rights confers.

But how should Scotland proceed to remedy this deficiency? There are a number of open paths to be explored. Scotland might develop a systematic and comprehensive doctrine of personality rights, as in Germany. Or it might, as Elspeth Reid suggests, simply recognize a new action for 'breach of privacy.' Or as both Niall Whitty and Jonathan Burchell suggest, it might try to build these protections upon Scotland's native heritage, namely the Roman *actio injuriarum* and actions for "real and verbal injury." The book's great virtue is to consider these options from all angles—historically, comparatively, taxonomically and contextually—in an engaged but undogmatic way. The overall effect is an intense exploration of this systemic question.

The book is comprised of twelve chapters in all written by a most distinguished list of scholars which includes, in addition to the editors, John Blackie, Elspeth Reid, Gert Brüggemeier, Jonathan Burchell, Hazel Carty, David Vaver, Kenneth McK Norrie, Graeme Laurie, Charlottee

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Waelde and Hector MacQueen. It is obvious that Niall Whitty, who authored chapter three, coauthored two other chapters, and exchanged views and drafts with many contributors, leaves a considerable personal imprint on the volume. The contributors are drawn not only from Scotland, but England, South Africa, Canada and Germany. One chapter compares national reports on six civil law, three common law and three mixed legal systems in the Edinburgh University Comparative Personality Research Survey.¹ Collectively they represent a wealth of expertise and experience in the fields of legal history, comparative law, intellectual property, medical jurisprudence and tort law. The early chapters tend to set the stage by framing the problem and providing historical and comparative accounts of the subject of personality rights, while most of the later chapters examine particular contexts, problems and individual recommendations of the authors.

Chapter two “Unity in Diversity: The History of Personality Rights in Scots Law” by Professor John Blackie may soon be regarded as the *locus classicus* on the subject. This is a lengthy (120 pages) but very lucid and rewarding tracing of personality rights in Scots law from the sixteenth to the mid-nineteenth century. Given the complexity of this history, one of the most appreciated features of the chapter is the attention to conceptual structure in describing evolutionary stages, for example helpfully presenting diagrams of developments as of 1700 and the 1850s. Here the author lays out the categories of *injuria* and the descending sublevels of recognized actions under discussion, and he shows the differing (and broadening) interests that Scots law was prepared to protect, ranging from sexual morality, family life, and dignity, to reputation, honor and privacy.

Chapter three, Professor Whitty’s “Overview” of personality rights in the modern Scots law, may be seen as a continuation of the historical background provided in John Blackie’s account. It sets forth the classification and taxonomy that modern writers have adopted and gives consideration to the shifting and diverse meanings attributed to the old categories and terms of Scots common law, as well as modern takes upon them. Differing conceptualization is apparently not unusual, as may be seen when David Walker’s scheme of verbal injury is compared to Kenneth Norrie’s, or when those schemes are compared to the even narrower view of T.B. Smith who had argued for a rejuvenated Scottish *actio injuriarum*, but one linked only to the insult element. Judicial solecisms are also not neglected. The classic blunder of Lord President

1. Available at <http://www.personalityrightsdatabase.com> (last visited May 18, 2010).

Inglis in the *Eisten* decision, where he conceived that a wrongful death action was based on the *actio injuriarum*, stands as a famous illustration of the confusion (not rectified until late in the twentieth century) that sometimes arises when mixed jurisdiction judges expound civilian principle. This chapter serves to clear the air, and it provides an inventory of modern developments in case law and statute. In a notable sign of Scotland's ongoing intellectual engagement with South African scholars, Whitty uses as a template for much of his overview the reticulated typology of personality rights developed by Johan Neethling.

The comparative treatment by Professor Gert Brüggemeier in "Protection of Personality Interests in Continental Europe: The Examples of France, Germany and Italy, and a European Perspective" struck this reviewer as another useful overview of the subject. The author outlines three civil law trajectories in the protection of personality rights, each with their differences and difficulties and relevance to Scotland's options. For example, he portrays France's path as being essentially a continuation of Roman law's *actio injuriarum*, whereas German legal science in the nineteenth century deliberately broke with the Roman law tradition, choosing to sacrifice the protection of personality interests at the altar of a private law focused on freedom of contract and alienable patrimonial rights. Yet as Germany's post-war constitution received implementation and the European Convention on Human Rights became an overarching Bill of Rights for Europe, Germany was later forced to recognize these "suppressed" interests and integrate them into a system ill-fitted to accept them. It was therefore a third force—constitutionalism—that helped bring these two distinct civil law traditions together again throughout Europe. It is that last process in fact which revealed Scotland's deficit and spurred the present study.

There seems to be no deficit of personality rights in the sibling jurisdiction of South Africa, however, and Jonathan Burchell's account, in a chapter subtitled "Reaffirming Dignity", describes how South Africa has developed a comprehensive remedy for impairment of human dignity. In South Africa, dignity is both a right protected by the 1996 constitution and a right protected by the *actio injuriarum* working symbiotically with the constitutional guarantee. In his view Scots law, by using its Roman heritage as a tool and South Africa's example as an inspiration, may immediately craft a viable remedy for invasions of privacy. It should replicate the same synergy between protection of dignity under the civil law and under a Bill of Rights.

As previously mentioned, certain chapters focus more narrowly upon particular aspects and contexts of personality rights in Scots,

English and South African law. They contain a number of valuable ideas and recommendations, and unfortunately only a few of these can be singled out. For example Elspeth Reid looks closely at the resources available for broadening privacy rights in the modern law of delict in Scotland. In her view the development of the *actio injuriarum* by Scottish courts has been somewhat meager, and she rejects the view that it would provide enough foundation to sustain personality rights broadly, as it does in South Africa. On the other hand, she asserts that Scots law, which is unfettered historically by the forms of action and has always been rights-based and often underpinned by principle, is fully capable of rising above English incrementalism and may recognize a broad tort protecting privacy in general. Reid sees no reason why Scots law should not pronounce the “P word” which the English courts have found so difficult to articulate.

Kenneth Norrie’s chapter takes a different slant, arguing that a reformed law of defamation could be in the vanguard of protecting personality rights in Scotland. He portrays the modern action as a Janus-headed figure presently protecting both dignitary and patrimonial interests. His important suggestion is to offer a way to transform Janus into a handmaiden of honor and dignity. This could be accomplished, he argues, by removing all patrimonial aspects from the ambit of defamation and thus limiting it exclusively to the protection of personality interests, including the nonpatrimonial side of reputation. So ‘purified’ defamation would more closely resemble the *actio injuriarum* and instead of being a strict liability action, would return to the requirement of *animus*.

Hector MacQueen’s treatment of the law of privacy in English and Scots law makes an interesting case for developing Scots common law by projecting ideas from U.K. statutes (for example by analogical extension from the Harassment Act of 1997 and Data Protection Act of 1998). Graeme Laurie deals with the recent and inexorable rise of personality rights in the sphere of medical law. He questions however whether ‘dignity’ and ‘personal autonomy’ can be appropriate justifications in all contexts, particularly those where dignity arguments could be put forward either to require disclosure of medical information or to support silence in the interest of the patient’s health. He cautions that it will not be positive if autonomy comes to dominate personality rights in the medico-legal sphere.

Here is an enriching book that should be of interest to a wide audience. It will of course be of immediate relevance in Scotland where the benefits of its exhaustive and learned treatment of Scots law are obvious. At the same time it is more than a work on Scots law, and its

forays into history and comparative law will be of great interest to the general reader. It should also attract readers in many of the sister mixed jurisdictions, such as Louisiana, where presently personality rights are hardly developed or known, but may one day be seeking ways and means to recognize these rights as well.