Intrusion of Privacy and the *Actio Iniuriarum*

Abstract

The recent emphasis on common law constitutional rights has renewed attention on the extent to which Article 8 Convention rights are adequately expressed through the existing common law authorities of the Scots law of delict. The inadequacy of existing delictual protections is particularly acute in the case of the non-informational aspects of privacy, where English law provides little guidance. This article examines the viability of the *actio iniuriarum* as a means for protecting non-informational privacy. It begins by outlining the emerging judicial framework for developing common law constitutional rights. It then discusses the distinction between informational and non-informational privacy, as well as judicial and scholarly treatment of the *actio iniuriarum*. It finally applies this framework to examine how far a modern *actio iniuriarum* might be developed to protect Article 8 rights. Comparative reference is made to South Africa, where the *actio iniuriarum* covers all forms of privacy intrusion.

1. Introduction

In recent years the Supreme Court has sought to encourage the development of a body of common law constitutional rights in place of reasoning which relies directly on the Human Rights Act 1998 (the 1998 Act). This places renewed attention on the extent to which the right to private and family life in Article 8 of the European Convention on Human Rights (ECHR) can be adequately expressed through the existing common law authorities of the Scots law of delict. In other jurisdictions with a Roman-Dutch heritage, such as South Africa, the *actio iniuriarum* has been treated as the primary mechanism in the law of delict for protection of privacy rights. The *actio iniuriarum* has not, however, been as fully developed in Scotland. The inadequacy of existing delictual protections is particularly acute in the case of the non-informational aspects of privacy, where English law provides little guidance owing to the structural limitations of the English law of torts. This article outlines the emerging judicial framework for developing common law constitutional rights, then applies this framework to examine how far a modern *actio iniuriarum* might be developed to protect Article 8 rights.

2. Common Law Constitutional Rights

The 1998 Act does not require that Convention rights are given direct horizontal effect. It is not therefore possible, in the United Kingdom, to cite Convention rights (without further elaboration in domestic law) as the sole basis of a private law action.[1] However, under s.6(1) of the 1998 Act, it is unlawful for a public authority to act in a way incompatible with Convention rights.[2] Courts are considered public authorities for this purpose. The requirement that they act compatibly with Convention rights extends to private law disputes.[3] This includes having regard to Convention rights when developing the common law:[4]

> 'Although the Act is not entrenched, the Convention rights that it confers have a peculiar potency. Enforcing them may require a court to modify the common law. […] Rights that can produce such results are clearly of a higher order than the rights which people enjoy at common law or under most other statutes.'

The approach of the courts towards the development of common law in fulfilment of the requirements of s.6(1) of the 1998 Act has evolved, at least in emphasis since Convention rights were first incorporated into domestic law. It was initially accepted by English courts that Convention rights are not 'merely or persuasive or parallel effect' but have become 'the very content' of the common law.[5] In *R v Parole Board,* however, the Supreme Court stressed that Convention rights are fulfilled primarily through an exhaustive treatment of domestic law:[6]

> 'The values underlying both the Convention and our own constitution require that Convention rights should be protected primarily by a detailed body of domestic law. […] The importance of the Act is unquestionable. It does not however supersede the

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[1] E Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh University Press, 2010), pp.16-17; E Reid and D Visser, 'Introduction', in E Reid and D Visser (eds), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa,* (Edinburgh University Press, 2013), p.7.
[2] Human Rights Act 1998 s.6(1).
[3] *Attorney General's Reference No 3 of 1999* [2009] UKHL 34; [2010] 1 AC 145 per Lord Hope at paras 18-19, Lord Brown at para 54. See also G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint', (2011) 74 *Modern Law Review* 878.
[4] *Wilson v First Country Trust* [2004] 1 AC 816 at para 180.
[5] *McKennit v Ash* [2006] EWCA Civ 1714; [2008] QB 73 per Buxton LJ at para 11, citing *A v B Plc* [2003] QB 195 per Lord Woolf CJ at para 4.
[6] *R (on the application of Osborn) v Parole Board* [2014] A.C. 1115 per Lord Reed at paras 56-57.

protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.'

The Supreme Court has also provided some guidance on how the process of developing common law constitutional rights should be undertaken. Where existing common law authorities do not provide adequate protection of Convention rights, the courts may have regard to the approach taken in other jurisdictions. In *A v British Broadcasting Corporation,* the Supreme Court clarified that when developing English common law, the courts may have regard to jurisdictions outside the Council of Europe (and therefore not party to the ECHR):[7]

'[T]he common law is capable of development. The application of the principle of open justice may change in response to changes in society and in the administration of justice. It can also develop having regard to the approach adopted in other common law countries, some of which have constitutional texts containing guarantees comparable to the Convention rights, while in others the approach adopted reflects the courts' view of the requirements of justice.'

When developing the common law in Scotland, it would be appropriate to have regard not only to common law jurisdictions, but also jurisdictions in the Civilian tradition. This is particularly the case for jurisdictions, such as South Africa, which share similar historical influences as Scots law.

This openness to development is, however, limited where adapting an aspect of the common law would have the effect of distorting the relevant action or changing its underlying doctrinal basis. In the English case of *Fearn v Tate Gallery Board of Trustees,* the Court of Appeal clarified that where a common law tort does not otherwise extend to a situation where the Convention rights of the claimant are engaged, the correct approach is to ask whether:

[7] *A v British Broadcasting Corporation* [2014] UKSC 25, [2015] A.C. 588 per Lord Reed at para 40.

> '(1) there was nevertheless an infringement of [the relevant Convention right]; and (2) if so, whether it is appropriate to extend the common law in order to provide a remedy for the claimants and so avoid a breach of HRA 1998 s.6 on the part of the courts as a public authority.'[8]

That case was brought against the Tate Gallery following the construction of a new viewing platform and concerned whether the tort of private nuisance could extend to overlooking the living accommodation of the neighbours. The Court of Appeal had held that "mere overlooking" did not fall within the common law of nuisance.[9] The Court of Appeal went on to explain that "overlaying the common law tort of private nuisance with Article 8 would significantly distort the tort in some important respects".[10] This was partly because nuisance is a property tort and therefore not all occupiers who might have their privacy infringed (such as licensees) would have a cause of action. It was also however because any substantive assessment of a person's reasonable expectation of privacy for the purposes of Article 8 of the ECHR would introduce considerations that are not doctrinally relevant to the action for private nuisance.[11] On appeal, the majority of the Supreme Court agreed that the tort of private nuisance did not extend to mere overlooking of a building, but considered that the particular use made by the Tate Gallery of their viewing platform did fall within the scope of private nuisance.[12] It was therefore deemed an "unnecessary complication and distraction" to consider development of the common law in response to Convention rights.[13] Invasion of privacy and damage to interests in private were not mutually exclusive and the "general principles of the common law of nuisance" were adequate to deal with the complaint.[14] The Supreme Court did not however disapprove the Court of Appeal's approach to cases where the common law did not extend to a situation where Convention rights are engaged.

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[8] *Fearn v Tate Gallery Board of Trustees* [2020] EWCA Civ 104; [2020] Ch. 621 at para 88.
[9] *Fearn v Tate Gallery Board of Trustees* [2020] EWCA Civ 104; [2020] Ch. 621 at para 74.
[10] *Fearn v Tate Gallery Board of Trustees* [2020] EWCA Civ 104; [2020] Ch. 621 at para 91.
[11] *Fearn v Tate Gallery Board of Trustees* [2020] EWCA Civ 104; [2020] Ch. 621 at paras 91-94.
[12] *Fearn and others (Appellants) v Board of Trustees of the Tate Gallery (Respondent)* [2023] UKSC 4 per Lord Leggatt at para 92.
[13] *Fearn and others (Appellants) v Board of Trustees of the Tate Gallery (Respondent)* [2023] UKSC 4 per Lord Leggatt at para 113.
[14] *Fearn and others (Appellants) v Board of Trustees of the Tate Gallery (Respondent)* [2023] UKSC 4 per Lord Leggatt at para 112.

A new focus is emerging on common law constitutional rights, rather than immediate reliance on reasoning derived from the 1998 Act. It is possible to discern a framework for how these common law constitutional rights may be developed in the private law sphere. The courts are not permitted to rely solely on the jurisprudence of the Strasbourg court without further reference to the expression of Convention rights in domestic common law or statute. However, the courts must, as an instance of the requirements placed on public authorities under s.6(1) of the 1998 Act, have regard to Convention rights in the interpretation and development of common law. In doing so, they may also have regard to the approach in other jurisdictions with similar doctrinal influences. This includes jurisdictions which are not party to the Council of Europe. The courts may not, however, develop the common law in a way which distorts the doctrinal basis of an action. This framework contrasts to, for example, the South African Bill of Rights, which imposes more robust requirements to give horizontal effect to its provisions in the private law sphere.[15]

3. Informational and Non-Informational Privacy

Until recently, the most robust modern statement that a right to privacy may exist in the common law of Scotland had been in *Martin v McGuinness*[16], in which the Lord Ordinary stated that "[o]f 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".[17] That case concerned the admissibility of evidence which had been obtained by a private investigator who had entered the pursuer's home and spoken to his wife. The Lord Ordinary also made brief reference to the applicability of the *actio iniuriarum,* defining it in the following terms: "an assault on personality of the nature of an insult to the dignity, honour or reputation of a person, causing hurt to his feelings".[18] The court did not however express a view on how far the *actio iniuriarum* could be developed for cases involving an intrusion of privacy.

In recent years English developments in the field of informational privacy have been found persuasive in Scotland. Informational privacy here refers to that aspect of privacy

[15] Constitution of the Republic of South Africa, 1996, s.8(3), s.39(2).
[16] *Martin v McGuinness* 2003 S.L.T. 1424 (OH)
[17] *Martin v McGuinness* 2003 S.L.T. 1424 (OH) per Lord Bonomy at para 28.
[18] *Martin v McGuinness* 2003 S.L.T. 1424 (OH) per Lord Bonomy at para 29.

concerning the disclosure of private information. In the well-known case of *Campbell v MGN Ltd,* [19] the English tort of breach of confidence was developed in light of the values contained within Article 8 of the ECHR to remove the requirement for a pre-existing relationship between the parties, resulting in the recognition of a tort of misuse of private information.[20] It has previously been held that the "substance" of the English tort of breach of confidence also gave rise to an action in Scots law, although "the juridical basis may differ to some extent in the two jurisdictions".[21] Reid has, however, outlined how the English tort of breach of confidence relies on equitable remedies that are not easily translated into Scots law; breach of confidence in Scotland is not an equitable wrong in the technical sense meant in English law but rather "part of a broader recognition that misuse of secret information [is] an actionable injury, regardless of whether the secret was originally divulged in a contractual context, and whether knowledge was acquired by serendipity or by design".[22] This presents some difficulties with translating the English tort of breach of confidence to Scotland, but far less so with delictual liability for misuse of private information, which is fundamentally concerned with the protection of secrecy as an aspect of *dignitas*. Reid suggests that further reference may be made to English authorities in the future, particularly in connection with balancing Article 8 rights against Article 10 rights to free expression.[23]

The protection of non-informational privacy in Scotland, however, is far more uncertain, as *C v Chief Constable of the Police Service of Scotland* [24] makes clear. In this case, ten police officers sought declarator that the use of messages sent via an electronic messaging system (WhatsApp) in disciplinary proceedings brought against them by their chief constable was unlawful, or alternatively in breach of their Article 8 rights. A preliminary issue was whether a right to privacy existed in the common law of Scotland. The Lord Ordinary founded his justification for a right of privacy at common law on two arguments. The first could broadly be described as a policy argument: "it seems to flow from the centrality of the role of

[19] [2004] UKHL 22; [2004] 2 A.C. 457
[20] *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 A.C. 457 per Lord Nicholls at para 14.
[21] *Lord Advocate v Scotsman Publications Ltd* 1989 S.C. (H.L.) 122; 1989 S.L.T. 705 per Lord Keith of Kinkel at 164.
[22] E Reid, 'Breach of confidence: translating the equitable wrong into Scots law' (2014) 1 *Jur. Rev.* 1-13 at p.4.
[23] Ibid. p.13.
[24] [2019] CSOH 48; 2019 S.L.T. 875

privacy in a democratic society and particularly in a society where electronic storage of information and electronic means of intrusion into the private lives of a citizen by government, private organisations and individuals are growing exponentially the common law should recognise the right to privacy".[25] The second was based on analogy to English law; particularly the development of breach of confidence in light of Convention rights.[26] The Lord Ordinary comments that "if [privacy] does not exist in Scots common law a very odd conclusion is reached that Scottish and English law in relation to this fundamental matter are entirely different. I think that is an inherently unlikely result".[27] It would indeed be odd if, as two modern democratic jurisdictions both subject to the requirements of the 1998 Act, Scots law and English law adopted radically different policy objectives in relation to privacy. However, there is nothing unusual about those policy objectives finding a different doctrinal expression in the Scots law of delict compared to the English law of tort. For reasons already discussed, the Lord Ordinary's heavy reliance on the English tort of breach of confidence as it was discussed in *Campbell v MGN Ltd* raises certain conceptual difficulties.[28]

Perhaps the greatest difficulty with the Lord Ordinary's reasoning, which was highlighted on appeal by Lady Dorrian,[29] is that it drew on authorities mainly concerned with informational privacy to develop a case for recognising a general right to privacy at Scots common law. As Lady Dorrian states, "[t]he process by which the nascent right [to privacy] became fully established [at Scots common law] is not developed, at least in terms which specify the nature, degree and scope of the right, or how it has progressed over time".[30] *Campbell v MGN Ltd*, on which the Lord Ordinary drew heavily, "elaborated on, or explained, the extent to which private information may be protected at common law, but did not go as far as to say that a fully protected right of privacy had been established".[31]

[25] [2019] CSOH 48; 2019 S.L.T. 875 per Lord Bannatyne at para 107.
[26] [2019] CSOH 48; 2019 S.L.T. 875 per Lord Bannatyne at paras 110-111.
[27] [2019] CSOH 48; 2019 S.L.T. 875 per Lord Bannatyne at para 116.
[28] Lord Bannatyne also refers to *Martin v McGuinness* 2003 S.L.T. 1424 (OH) and *Henderson v Chief Constable of Fife Police* 1988 S.C.L.R 77; 1988 S.L.T. 361.
[29] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61; 2020 S.L.T. 1021 per Lady Dorrian at paras 75-83.
[30] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61; 2020 S.L.T. 1021 per Lady Dorrian at para 76.
[31] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61; 2020 S.L.T. 1021 per Lady Dorrian at para 80.

Non-informational privacy under Article 8 of the ECHR is extremely broad and embraces many aspects in the jurisprudence of the Strasbourg court which do not at present have a clear juridical foundation in the English law of torts or the Scots law of delict. Reid gives particular attention to territorial privacy and intrusion into the home environment[32], as well as intrusion into physical privacy of the person, whether or not there is disclosure of their image.[33] These categories are influenced by the scholarly taxonomies of Prosser, who recognised "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs",[34] and Solove, who recognised intrusion of the private sphere separately from informational privacy.[35] If a right to physical privacy were recognised at common law in Scotland, it might have been pleaded in the case of *Beyts v Trump International Golf Club Scotland Ltd*, [36] which concerned a woman who had been photographed relieving herself on a right of way by staff at a golf course. As it was, the case was pleaded in terms of data protection. As there was no causal connection between the distress the pursuer had suffered and the defenders' lack of registration under s.17 of the Data Protection Act 1998, the defenders were assoilzied. Other aspects of Article 8 protection which might conceivably be applicable in the law of delict include respect for a person's right to establish and develop relationships with others.[37]

Hughes has noted there is little indication that the English courts will develop a broad right to privacy that would embrace the full range of non-informational contexts where it can arise.[38] This is often said to be due to structural reasons. This was reflected by Lord Hoffman's dicta in *Wainwright v Home Office* [39] that privacy is a "high level principle" and therefore of little use as an analytical tool in the development of the law.[40] Lady Hale referred to Lord Hoffman's dicta when she similarly noted in *Campbell v MGN Ltd* that "our

[32] E Reid, *Personality, Confidentiality and Privacy in Scots Law,* no 1 supra, paras 17.02-17.06. See also *Banaghan v Smith* (1857) 19 D 317; *Pringle v Bremner and Stirling* (1867) 5 M (HL) 55; *Robertson v Keith* 1936 SC 29.
[33] E Reid, *Personality, Confidentiality and Privacy in Scots Law*, no 1 supra, paras 17.07-17.09. See also *Henderson v Chief Constable of Fife Police* 1988 S.C.L.R 77; 1988 S.L.T. 361; *McKie v Chief Constable of Strathclyde* 2002 20 Rep LR 137; 2002 GWD 7-246 (OH), affirmed 2003 SC 317.
[34] WL Prosser, 'Privacy' (1960) 48 *California Law Review* 383 at 389.
[35] D Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477 at 549-553.
[36] 2017 S.L.T. (Sh Ct) 93
[37] *X v Iceland*, no. 6825/74, [1976] ECHR 7; (1976) 5 DR 86; (1976) 5 DR 86, EComm HR.
[38] K Hughes, 'A Common Law Constitutional Right to Privacy – Waiting for Godot?', in M Elliot and K Hughes (eds), *Common Law Constitutional Rights* (Bloomsbury, 2020), p.95.
[39] [2003] UKHL 53
[40] *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 per Lord Hoffman at para 32.

law cannot, even if it wanted to, develop a general tort of invasion of privacy".[41] The "intellectual superstructure" of the English law of torts is said to be influenced by its historical reliance on the traditional forms of action in tort, which were not articulated by English legal scholars in terms of rights or infringeable interests until the 19th century.[42] It follows, as stated by Tugendhat J in *AKJ v Commissioner of Police Metropolis*, [43] that English law recognises not a general right to privacy, but rather a "cluster of narrower privacy related rights".[44] Scots lawyers are said, meanwhile, not to have a "structural mistrust for high-level principles from which we might extract particular rules of liability".[45] Delict is "a broad concept" within the law of obligations, "embracing all civil claims for reparation which lie outside the law of contract".[46] The historical development of the English law of torts has undoubtedly constrained its approach to informational privacy, while also shaping its rejection of a general right to privacy at common law in its non-informational contexts. It is important, however, not to rely solely on structural or historical explanations for the English position. It is clear that the English courts also have policy concerns around the scope of the right and how liability for intrusion of privacy is controlled. Lady Dorrian's concern about the "nature, degree and scope of the right" to privacy in *C v Chief Constable of the Police Service of Scotland* [47] make it clear that these policy considerations are also reflected in the Scottish courts.

4. The *Actio Iniuriarum*: Judicial and Scholarly Treatment

The *actio iniuriarum,* which is the historical foundation for all personality rights in Scots law, has been referred to in some modern Scots cases dealing with privacy. It is clear, however, that the courts approach it with considerable hesitancy. In *Martin v McGuinness, [48]*

[41] *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 A.C. 457 per Lady Hale at para 133.
[42] HL MacQueen and WDH Sellar, 'Negligence', in K Reid and R Zimmermann (eds), *History of Private Law in Scotland* (Oxford University Press, 2000), Vol 2, p.547.
[43] *AKJ and others v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB)
[44] *AKJ and others v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB) per Tugendhat J at para 70. The English courts have, however, been surprisingly willing to push the envelope of misuse of private information, including to covert surveillance of the home, even where the information gathered is not disclosed: *Gulati v MGN Ltd* [2017] QB 149
[45] KM Norrie, 'The *actio iniuriarum* in Scots law: Romantic Romanism or Tool for Today?', in H Scott and E Descheemaeker (eds), *Iniuria and the Common Law* (Hart Publishing, 2013), p.51.
[46] Lord Hope, 'The Strange Habits of the English', in HL MacQueen (ed), *Miscellany VI,* (Stair Society, Vol 54, 2009), p.317.
[47] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61; 2020 S.L.T. 1021 per Lady Dorrian at para 76.
[48] 2003 S.L.T. 1424 (OH)

discussed above, the Lord Ordinary restated the "rather cautious submission" made by counsel that the *actio iniuriarum* might be applicable to intrusion into the territorial privacy of the home.[49] Express reference was also made to the *actio iniuriarum* in *Stevens v Yorkhill NHS Trust,* [50] which concerned the injury to a mother's emotional health when a health board removed the organs of her deceased child without her prior knowledge or permission. The temporary judge in that case found that liability could not rest on the existence of a doctor-patient relationship between the mother and the hospital.[51] The temporary judge further took the view that the juridical basis for an earlier series of Scots cases concerning interference with the bodies of the deceased was the *actio iniuriarum.*[52] Judicial scepticism, however, remains marked towards relying directly on the *actio iniuriarum* in privacy cases. In *C v Chief Constable of the Police Service of Scotland,* [53] Lady Dorrian refers to the discussion of the *actio iniuriarum* in *Martin v McGuinness* as a "side excursion".*[54]*

Perhaps more instructive are those cases where the *actio iniurarum* was not referred to, but which operate on different approaches to liability versus the English courts. In *Henderson v Chief Constable of Fife Police*, [55] the procedures in place at a police cell required a woman who was being held there to remove her brassiere. It was held this had been "an interference with her liberty which was not justified in law, from which it follows that she has a remedy in damages".[56] As Norrie highlights, fault in this case was based on the lack of legal justification for the actions of the police.[57] It was not enough to establish legal justification for the police to show that they had applied their usual procedure, if this had been done unthinkingly and without reference to the policy objectives that underlay that procedure.[58] This differs starkly from the approach taken to similar facts in *Wainwright v*

[49] 2003 S.L.T. 1424 (OH) per Lord Bonomy at para 29.
[50] 2006 SLT 889 (OH)
[51] 2006 SLT 889 (OH) per Temporary Judge CJ Macaulay QC at para [67].
[52] 2006 SLT 889 (OH) per Temporary Judge CJ Macaulay QC at para [62]. The cases referred to were *Pollok v Workman* 1900 2F 354, *Conway v Dalziel* 1901 3F 918 and *Hughes v Robertson* 1913 SC 394.
[53] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61; 2020 S.L.T. 1021
[54] *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61; 2020 S.L.T. 1021 per Lady Dorrian at para 86.
[55] 1988 S.C.L.R 77; 1988 S.L.T. 361.
[56] *Henderson v Chief Constable of Fife Police* 1988 S.C.L.R 77; 1988 S.L.T. 361 per Lord Jauncey at p.367. It should be noted however that Lord Jauncey was influenced by a pre-*Wainwright* English case, *Lindley v Rutter* [1981] QB 128.
[57] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, p.60.
[58] Ibid. p.60.

Home Office, [59] where fault was based not on the absence of legal justification but rather on actual intent to cause emotional distress.[60] It is difficult to find a Scottish juridical basis for the approach taken in *Henderson v Chief Constable of Fife Police* in anything other than the *actio iniuriarum.* Likewise, in the pre-1998 Act case of *McKie v Chief Constable of Strathclyde*[61] it was noted that "the intimate nature of the search carried out" could be considered to "have gone well beyond what was necessary in the circumstances and to have amounted to assaults on the pursuer for the purposes of a civil claim".[62] Again, the approach to fault in this case appears to be based on the lack of any legal justification for what was done, taking into account what would have been proportionate to achieve police objectives in the circumstances.

Scholarly opinion on the *actio iniuriarum* has also been mixed. A favourable view is expressed by Whitty, who treats the Scottish post-mortem cases[63] in terms of *solatium* for affront derived from *iniuria.*[64] Norrie also states that "there is little doubt [..] that the Scottish courts, if they are so minded, could build upon the concept of *iniuria* in order to provide monetary redress in the form of *solatium* in appropriate contexts".[65] Brown examines the applicability of the *actio iniuriarum* in a variety of modern contexts, including behaviours made possible by new technologies, such as the publication of "revenge porn".[66] A more sceptical view was expressed by Lee, who accepted that the *actio iniuriarum* existed in Scots law, but felt, for reasons not directly stated, "it is not an action which one would wish to see encouraged".[67] Tunney and Jameson-Tull, in a commentary on a case where the

[59] [2003] UKHL 53; [2004] 2 AC 406
[60] [2003] UKHL 53; [2004] 2 AC 406 per Lord Hoffman at para 45.
[61] 2002 Rep LR 137; 2002 GWD 7-246 (OH)
[62] 2002 Rep LR 137; 2002 GWD 7-246 (OH) per Lord Emslie at para 31.
[63] *Pollok v Workman* 1900 2F 354*, Conway v Dalziel* 1901 3F 918*, Hughes v Robertson* 1913 SC 394 and *Stevens v Yorkhill NHS Trust* 2006 SLT 889 (OH).
[64] N Whitty, 'Rights of Personality, Property Rights and the Human Body in Scots Law' (2005) 9 *Edinburgh Law Review* 194 at p.216. See also J Brown, 'Dignity, Body Parts and the *actio iniuriarum:* a novel solution to a common (law) problem?' (2019) 28(3) *Cambridge Quarterly of Healthcare Ethics* 522-533. Whitty has also supported the *actio iniuriarum* as a potential solution for intrusion of personal privacy: N Whitty, 'Overview of Rights of Personality in Scots Law', in N Whitty and R Zimmermann, (eds), *Rights of Personality in Scots Law,* (Dundee University Press, 2009), p.174.
[65] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, p.61.
[66] J Brown, 'Revenge Porn and the *actio iniuriarum:* using old law to solve new problems' (2018) 38(3) *Legal Studies* 396-410.
[67] RW Lee, *An Introduction to Roman-Dutch Law,* (Clarendon Press, 5th ed, 1953), p.335.

actio iniuriarum was pleaded by counsel but not relied upon by the court, [68] caution against "over-admiring the glass case of historical concepts".[69]

A sceptical view has also been expressed by Reid, who regards the *actio iniuriarum* as an infertile source of development for the common law.[70]Reid considers that the *actio iniuriarum* lacks a fully developed jurisprudence of the kind that exists in South Africa. The relative paucity of Scots material has therefore prevented the adaptation of the *actio iniuriarum* to the modern social realities that it is able to accommodate in South African law.[71] It is true that the Roman "grammar" of the Scots law of delict, based upon the Aquilian action for *damnum iniuria datum* in respect of patrimonial loss and the *actio iniuriarum* in respect of infringement of personality interests, became obscured in the 19th century.[72] This was driven in part by a growing cultural ambivalence to the Roman-Dutch juristic literature, particularly after written arguments were ended by the Court of Session Act 1850.[73] Key doctrinal features of the *actio iniuriarum* were embedded in this juristic literature. It is not therefore difficult to see how, from the later 19th century onwards, they could become obscured. There were also structural changes, as personal injury arising from negligence came to occupy its now preeminent position in the Scots law of delict. In the early 20th century, the *actio iniuriarum* came to be associated with awards to a relative following the death of a person wrongfully killed, then eventually with any damages for non-patrimonial losses, even if caused through negligence.[74] This was in spite of the fact that the law of negligence developed originally from the Aquilian action and therefore belonged to an entirely different category of liability from the *actio iniuriarum.* While this error was later corrected and the proper distinction between negligence and *iniuria* restored by Lord Kilbrandon in *McKendrick v Sinclair,* [75] it would be easy to argue that the Roman grammar

[68] *Hardey v Russel & Aitken* 2003 GWD 2-50
[69] J Tunney and J Jameson-Till, 'Do you want to know a secret? Exploring the boundaries of non-contractual confidence' (2003) 71(1) *SLG* 2003 7 at p.11.
[70] E Reid, *Personality, Confidentiality and Privacy in Scots Law*, no 1 supra, paras 17.11-17.14. Nos 67-69 also sourced from Reid.
[71] E Reid, *Personality, Confidentiality and Privacy in Scots Law*, no 1 supra, para 17.11.
[72] J Blackie, 'The Protection of *corpus* in Modern and Early Modern Scots Law', in H Scott and E Descheemaeker (eds), *Iniuria and the Common Law,* note 48 supra, p.156.
[73] J Crabb Watt, *John Inglis, Lord Justice-General of Scotland: A Memoir,* (W Green, 1893), p.55.
[74] See for example *Black v British Railway Company* 1908 SC 444 per Lord President Dunedin at p.453: 'The end of it all is that I think *solatium* […] has in the *actio iniuriarum* come to mean reparation for feelings – in short all reparation which is not comprehended under the heading of actual patrimonial loss'.
[75] 1972 SC (HL) 25 per Lord Kilbrandon at p.50: 'the correct analogue [for death caused by negligence] is not the *actio iniuriarum.* This was truly based on insult or affront; it survives in our forms of actions which are

has entirely collapsed. It would follow that the *actio iniuriarum* no longer has relevance as an overarching cause of action, beyond the various specific actions which historically descend from it.

It is submitted, however, that the new emphasis on common law constitutional rights means it is now incumbent on the courts to explore what common law authorities are available to give expression to Article 8 Convention rights. It is clear from *Stevens v Yorkhill NHS Trust*[76] that the *actio iniuriarum* has not disappeared from the Scottish legal consciousness. *A v British Broadcasting Corporation*[77] also clarifies that when developing the common law, it is permissible for the courts to adopt a comparative perspective to see how similar actions have been developed in a modern context elsewhere. It may therefore be useful to examine how the South African courts have developed the *actio iniuriarum*, without of course necessarily following them. This must be done, however, in a way which does not distort the cause of action. The question is therefore whether adapting the *actio iniuriarum* to offer protection in situations where Article 8 is engaged would change its doctrinal basis in Scots law.

A further reservation expressed by Reid is that "the *actio iniuriarum* as received into Scots law required malice in the sense of intention to injure".[78] She argues that fully embracing Article 8 values requires, by contrast, a "complex balancing process […] between level of fault, injuriousness of the intrusion and the persuasiveness of the countervailing interests served by the defender".[79] The specifics of fault, infringement of interest and countervailing justification in the Scottish *actio iniuriarum* will be addressed in the next section.

Implicit in much of the more sceptical judicial and scholarly treatment of the *actio iniuriarum* is the idea that it does not, in its basic architecture, reflect the modern values of human rights. The three "Ulpianic" interests (so called after their best-known articulation) which the *actio iniuriarum* embraced in the classical Roman law were *corpus, fama* and

included under the classification of verbal injury […] the Roman ancestor of our action of reparation is the Lex Aquilia'.

[76] 2006 SLT 889 (OH)

[77] [2014] UKSC 25, [2015] A.C. 588

[78] E Reid, *Personality, Confidentiality and Privacy in Scots Law*, no 1 supra, para 17.13.

[79] E Reid, *Personality, Confidentiality and Privacy in Scots Law*, no 1 supra, para 17.14.

dignitas.[80] The former two equate to physical integrity and reputation. To the extent that the third interest, *dignitas,* is equated with honour, Norrie has highlighted that the law cannot possibly afford any respect to such values.[81] Indeed both the classical Roman law and the later Civilian tradition treated *dignitas*, to a greater or lesser degree, as an asymmetrical concept; a relative attribute of the pursuer vis-à-vis the defender.[82] Many of the honour-based interests the *actio iniuriarum* traditionally protected - particularly the interest of the husband on the rape or adultery of his wife - would not fall within the modern protections afforded to private and family life under Article 8 of the ECHR.[83] It is submitted, however, that the concept of *dignitas* is capable of evolution. Scott notes that *dignitas* operates at two levels of generality: it is both the general interest protected by the *actio iniuriarum* as a whole, of which *corpus* and *fame* were categories, and a third category meant to designate "an as-yet unmapped territory of residual [specific] dignitary interests".[84] It is possible to map out these interests in a manner consistent with modern understandings of *dignitas.* Sociologists have tracked the evolution during the 18th-20th centuries from "honour cultures", in which *dignitas* is a status predicated on the perceptions of others,[85] to "dignity cultures", in which *dignitas* is based on an inherent worth which cannot be alienated by others.[86] This transition was mediated by a mixture of religious and philosophical ideas, as well as reactions against the brutalities of the first half of the 20th century.[87] Therefore, as Scott notes, "the delict [of *iniuria*] can perfectly exist as an attack on [the defender's] dignity considered in and by itself, even if it is taken to be held in the same measure by all".[88]

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[80] D.47.10.1.2. Ulpian *ad Edictum.*

[81] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 45 supra, pp.61-63.

[82] H Scott and E Descheemaeker, 'Iniuria and the Common Law', in H Scott and E Descheemaeker (eds), *Iniuria and the Common Law,* note 48 supra, pp.19-21.

[83] These survived to be discussed in D Walker, *The Law of Delict in Scotland,* (W Green, 2nd ed, 1981), Ch.22.1-2.

[84] H Scott and E Descheemaeker, 'Iniuria and the Common Law', in H Scott and E Descheemaeker (eds), *Iniuria and the Common Law,* note 48 supra, pp.16-17.

[85] AKY Leung and D Cohen, 'Within- and Between-Culture Variation: Individual Differences and the Cultural Logics of Honor, Face, and Dignity Cultures', (2011) 100(3) *Journal of Personality and Social Psychology* 507.

[86] PL Berger, 'On the Obsolescence of the Concept of Honor', (1970) 11 *European Journal of Sociology* 339; AKY Leung and D Cohen, 'Within- and Between-Culture Variation', ibid, p.526.

[87] M Rosen, *Dignity: Its History and Meaning,* (Harvard University Press, 2012).

[88] H Scott and E Descheemaeker, 'Iniuria and the Common Law', in H Scott and E Descheemaeker (eds), *Iniuria and the Common Law,* note 48 supra, p.21.

5. Elements of a Modern *Actio Iniuriarum*

To address the stated concern of the judiciary in Scotland that further developments in the law of delict must make clear the degree and scope of the right, the *actio iniuriarum* would need to be given a detailed, modern articulation. Only then could it be assessed as a candidate for embodying the values contained in Article 8 of the ECHR. Multiple Scots legal writers have already begun this task in recent years[89] and it is hoped to continue it here. Particular focus will be given to the non-informational aspects of privacy, which have received much less attention in recent case law than the confidentiality and informational aspects. The *actio iniuriarum* will not, however, be shoehorned into a conceptual structure that, in terms of the Court of Appeal in *Fearn v Tate Gallery Board of Trustees,* undermines its underlying basis. Reference will be made to its native Scots sources as well as comparative insights from South Africa. The choice of South Africa as a comparator requires some justification. It is significant that South African law draws its privacy protections in delict from the *actio iniuriarum* and retains to a large degree the Roman grammatical structure of that delict, unlike continental jurisdictions such as Germany which of course equally draw their privacy protections from *iniuria* but no longer articulate them in those terms.[90] Moreover, South African delicts, as Brand notes, are "guided by similarly formulated human rights instruments".[91] Both the ECHR and the South African Bill of Rights contain protections for privacy, with limitations on that right authorised according to what is necessary in a democratic society.[92] Both jurisdictions also - very unusually where the treatment of the *actio iniuriarum* is concerned - adopt *stare decisis* as their primary mode of legal reasoning, although Scotland has never directly treated Roman juristic material as positive authority.[93]

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[89] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', note 48 supra; N Whitty, 'Rights of Personality, Property Rights and the Human Body in Scots Law', note 68 supra; J Brown, 'Revenge Porn and the *actio iniuriarum:* using old law to solve new problems', note 70 supra.

[90] In Germany §823(1) BGB has been interpreted in light of Art. 1 of the *Grundgesetz für die Bundesrepublik Deutschland*, which provides for the inviolability of human dignity. See BS Markesinis et al, *Markesinis's German Law of Torts,* (Bloomsbury, 5th ed, 2019), Ch.9(V). In France protection of privacy was initially driven by judicial developments, before a right to private and family life, now manifested in Art. 9 *Code civile,* was introduced by Loi no.70-643 de 17 juillet 1970 tendant à renforcer la garantie des droits individuels des citoyens, Art 22.

[91] FDJ Brand, 'Privacy', in E Reid and D Visser (eds), *Private Law and Human Rights,* (Edinburgh University Press, 2013), p.177.

[92] ECHR Art. 8(2). Constitution of the Republic of South Africa. Art. 36(1).

[93] FDJ Brand, 'Privacy', note 96 supra, p.178.

There is one aspect of the *actio iniuriarum* that will not be discussed here. That is the distinction between verbal and real injuries; that is to say, between injuries caused by physical acts and injuries caused by words. This distinction can be found in Roman[94] and Dutch-Roman[95] law but in its received form in Scotland, it was always more of jurisdictional than substantive importance.[96] Since the abolition of the Commissary Court in 1830 and the transferral of its jurisdiction to the Court of Session, there has been little practical significance to the distinction. Norrie points out that in many situations engaging privacy rights it is difficult and likely unnecessary to classify the injury as either physical or verbal.[97] The preeminent verbal injury, defamation, is now governed in large part by the Defamation and Malicious Publications (Scotland) 2021, which introduces, in effect, a requirement of third-party communication[98] and in doing so shifts the definition of defamation much closer to its English legal understanding than its historical construction under the *actio iniuriarum.*[99] Other non-defamatory verbal injuries as they historically existed under the *actio iniuriarum* have either been swallowed up by defamation or severely restricted by the introduction of an anglicised requirement for the pursuer to show falsity.[100] They have now been put on a statutory footing by Part 2 of the 2021 Act. For these reasons, it is submitted the distinction historically drawn between physical and verbal injury is no longer relevant for current purposes.

In a modern action for intrusion of privacy, the elements of the *actio iniuriarum* are taken to be:

(a) an intentional or reckless act,

(b) which infringes a relevant dignitary interest,

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[94] Inst.4.4.1. See also D.47.10.1.1. Ulpian *ad Edictum.*

[95] A Vinnius, *In quatuor libros Institutionum imperialium commentarius academicus et forensic,* (Daniel Elzevier, reprint, 1665), Cujas Library, available at http://cujasweb.univ-paris1.fr/book/app/resource/0607001512/#page/1/mode/2up. Liber 4.4. p.741.

[96] J Blackie, 'From *actio iniuriarum* to Right of Personality: The Historical Background in Scots Law', in N Whitty and R Zimmermann, (eds), *Rights of Personality in Scots Law,* note 68 supra, p.76.

[97] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, pp.54-55.

[98] Defamation and Malicious Publications (Scotland) Act 2021, s.1(2).

[99] MA Jones et al (eds), *Clerk and Lindsell on Torts,* (Sweet and Maxwell, 21st ed, 2014), Ch.22.

[100] KM Norrie, 'Hurts to Character, Honour and Reputation: A Reappraisal' 1984 *Juridical Review* 163, fn 104; KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, pp.57-58. But consider *Newton v Fleming* (1846) 6 D 677, where the Court of Session indicated that truth would not always be a defence. Discussed in N Whitty, 'Overview of Rights of Personality in Scots Law', in N Whitty and R Zimmermann, (eds), Rights of Personality in Scots Law, note 68 supra, pp.176-180.

(c) without legal justification,

(d) resulting in emotional distress,

(e) with a remedy in *solatium.*

5.1 Fault

The unifying substantive principle of the *actio iniuriarum* in the classical Roman law was *contumelia.* Birks renders the closest English equivalent as "contempt", [101] but for reasons which will become apparent, it is more helpful for the purposes of Scots law to render it as "affront". The following definition of *iniuria* can be found in Ulpian's commentary on the Edict:[102]

> 'Iniuria ex eo dicta est, quod non iure fiat: omne enim, quod non iure fit, iniuria fieri dicitur. hoc generaliter. specialiter autem iniuria dicitur contumelia.'
>
> 'Wrong is so called from that which happens not rightly; for everything which does not come about rightly is said to occur wrongfully. This in general. But, specifically, wrong is the designation for contumely.'

Contumelia was, as Birks states, "a kind of arrogance of pride, an over-confident exultation of the self, manifested in violence or other misbehaviour towards others".[103] It is therefore both a state of mind and a set of behaviours which evince and are characterised by that state of mind.[104] In an action where the wrong itself was defined by a contumelious state of mind, it was hardly necessary for Roman jurists to develop an independent mental element of fault; indeed it was only in post-classical law that *animus iniuriandi* ("mind to insult") was articulated.[105] In Scotland, the *animus iniuriandi* has always been intent. This is explained in part by the fact that civil liability for physical injuries were, prior to 1830, under the jurisdiction of the Court of the Justiciars, whose primary competence was (and remains)

[101] P Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 *Irish Jurist* 1 at p.8.
[102] D.47.10.1.pr. Ulpian *ad Edictum.* Trans. A Watson (ed), *The Digest of Justinian,* (University of Pennsylvania Press, 1985).
[103] P Birks, 'Harassment and Hubris', note 106 supra, p.8.
[104] Ibid. p.9.
[105] H Scott and E Descheemaeker, 'Iniuria and the Common Law', in H Scott and E Descheemaeker (eds), *Iniuria and the Common Law,* note 48 supra, p.11.

criminal law. It follows that the Court of Session in 1765 defines *iniuria* as an intentional delict:[106]

> 'An *actio iniuriarum,* where there is no patrimonial loss, and where damages awarded are only in *solatium,* must be founded upon *dolus malus,* according to the opinions of all writers upon law, and so far it differs from damages awarded to repair patrimonial loss, in which it is sufficient to specify even *culpa levissima*.'

It is important to note that the relevant intention is to infringe a dignitary interest. It is not necessary that the defender intended to affront or hurt the feelings of the pursuer, although this will usually be the result of an infringement of one of their dignitary interests.[107] There is therefore no equivalent in the *actio iniuriarum* to the English requirement for imputed malice as it was articulated by Lord Hoffman in *Wainwright v Home Office.*[108] In modern South African law, the *animus iniuriandi* is subdivided into (1) *dolus directus,* where the defender intended to infringe a dignitary interest, and (2) *dolus eventualis,* where the defender commits an act having reconciled themselves to the possibility that it may infringe the interest.[109] This is more familiar to modern Scottish lawyers as the distinction between intention and recklessness. *Dolus eventualis* may be construed objectively and therefore covers situations where the defender ought to have been aware of the possibility that a dignitary interest would be infringed. South African law has also, since *National Media Ltd v Bogoshi,* begun to accommodate negligence, at least for media defenders.[110] Serious reservations must be expressed, however, over whether the concept of *iniuria* in Scotland could ever follow suit, having always been understood in clear terms as an intentional delict. Indeed, it is the intentional nature of the delict of *iniuria* which validates recovery for emotional distress falling short of a recognised psychiatric disorder, which would not be recoverable in an action for negligence, descended as it is from the Aquilian action. TB Smith refers in his *Short Commentary* to "deliberate affront to

[106] *Graeme and Skene v Cunningham* (1765) Mor 13923.
[107] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, pp.52-54; KM Norrie, 'Actions for Verbal Injury', (2003) 7 *Edinburgh Law Review* 390; KM Norrie, *Defamation and Related Actions in Scots Law,* (Butterworths, 1995), p.120.
[108] [2003] UKHL 53 per Lord Hoffman at paras 424-426.
[109] *SAUK v O'Malley* 1977 (3) SA 394 (A) at p.402G-H. See also J Burchell, *Personality Rights and Freedom of Expression: The Modern* Actio Iniuriarum, (Juta, 1998), Ch.22.
[110] *National Media Ltd v Bogoshi* 1998 (4) SA 442 (A) per Hefer J at p.1214C-E.

the pursuer (or negligence so gross as to be the equivalent of intent)".[111] Smith was likely referring to *culpa lata,* a Roman concept of gross negligence amounting to reckless disregard for consequences. This is much closer to *dolus eventualis* in the sense of the defender having it within their comprehension (or acting in circumstances where they ought to have had it within their comprehension) that the pursuer's dignitary interests may be infringed, and not to negligence in the sense of the defender breaching a duty of care they held towards the pursuer.

It can be questioned, however, how far the lack of an action in negligence would affect the ability of the *actio iniuriarum* to embrace the values contained within Article 8. Even cases where the intrusion of the pursuer's privacy was ancillary to wholly different objectives the pursuers were trying to achieve, such as the gathering of evidence following a road traffic accident in *Martin v McGuinness*[112] or the reduction of violence or self-harm risks in *Henderson v Chief Constable of Fife Police,*[113] would still be easily accommodated under the *animus iniuriandi.* The contumelious mind, as the *Institutes* make clear,[114] is essentially a hubristic one. What could be more excessively self-confident than the belief that one's own objectives and priorities are too important have proper regard to the *dignitas* of others? It is possible to envisage some scenarios in which the defender entirely lacks the necessary contumelious mind but instead negligently allows a breach of privacy to take place. Reid gives the example of an agency charged with protecting the new identities of individuals such as notorious child-killers Venables and Thompson negligently allowing those identities to be disclosed.[115] Such scenarios would likely turn on their individual facts, including any actions taken or choices made by the agency and whether at the relevant time the risk of a disclosure was apparent or ought to have been apparent to employees of the agency.

[111] TB Smith, *Short Commentary on the Law of Scotland,* 'Designation of Delictual Actions – Damn *Iniuria* Damn', 1972 *SLT (News)* 125 at p.126.
[112] 2003 S.L.T. 1424 (OH)
[113] 1988 S.C.L.R 77; 1988 S.L.T. 361
[114] Inst.4.4.pr.
[115] E Reid, *Personality, Confidentiality and Privacy in Scots Law*, no 1 supra, para 17.14, with reference to *Venables v News Group Newspapers Ltd* [2001] Fam 430, which concerned an injunction against publication of the new identities of Venables and Thompson.

In South Africa there has also been a debate over whether *animus iniuriandi* requires knowledge of wrongfulness – or in other words, whether it is sufficient for the defender to have a bare intention to infringe a dignitary interest or if they must also be aware that they lack any legal justification. This will be discussed later. In the Scots law of defamation, the requirement of malice is presumed if the pursuer is able to show that a defamatory statement has been made about them. It must only be averred and proved by the pursuer when certain defences are successfully made out, such as honest opinion or qualified privilege.[116] This may be a useful device in the modern law of defamation for balancing the interest of reputation against countervailing rights or interests. It is submitted, however, that in privacy cases the same balancing exercise is achieved with an independent element of wrongfulness.

5.2 Relevant Dignitary Interests

In addition to being the general interest which the whole of the *actio inuriarum* serves to protect, *dignitas* acts as a residual category which covers a range of specific dignitary interests other than *corpus* (physical integrity) and *fama* (reputation). It is from the synecdochical nature of *dignitas* that the *actio iniuriarum* in Scotland draws its relatively greater flexibility compared to the English law of torts. As will be seen, however, the generation of new dignitary interests is subject to strict controls; the pursuer cannot simply assert that their *dignitas* has been impaired without either referring to the existing specific interests or showing a policy basis for creating a new one. Stair does not refer to *iniuria* as an independent wrong but mentions the major dignitary interests while discussing repairable interests in Scots law: 'At first, Life, Members and Health […] next to Life, is Liberty […] the Third is Fame, Reputation and Honour […]'[117] Bankton by contrast does refer to *iniuria* as a separate wrong:[118]

> 'The next interest is in one's Fame and Reputation, which is hurt by Injury, specially so termed; for, in the general acceptation, every offence is an injury […] An assault, by holding up the fist, or any weapon, against one in a threatening manner, is real injury,

[116] Defamation and Malicious Publications (Scotland) Act 2021 ss.7, 10-12.
[117] J Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland,* (Edinburgh University Press, 1981, reprint of second edition published 1693), 1.9.4.
[118] AM Bankton, *An Institute of the Laws of Scotland,* (Stair Society, 1993, reprint of first edition published 1751-1853), 1.10.21-22, 38.

because it tends much to the person's disgrace who is so used […] There is no place for an action of Injury, when the affront is not presently resented, but dissimulation of the offence is not inferred from silence at the time, for perhaps there was a danger of a second injury […]'

The Court of Session in the 19th century continued to recognise the major dignitary interests. In *Newton v Fleming*, [119] Lord Murray summarised the view of Stair, Bankton, Erskine and other Scots writers in finding that *iniuria* is a delict intentionally committed "to the reproach and grievance of another, whereby his fame, dignity or reputation is hurt".[120] This stands as one of the clearest articulations of the Ulpianic scheme of dignitary interests in Scots law, although it omits *corpus* or physical integrity, by that time largely the province of the criminal law.

In South Africa, *dignitas* as a residual interest has long been extended to embrace both the informational and non-informational aspects of privacy. For example, territorial privacy has been recognised, including where the defender enters the home or looks through a window.[121] The physical privacy of the person has been recognised in the case of unauthorised medical examinations[122] and the taking of unauthorised blood samples.[123] South African courts have also recognised an intrusion of privacy where telephone conversations are bugged[124] or private documents and correspondence are read,[125] even if the end product of these activities are not later disclosed to the general public. The same would likely apply to scenarios like that in *Beyts v Trump International Golf Club Ltd,* [126] where defenders took photographs of the pursuer in a compromising position but did not publish them. Most recently the South African courts have recognised privacy as a specific dignitary interest within the *actio iniuriarum*, in effect giving the Ulpianic scheme four parts instead of three.[127]

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[119] (1846) 6 D 677
[120] *Newton v Fleming* (1846) 6 D 677 per Lord Murray at p.694.
[121] *S v I* 1976 (1) SA 781 (RA) at p.783F-H.
[122] *Goldberg v Union and South West Africa Insurance Co Ltd* 1980 (1) SA 160 160 (E) at p.164.
[123] *M v R* 1989 (1) SA 416 (O) pp.426-427.
[124] *Financial Mail (Pty) Ltd v Sage Holdings (Pty) Ltd* 1993 (2) SA 451 (A) at p.463.
[125] *Reid-Daly v Hickman* 1981 (2) SACR 496 (C) at p.323; *S v Hammer* 1994 (2) SACR 496 (C) at p.498.
[126] 2017 S.L.T. (Sh Ct) 93
[127] Intrusion of privacy promoted as an independent interest by South African writers: WA Joubert, *Grondslae van die Persoonlikheidsreg*, (Balkema, 1953), pp.130-136; J Neethling et al, *Delikterig,* (Butterworths, 2nd ed,

The Scots law of injuries (*iniuriae*) has generally preferred to operate at a high level of factual specificity. It is therefore submitted that if the Scottish *actio iniuriarum* were developed to accommodate privacy interests, the pursuer would usually refer to established authority for one of the modes by which privacy could be intruded. The initial modes of non-informational intrusion would likely mirror the intrusions into territorial privacy or physical privacy reflected, respectively, in *Martin v McGuinness* [128] and *Henderson v Chief Constable of Fife Police,* [129] as well as the obtaining (even without disclosure) of private images or correspondence. When determining the limits of these modes of intrusion, the courts could refer to the nexus of spatial and functional privacy as detailed by the Strasbourg court in *Von Hannover v Germany,* [130] where it was held that the taking of photographs even of routine activities in a public place could, in particular circumstances, amount to an intrusion of privacy. If there were no established authority, the pursuer might be required to meet a policy test to establish a new mode of intrusion. The policy test adopted in South African law for infringement of its specific privacy interest has both a subjective and an objective component: (1) the pursuer must have a subjective expectation of privacy and (2) that expectation must be reasonable.[131] This overlaps closely with the test set down in the English tort of misuse of private information for what constitutes private or confidential information.[132] The need for a reasonable expectation of privacy has also been central to the piecemeal development of privacy interests in Scots law thus far.[133] One consequence of the recognition of privacy as a specific dignitary interest in South Africa is that it has removed any barrier (which did exist when privacy was treated as a residual aspect of *dignitas*) to commission of an *iniuria* against a juridical person, such as a company or

1992), p.325. The shift from insulting dignity to intrusion of privacy recognised in *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A); *NM v Smith* 2007 (5) SA 250 (CC).

[128] 2003 S.L.T. 1424 (OH). There are also some earlier authorities for intrusion of territorial privacy in Scots law, although they have tended to express themselves in terms of liberty rather than privacy and focus on the absence of a warrant: *Banaghan v Smith* (1857) 19 D 317, *Pringle v Bremner and Stirling* (1867) 5 M (HL) 55, *Robertson v Keith* 1936 SC 29.

[129] 1988 S.C.L.R 77; 1988 S.L.T. 361

[130] [2004] EMLR 379; (2005) 40 EHRR 1.

[131] FDJ Brand, 'Privacy', in E Reid and D Visser (eds), *Private Law and Human Rights,* note 96 supra, p.162. Brand notes that this is analogous to the test set out for impairment of the dignity interest in *Delange v Costa* 1989 (2) SA 857 (A) at p.862.

[132] *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 A.C. 457 per Lord Nicholls at para 21.

[133] The pursuers were unsuccessful in *C v Chief Constable of the Police Service of Scotland* [2020] CSIH 61; 2020 S.L.T. 1021 because as police officers in the relevant circumstances they lacked a reasonable expectation of privacy, per Lord Malcolm at para 145. The 'reasonable expectation' approach was recently affirmed in *Sutherland v HMA* [2020] UKSC 32 per Lord Sales at paras 60-61.

organisation.[134] As Scots law, however, insists upon emotional distress in all cases of *iniuria,* it is unlikely a juridical person could successfully raise the *actio iniuriarum* for intrusion of privacy.

5.3 Wrongfulness

The essence of wrongfulness in the Scottish *actio iniuriarum* is that a dignitary interest has been impaired without legal justification. The presence or absence of legal justification lies at the heart of whether the pursuer's expectation of privacy is reasonable or not. Norrie treats lack of legal justification as an aspect of fault[135] and indeed there is considerable overlap here between fault and wrongfulness. In South African law, defamation and privacy are dealt with in a unified way under the *actio iniuriarum,* with the result that many legal justifications developed for defamation have also been extended to privacy. The most significant of these is the legal justification of reasonable publication in the public interest for media defenders.[136] There is a synergy here to the defence of publication on a matter of public interest recently developed in the Scots law of defamation.[137] A defence of public interest also accords with Bankton's view of legal justification.[138] It is to be doubted, however, how far analogy to defamation would be useful in Scotland, given that defamation here has developed its own distinctive line of authority and is now in part governed by a statutory regime.[139] The extension of anglicised principles from defamation has also, historically, had a corrosive effect on the broader Scots law of injuries. In particular, the requirement that a verbal injury must be false, in itself sensible for defamatory injuries, is far less useful for non-defamatory verbal injuries, which as previously mentioned the requirement for the pursuer to aver and prove falsity has severely impeded.[140] New legal

[134] *Financial Mail (Pty) Ltd v Sage Holdings (Pty) Ltd* 1993 (2) SA 451 (A) at p.462A-B.
[135] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, pp.52-54.
[136] *National Media Ltd v Bogoshi* 1998 (4) SA 442 (A) per Hefer JA at p.1214E-I, followed in *Methembe-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) per Lewis JA at para 44.
[137] Defamation and Malicious Publication (Scotland) Act 2021 s.6(1).
[138] AM Bankton, *An Institute of the Laws of Scotland,* note 124 supra, 1.10.31: 'if it concerned the good of the commonwealth to have the crime known, and is not said with design of reproach'.
[139] Defamation and Malicious Publication (Scotland) Act 2021. Part 1.
[140] KM Norrie, 'Hurts to Character, Honour and Reputation: A Reappraisal' 1984 *Juridical Review* 163, fn 104; KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, pp.57-58.

justifications from defamation should therefore be approached with caution in the privacy sphere.

There has been a long debate in South Africa over whether *iniuria* must entail the defender's knowledge of wrongfulness, or whether intention to impair a dignitary interest is sufficient. This will usually be relevant where the defender sincerely believed themselves to have a legal justification, but in fact did not, although it also comes into play where the defender could not have appreciated the wrongfulness of their conduct. The issue was considered in a helpful judgment in *Le Roux v Dey,*[141] which involved impairment of *dignitas* by a group of children who, it was averred, could not have realised their conduct was wrong. Harms DP, in finding that knowledge of wrongfulness was not always required, made the following observation: [142]

> 'The Continental Pandectists of the 19th Century analysed the concept of *dolus* and added another element to the intention to injure, namely consciousness of the wrongfulness of the act (coloured intent or *wederregtelikheidsbewussyn*). In spite of my high regard for them it has to be conceded that by systemising the Roman law concepts they did not necessarily state the Roman-Dutch law.'

In this sense the long neglect of the *actio iniuriarum* in Scotland has perhaps been a benevolent one. Our concept of the *animus iniuriandi* was received from Dutch-Roman juristic literature and other early modern learned legal sources, by way of the Institutional Writers and their peers. It did not significantly interact with 19th century German Pandectist theory. It is submitted that all that is necessary to show *animus iniuriandi* in Scotland is that the defender intended (or was reckless as to) impairment of a dignitary interest and that mistaken belief in a legal justification, however sincere, avails a defender of nothing. This is consistent with the approach taken in *Henderson v Chief Constable of Fife Police*, [143] where the fact that the police had followed their own procedures for reducing the risk of self-harm or violence was not held in itself to justify their actions. What mattered was whether the policy had been followed in a manner proportionate to the risk actually posed by Mrs

[141] 2010 (4) SA 210 (SCA)
[142] *Le Roux v Dey* 2010 (4) SA 210 (SCA) per Harms DP at para 29. Reliance on J R Midgley and J C van der Walt, 'Delict', in W Joubert (ed), *The Law of South Africa,* (LexisNexis Butterworths, 2nd ed, 2003), Vol. 8(1), para 105, note 3.
[143] 1988 S.C.L.R 77; 1988 S.L.T. 361

Henderson in all circumstances; only then could the procedure amount to a legal justification for the intrusion into her physical privacy. Similarly, an energy company that obtains a warrant to break into the home of a person who is not their customer would not necessarily be able to escape liability for that person's emotional distress on the basis that they mistakenly believed an overdue account holder lived on the property, if that mistake evinced a failure to properly take into account the privacy of the home.[144] Again, this is consistent with an approach to the contumelious mind which stresses the hubris or excessive self-confidence of the defender in assuming, unthinkingly and unreflexively, that their own policies are sufficient to protect the dignitary interests of the pursuer.

It is submitted that the main function of the requirement of wrongfulness in modern Scots law would be twofold. Firstly, it allows the courts to balance the values contained within Article 8 of the ECHR against the values contained in other human rights, particularly the right to free expression as contained in Article 10 of the ECHR. Indeed, wrongfulness performs a similar balancing function in South African law, where the relevant constitutional protections are Articles 14 and 16 of the Bill of Rights in the Constitution of the Republic of South Africa.[145] The second function is to balance privacy interests against any legitimate public or private interest that might provide a legal justification for an intrusion of privacy (or, to put it another way, render the pursuer's expectation of privacy unreasonable in all the circumstances). Scottish courts will clearly be guided, when determining these legal justifications, by the limitations on the right to private and family life in Article 8(2) of the ECHR:[146]

> 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[144] T Haynes, 'British Gas broke into my home – and I'm not even a customer', *The Telegraph,* 23rd June 2022, available at https://www.telegraph.co.uk/money/consumer-affairs/british-gas-broke-home-not-even-customer/.
[145] Constitution of the Republic of South Africa. Art 14, 16.
[146] European Convention on Human Rights. Art. 8(2).

Recent case law in Scotland would tend to suggest this might include the reasonable control and safety of detained persons,[147] the protection of the defender's own rights,[148] and, in terms of *C v Chief Constable of the Police Service of Scotland,* public confidence in the police.[149] Nevertheless, wrongfulness clearly represents the most discretionary aspect of the *actio iniuriarum.*

5.4 Emotional Distress

As Norrie highlights, the focus of both Stair and Bankton is on 'an anglicised *iniuria* - as something that is suffered - even though to the jurists of the *ius commune* that word usually meant wrongfulness as a judgment rather than injury as a loss'.[150] This construction of *iniuria* primarily as a manifestation of the pursuer's suffering rather than the wrongfulness of the defender most likely survives into modern Scots law. It explains why, whatever the position in classical Roman law or the *ius commune,* in Scotland the relevant dignitary interest must always in fact be impaired, and suffering must always flow from that impairment, for *iniuria* to be actionable.

For Bankton, the nature of the suffering caused by impairment of a dignitary interest was affront.[151] This is affirmed by Erksine: 'though every wrong may in some sense get the appellation of injury, yet the crime of injury, in a strict acceptation, consists in the reproaching or affronting our neighbour'. [152] It can be seen that the concept of affront has a strong flavour of honour to it, and perhaps even the asymmetry which historically characterised *iniuria.* More recent references to the *actio iniuriarum* have tended to shift the emphasis away from the affront of the pursuer at an assault on their social status and instead towards the emotional distress they suffer from impairment of their dignity. The pursuer in *Stevens v Yorkhill NHS Trust*[153] was not affronted by the defender's actions. In removing her deceased child's organs without permission, the defender did not attack her social status. Rather, they caused her to suffer a natural emotional distress. The court in

[147] *Henderson v Chief Constable of Fife Police* 1988 S.C.L.R 77; 1988 S.L.T. 361
[148] *Martin v McGuinness* 2003 S.L.T. 1424 (OH)
[149] [2019] CSOH 48; 2019 S.L.T. 875
[150] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, pp.50-51.
[151] Page 20.
[152] J Erksine, *An Institute of the Law of Scotland,* (Law Society of Scotland, 1989, reprint of first edition published 1773), 4.4.80.
[153] 2006 SLT 889 (OH)

Stevens v Yorkhill NHS Trust formulated this emotional distress as "hurt feelings caused by affront".[154] Hurt feelings is a familiar formulation in connection with the remedy of *solatium,* but it may not adequately capture the suffering of the pursuer when their dignitary interests are infringed. The concept of affront also remains in tension with hurt feelings and/or emotional distress. It is submitted that in modern law, emotional distress is a better characterisation of the suffering of the pursuer under the Scottish *actio iniuriarum* than affront.

5.5 Remedy

Emotional distress is by its nature unquantifiable. It follows that compensatory damages are not available under the *actio iniuriarum,* nor can damages be assessed on any loss-based theory. The appropriate remedy in Scotland, historically and today, is *solatium.* The function of *solatium* in the *actio iniuriarum* is to act both as a solace for the pursuer and as a vindication of the injury.[155] It is important to note here that vindication of an injury merely acknowledges that a wrong has taken place. Delict in modern Scots law, as in South Africa, is not penal. [156]

6. Concluding Remarks

It has sometimes been proposed that the legal protection of privacy in South Africa represents a hybrid solution which is transplantable to other jurisdictions.[157] It will clearly be seen that what is set out here is not a transplant. A comparison to South Africa does, however, show two things. First and foremost, it demonstrates the enormous potential suppleness of the concept of *iniuria* that continues to exist in Scots law. Secondly, it shows that the *actio iniuriarum,* if it had not been neglected from the Victorian period onwards, could have easily risen to the challenge of protecting the values contained within Article 8 of the ECHR. As it is, the articulation of a modern *actio iniuriarum* capable of protecting privacy as a dignitary interest necessarily involves a degree of reconstruction. It is important, however, given how unsatisfactory the current tortious/delictual protection of privacy in the

[154] *Stevens v Yorkhill NHS Trust* 2006 SLT 889 (OH) per per Temporary Judge CJ Macaulay QC at para [63].
[155] KM Norrie, 'The actio iniuriarum in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, p.52.
[156] FDJ Brand, 'Privacy', in E Reid and D Visser (eds), *Private Law and Human Rights,* note 96 supra, p.167.
[157] J Burchell, 'The Legal Protection of Privacy in South African Law: A Transplantable Hybrid', (2009) 13(1) *Electronic Journal of Comparative Law* 1. See also J Burchell, 'Personality Rights in South Africa', in N Whitty and R Zimmermann, (eds), *Rights of Personality in Scots Law,* note 68 supra, pp.380-381.

United Kingdom is compared to most member states of the Council of Europe,[158] that the *actio iniuriarum* is fully explored as an option as the courts work towards an understanding of common law constitutional rights that gives expression to Convention rights.

It may be, of course, that the modern courts choose not to go down this route and allow the *actio iniuriarum* to recede until it joins, in Norrie's terms, the "ghosts of the past".[159] The systematic and flexible tendencies of the modern Scots law of delict may yet lend themselves to a different solution. It would, however, be a loss, not just of legal history or grammatical structure, but of the sophisticated balancing between competing policy interests; between certainty and flexibility; between rules and discretion that the Roman-Dutch *iniuria* could represent.

[158] See note 95 supra.
[159] KM Norrie, 'The *actio iniuriarum* in Scots law: Romantic Romanism or Tool for Today?', no 48 supra, p.65.