

# The *Actio Iniuriarum* in Scots Law: Romantic Romanism or Tool for Today?

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## *Introduction*

Scots lawyers have always been fond of claiming that their system is one derived from principle rather than practice, that it has developed through the intellectual thought of our writers rather than through the piecemeal and arbitrary evolution of rules that is a defining characteristic of the common law. We tend to see ourselves as part of the civilian tradition, having received Roman law, or at least Roman-Dutch law, at the most crucial stage in the development of our modern legal system, that is to say the period between the Reformation and the Enlightenment. This reception was effected through the systematisation of Scots law achieved by the Institutional writers, who drew heavily on their Roman-Dutch training, rather than by the courts through case law. Yet notwithstanding that claimed love of principle, the treatment of one of Roman law's most significant contributions to legal thought, the *actio iniuriarum*, which was a central feature of the Scottish law of obligations during the Institutional period, was cavalier and even negligent throughout the 19<sup>th</sup>, and for much of the 20<sup>th</sup>, centuries. It is only latterly that Scottish commentators, and even on occasion Scottish courts, are rediscovering our historical roots and we see once again the *actio iniuriarum* being called into aid – both as a means of achieving an appropriate result in particular cases, and as a means by which we can understand the structural underpinning of our law of obligations. This striking ambivalence towards the *actio iniuriarum* is probably explained by changing political imperatives. The Enlightenment Scots, Unionist to a man, exhibited a clear desire to associate themselves with the English and so participate in that great 18<sup>th</sup> and 19<sup>th</sup> century adventure, the British Empire; but as that Empire recedes into history, legal

nationalism reasserts itself once again by seeking a reconnection with our Romanist roots.

However that may be, Scottish judges and legal commentators are today comfortable once again in using concepts derived from Roman law to tackle new legal problems, but of course nowadays we also have other tools to drive the development of the law, none more important than the European Convention on Human Rights. This has had a profound effect on the development of the law of delict, both in the fields of personal injury<sup>1</sup> and of course privacy.<sup>2</sup> So the underlying question that I want to explore here is whether, in the modern world, Scots law gains anything by reactivating its long-neglected roots, over and above the tools that it unquestionably has. Would we be better striking out in a new direction, connecting with the new *ius commune* of European Human Rights law, instead of rediscovering, reviving, and seeking to apply the principles underpinning the *actio iniuriarum*? Should we regard it as no more than a romantic Romanism, useful for emphasising our difference from English law, or use it as an active driver of the development of our law in the modern world? It can be the latter only if it is able to serve some purpose other than or better than any other existing legal tool.

### **Characteristics of the *actio iniuriarum* in Scots law**

It was during the Institutional period that the *actio iniuriarum* was directly received into our law and ‘injury’, in its specialised Roman sense, became understood to be an actionable wrong in Scotland. Stair,<sup>3</sup> though he lists a number of the interests that the law of Scotland protects, and talks of a general obediencial obligation of reparation, does not mention injury as a separate wrong and it is left to Bankton, as always the most accessible of the Scottish Institutional writers, to give it unequivocal recognition. He talks of ‘injury’ as a wrong independent of any other though it is

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<sup>1</sup> *Osman v United Kingdom* [1999] 29 EHRR 245 applied, for example, in *Chief Constable of Hertfordshire Police v Van Colle* [2008] UKHL 50.

<sup>2</sup> *Von Hannover v Germany* (2005) 40 EHRR 1 applied, for example, in *Douglas v Hello (No 3)* [2006] QB 125 and *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB).

<sup>3</sup> *Institutions*, 1, 9, 4.

clear that he is finding this wrong in an anglicised '*iniuria*', as something that is suffered, even although to the jurists of the *ius commune* that word more usually meant 'wrongfulness' as a judgment rather than injury as a loss.<sup>4</sup> 'Injury' (as a loss) was almost, but not quite, synonymous with insult, that is to say an injury to dignity: it was an attack on a person's honour, dignity or status.<sup>5</sup> Now this was a 'high-level principle', to use the words of Lord Hoffmann in *Wainwright v Home Office*,<sup>6</sup> which of course as an analytical tool he rejected as being of no value to the development of the law. That rejection, however, reflects a peculiarly English mindset which has far less purchase in Scotland, for Scottish lawyers have never had a structural distrust for high-level principles from which we might extract particular rules of liability.<sup>7</sup> The phrase *actio iniuriarum* was able, therefore, to serve as a useful shorthand to mean an action raised in response to an attack on one of the interests protected by, and prohibited under, the concept of *iniuria*, or injury. Injury, in this sense, had at least three defining characteristics.

(i) *Affront*

The first question is what interests were protected by the *actio iniuriarum*, so that their infringement gave rise to liability? Stair listed the interests that Scots law

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<sup>4</sup> The ambiguity remains between injury as a loss and injury as an action. The maxim *volenti non fit iniuria* might be translated either as a defence that negatives loss or as a defence that negatives wrongfulness. The traditional formulation of a claim for damages in a Scottish court narrates that the pursuer has suffered 'loss, injury or damage'. Yet, in the phrase *damnum iniuria datum*, or damage wrongfully caused, *iniuria* unambiguously means wrongfulness, and this was the primary meaning Bankton gave it when he described injury as being committed 'either by Facts, as beating, or other atrocious usage of one's person; by Words, reproachful and slanderous, so far as they infer a damage to the state of the person or wound his character; by Consent, in giving warrant, command or authority to commit the injury; or by Writing, as by composing infamous libels and satires to one's disgrace': *Institute* 1, 10, 21.

<sup>5</sup> 'Injury according to Stair, Bankton, Erskine and other writers on the law of Scotland, who in that respect adopt the language of the civil law, "is an offence maliciously committed to the reproach and grievance of another, whereby his fame, dignity or reputation is hurt": *Newton v Fleming* (1846) 8 D 677 (Lord Murray), p.694.

<sup>6</sup> [2004] 2 AC 406 at 419.

<sup>7</sup> Stair's 'general obediencial obligation', for example, is clearly a 'high-level principle' of a nature dismissed by Lord Hoffmann.

protected<sup>8</sup> without explicitly tracing any of them to the general wrong of *iniuria* but, following the Roman law more closely, Bankton<sup>9</sup> clearly envisaged a general wrong of which Stair's interests are merely examples. He made it clear that real injury included physical assault (if without using that precise term),<sup>10</sup> but revealingly the loss for which a monetary redress was due was less physical than emotional, and this gives us our first, and perhaps most important, defining characteristic of the action: damages were not awarded because the pursuer had suffered physical injury<sup>11</sup> but because he had suffered emotional disturbance.<sup>12</sup> It was the affront at the insult to his honour that demanded redress rather than the corporeal effects on the pursuer of the wrongful act. The protected interest was honour, or *dignitas*, and the loss suffered through its infringement was affront.<sup>13</sup> Given the very incorporeality of such a loss, compensatory damages were not appropriate, for no true (commercial) value can be placed on affront, and instead monetary redress in the form of solatium was the appropriate remedy (remembering that punitive or exemplary damages have no place in the law of Scotland). A solatium acted both as a solace to the affronted victim and an acknowledgement by the law that a wrong had been committed (*iniuria*, in the wider sense of wrongfulness). Other infringements of interests that came within this high-level principle included wrongful imprisonment, defamation, and interference with family relationships: in all of these it was the element of affront that was the loss attracting monetary redress, and for this

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<sup>8</sup> 1, 9, 4.

<sup>9</sup> I, 10, 21-39.

<sup>10</sup> 1, 10, 22. See John Blackie in *Rights of Personality in Scots Law*, eds N. Whitty and R. Zimmermann (DUP 2009), 104-108 for the emergence of 'assault' as a nominate wrong.

<sup>11</sup> Indeed, none may be suffered since the concept of assault has always included threats of assault.

<sup>12</sup> For cases involving real injury but no physical harm, see for example *Gordon v Stewart* (1842) 5D 8 (an attempt to touch the pursuer's nose 'in an insulting manner') and *Ewing v Earl of Mar* (1851) 14D 314 (riding a horse at the pursuer). For the modern law concerning the emotional aspects of assault, see Elspeth Reid *Personality, Confidentiality and Privacy in Scots Law* (SULI, 2010) at paras. 2.19-2.23.

<sup>13</sup> In Roman law an attack on *dignitas* was likely thought wrongful because of its potential to distrust the stability of a highly stratified society, but in Scotland the loss always was a more personal affront.

reason many of the modern forms of liability traced to the *actio iniuriarum* may conveniently be referred to as the 'affront-based delicts'.<sup>14</sup>

(ii) *Intent*

The second definitional characteristic of *iniuria* concerns the nature of fault (or wrongfulness) that it was (or is) necessary for a pursuer to establish. Now to a large extent this is explained by the jurisdictional rules of the Scottish courts in the Institutional period. Insofar as it concerned *dignitas*, that is to say the place of a person in society (the person's honour, dignity and status), 'injury' jurisdictionally belonged to the Commissary court, which had taken over the Consistorial jurisdiction of the Courts of the Official (the papal courts) at the Reformation.<sup>15</sup> With those injuries that led to death or physical harm, the Justiciary Court had jurisdiction. There was some overlap between the Commissary and the criminal court, and even between these courts and the civil courts, but the remaining dividing lines were removed entirely when the Court of Session took over jurisdiction for all delictual (as opposed to criminal) liability, which it had done by 1830.<sup>16</sup> The flavour of criminality remained, however, even when redress for the wrong was sought only in the civil courts, and this fact, together with the historical influence of the church courts which focused on matters of conscience, meant that the nature of fault with *iniuria* in Scotland was always intent. It follows that the affront-based delicts were and are intentional delicts. As the Court of Session put it in 1765:

An *actio iniuriarum*, where there is no patrimonial loss, and where the 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

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<sup>14</sup> Bankton explicitly sees injury as an 'affront': I, 10, 38. According to Erskine, *Institute*, IV, 4, 80, 'the crime of injury, in a strict acceptation, consists in the reproaching or affronting our neighbours'.

<sup>15</sup> *The Court of the Official*, Stair Society, vol. 34 (1982).

<sup>16</sup> Blackie (n 10), 35-40.

damages awarded to repair patrimonial loss, in which it is sufficient to specify even *culpa levissima*.<sup>17</sup>

This remains the case today and it is this fact that justifies recovery for a wider range of losses than is possible with aquilian liability. Negligence, or the unintentional causing of injury, does not found liability for mere mental disturbance unless that disturbance amounts to a recognised psychiatric illness, but the matter is very different when the harm has been caused intentionally.<sup>18</sup> While it is good social policy to accept that distress and upset are part and parcel of life itself and therefore have to be borne without redress, it is also good legal policy to discourage people from acting with the intention of causing such upset.<sup>19</sup> Remember that solatium not only provides a solace but it also acts as an acknowledgement that some legal wrong has been committed and so it is peculiarly appropriate that redress should be available for intentional wrongfulness, even when that does not lead to physical and quantifiable loss, injury or damage.

We need to be clear, however, as to the exact nature of ‘intent’ that is necessary to found liability. It would seem that there is no requirement to intend to cause emotional distress and that it is sufficient for liability that the defender intended to do the wrongful act.<sup>20</sup> However, because this rather contradicts the policy basis that justifies recognising liability for affront in the first place (discouraging people from acting in a manner designed to cause affront), something additional to the intent to

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<sup>17</sup> *Graeme and Skene v Cunningham* (1765) Mor 13923. See also *Newton v Fleming* (1846) 8D 677 (Lord Murray), 694: ‘But in order to make out injury, it must be shown in the outset that there is an offence committed and malice’.

<sup>18</sup> Lord Hoffman in *Hunter v Canary Wharf Ltd* [1997] AC 655, 707 pointed out that there was no reason why a tort of intention should be subjected to the same limitations to compensation as the tort of negligence, in particular the rule that excludes damages for distress short of psychiatric injuries: ‘The policy considerations are quite different’.

<sup>19</sup> An example I gave some years ago (*Stair Memorial Encyclopaedia*, vol 15 (1996), para 437) was of a person locking a building with someone inside. If this is done intentionally to imprison the person damages for emotional upset might be recoverable, but if it is merely negligent there is no *animus iniuriandi* and emotional upset is not enough to sound in damages - though the negligent act might lead to damages if it causes patrimonial loss.

<sup>20</sup> See further Kenneth Norrie ‘Actions for Verbal Injury’, (2003) 7 ELR 390.

do the act is necessary before liability is established. In English law<sup>21</sup> this additional element is the concept of imputed malice. Intentionally doing an act that leads to an unintended (or, perhaps better, a non-intended) injury may *impute* 'malice' in the English sense.<sup>22</sup> But Scots law seems to take a different approach to justify imposing liability on someone for an intentional act when they did not specifically intend the harmful result of the act. Scots law betrays very clearly its civilian roots here, for it imposes liability for harmful consequences when there is *no lawful justification* for doing the intentional act.<sup>23</sup> Wrongfulness is found not in the intention to do an act which injures, but in the intention to do an injurious act without having lawful authority to do it. This has long been the justification for giving damages for assault, in the sense of physical touching without the lawful authority of consent<sup>24</sup> and the same thinking can be seen in quite different aspects of the law of obligations, such as unjustified enrichment, where it is now clear that enrichments will be reversed where there is no legal authority to keep the enrichment.<sup>25</sup> We see this again in real injury cases such as wrongful imprisonment and wrongful prosecution where fault is typically found in 'malice and want of probable cause'. Affront is therefore not enough to found liability under the *actio iniuriarum* in Scotland: it must be affront caused by an intentional act done without lawful justification, and it is for the pursuer to aver and show this lack of lawful justification.

### (iii) *Real and verbal injuries*

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<sup>21</sup> See discussion in *Wainwright v Home Office* [2004] 2 AC 406 (Lord Hoffmann), 424-426.

<sup>22</sup> *Wilkinson v Downton* [1897] 2 QB 57, as explained by Lord Hoffmann in *Wainwright*, above.

<sup>23</sup> *Barratt International Resorts Ltd v Barratt Owners Group* 2003 GWD 1-19 (OH). I had earlier suggested that (at least in the context of a requirement for malice in cases of qualified privilege in defamation) 'malice does not in this context connote bad intent, but more lack of good intent': *Defamation and Related Actions in Scots Law* (Butterworths, 1995) at p. 120. Privilege in defamation is based on presumed good intent, and malice in that context is therefore the lack of good intent.

<sup>24</sup> See H. McKechnie in *Greens Encyclopaedia* (1931) vol 12 at para 1124: 'The essence of assault is insult rather than actual physical hurt ... In its civil aspect it consists of an overt physical act intended to insult another and committed without lawful justification or excuse'.

<sup>25</sup> *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151; *Shilliday v Smith* 1998 SC 725.

Affront was the basis of *iniuria* in Roman law as it is in Scots law; intent was part of the Roman law too, if only by default since the distinction between intent, recklessness and negligence was never truly drawn by the Romans. The third defining characteristic of the Scots law of *iniuria* is also taken directly from Roman law:<sup>26</sup> this is the structural distinction that we make between real injuries and verbal injuries. Now, it is a common mistake to interpret this as referring to the losses suffered (using ‘injury’ in its sense of loss rather than its sense of wrongfulness). In fact, the distinction is between the methods of causing the loss. Real injuries are injuries caused by physical acts (subdivided into wrongs such as assault, mutilation, killing and rape) while verbal injuries are those caused by the use of words (originally this class was not subdivided, but it later became divided into defamation and other verbal injuries<sup>27</sup>). The legal distinction between these two categories in Scotland was, however, jurisdictional rather than substantive, with the Justiciary Court dealing with real injuries (in both the criminal and the civil sense) and the Commissary Court dealing with verbal injuries.<sup>28</sup> However, once jurisdiction had been transferred from both of these courts to the civil courts,<sup>29</sup> the continuing relevance of the distinction becomes open to question, except insofar as it indicates a factual difference with wrongful imprisonment (for example) being a real injury because it is effected by physical acts, and defamation being a verbal injury because it is effected by words. In truth it was never a particularly helpful distinction even in a classificatory sense because it is easy to imagine cases in which it is difficult or impossible to say whether it is physical acts or words that have caused the loss. For example if I have in my possession a compromising letter that you wrote, or that someone wrote to

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<sup>26</sup> D.47.10.1.1: Ulpian reports that Labeo (who was alive at the very end of the Republic) distinguishes between ‘*iniuriam ... aut re aut verbis*’, though Paul du Plessis concludes (CHAPTER?) that the distinction was in reality that of Ulpian and no earlier. That the distinction was made in Roman-Dutch law is evident from Francois du Bois’ contribution to the present book: ‘The *Actio Iniuriarum* and the Emergence of a Right to Feelings’ (CHAPTER?)

<sup>27</sup> Scots law never distinguished between the different methods of communicating words, whether for example spoken or written and so has never distinguished between what in English law is called libel and slander.

<sup>28</sup> Blackie (n 10), 76

<sup>29</sup> The Commissary Court was abolished in 1830, its jurisdiction being taken over by the Court of Session, as was the Jury Court which had been created in 1815 with jurisdiction to hear ‘all actions on account of injury to the person, whether real or verbal, as assault and battery, libel or defamation’ (actions listed in the Court of Session Act 1825, s.28).



you, is my giving it to a third party to see and to read a verbal or a real injury? If it is a breach of confidence, or is defamatory, it is clearly an injury, but given the unified jurisdiction of the civil courts today there really is little if any point in classifying it one way or the other.<sup>30</sup>

### **A Change of Focus in the 19<sup>th</sup> Century**

In the 19<sup>th</sup> Century, there were three crucial developments in the law of obligations that substantially changed the focus of *iniuria* and moved Scots law some distance away from its civilian roots. First, as happened elsewhere, the action for negligence came to dominate the law of delict in Scotland: peripheral at the start of the 19<sup>th</sup> Century, negligence was ubiquitous by the end. Yet the modern ubiquity of the action for negligence obscures to our contemporary eyes the exceptionality of a legal remedy pronounced against an individual who did not intend to cause any harm. Liability in negligence lends itself well to losses of a physical nature, patrimonial in the case of damage to property and personal in the case of damage to human body or mind, and it does have a deontological attractiveness in its provision of redress against persons who neglected to do what they ought to have done. But affront is not and never has been a justifiable human reaction to unintended acts. We are affronted at insult not because of its effect but because of the intent with which it is done. Our dignity is not – cannot be – harmed by accident, but by the knowledge (or ourselves, and of others) that there has been a deliberate effort to undermine it. We may feel emotional distress at accidental injury, but that distress cannot truly be characterised as affront, which is properly a reaction to a deliberate assault on one's sense of worth.

The second 19<sup>th</sup> Century development was that in Scottish court practice the very phrase '*actio iniuriarum*' began to be misused, and it took on a meaning that none of the Institutional writers, nor the civilian writers of the *ius commune*, would ever have

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<sup>30</sup> In *Continental Tyre Group Ltd v Robertson* 2011 GWD 14-321 (Sheriff Principal Bowen) it was held that it mattered little whether the claim was one for defamation or for verbal injury: but that was in the context of the remedy of interdict, where all that is necessary to show is a legal wrong (as opposed to the particular legal wrong). The opportunity was, thereby, lost to examine the parameters of verbal injury (in that case as an economic, as opposed to personality, loss).

given it. Perhaps because aquilian liability, as manifested in the action for negligence, expanded from patrimonial to all physical losses, including bodily injury, the word ‘injury’ came to be used in a far wider sense than Bankton had used it: the word became, and indeed remains, the denominator of a central aspect of the law of negligence – personal injury. Of course physical injury leads to damages, while solatium remains the appropriate remedy covering monetary redress given as solace for emotional injury, but one particular type of solace came, for reasons that are yet obscure,<sup>31</sup> to be seen as so peculiarly associated with the *actio iniuriarum* that the very term became synonymous with the claim. This was the solatium awarded to a surviving relative on the death of a person wrongfully killed – a bereavement award, in other words.<sup>32</sup> By the mid-19<sup>th</sup> century most people who were wrongfully killed were killed negligently and the continuation of the long-established practice of awarding solatium to the relatives of those wrongfully killed had the effect of blurring the distinction between *iniuria* and negligence<sup>33</sup>, so much so that by the mid-20<sup>th</sup> century, judges (though not writers) were describing the method of attaining any damages for non-patrimonial (and so non-quantifiable) losses caused through negligence as an *actio iniuriarum*.<sup>34</sup> It took Lord Kilbrandon in the House of Lords decision of *McKendrick v Sinclair*<sup>35</sup> to remind Scottish court practitioners what writers had been saying for some decades<sup>36</sup> that the action for negligence, whoever the pursuer is and whatever the physical loss suffered, is traced to the *lex aquilia* while the *actio iniuriarum* is properly concerned with cases of intentional insult or affront.

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<sup>31</sup> The error is traced by TB Smith (n 36 below) to Lord President Inglis in *Eisten v North British Railway Co* (1870) 8 Macph 980.

<sup>32</sup> Now governed by the Damages (Scotland) Act 2011.

<sup>33</sup> In *Black v North British Railway Co* 1908 SC 444, 453, Lord President Dunedin may be found saying: ‘The end of it all is that I think *solatium* borrowed from the action of assythment, 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.’

<sup>34</sup> See for example Lord Avonside’s first instance judgment in *McKendrick v Sinclair* 1972 SC(HL) 25.

<sup>35</sup> 1972 SC (HL) 25. See also Lord Fraser of Tullybelton in *Robertson v Turnbull* 1982 SC(HL) 1 at p. 8.

<sup>36</sup> McKechnie, *Scottish Legal History in Stair Society* vol 20 at 276-277 and *Greens Encyclopaedia of the Laws of Scotland* (1931) vol. 12 at paras. 1088-1090; TB Smith *Short Commentary on the Law of Scotland* (1962), at pp 653-663, and ‘Designation of Delictual Actions: Damn iniuria damn’ 1972 SLT (News) 125 and ‘Damn Iniuria Again’ 1984 SLT (News) 85.

However, the crucial effect of seeing bereavement awards as the major application of the *actio iniuriarum* was that it shifted the focus of the loss away from affront to dignity, and towards hurt to feelings. Emotional distress, upset and sadness are the natural consequences of bereavement in the way that affront, or insult, or the taking of offence, is not. This opened the way for the *actio iniuriarum* to expand its parameters beyond insult and towards hurt feelings, and it is this that gives the action its potential in the modern age.

The third crucial development in the 19<sup>th</sup> Century was the response of the law to a hardening of the rules applicable to the wrong of defamation. This was and is in Scotland an archetypical affront-based delict, even if there was always the possibility of claiming for patrimonial loss caused through damage to the economic worth of one's reputation in the same action.<sup>37</sup> That affront founds the action explains why, unlike in English law, it has always been possible in Scotland to sue for defamation even if no-one other than the pursuer hears the words used by the defender – there is no need for 'communication' in the English sense.<sup>38</sup> However, after some decades of doubt, it was conclusively settled in 1859 that truth is an absolute defence to an action for defamation.<sup>39</sup> In itself a perfectly sound rule<sup>40</sup> – even with a civilian conception of defamation being an *iniuria*, or an affront to dignity<sup>41</sup>, on the basis that a person has no business being affronted by having his true character revealed – the rule nevertheless seems right away to have been assumed to apply to all injuries

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<sup>37</sup> I describe defamation as a 'Janus-headed delict protecting [the] personality right to honour (dignity) and [the] patrimonial right to reputation': Norrie, 'The Scots Law of Defamation: Is There a Need for Reform?' in Whitty and Zimmermann (n 10), 435.

<sup>38</sup> *Mackay v McCankie* (1883) 10 R 537. Lord Kilbrandon said, in 'The Law of Privacy in Scotland' (1971) 2 Cambrian L.Rev 31, 38: 'In such a case the damage is done neither to the man's patrimony nor to his reputation, which remain respectively undiminished and untarnished. The damage is done to his dignity, and is thus actionable under the old law'.

<sup>39</sup> *Mackellar v Duke of Sutherland* (1859) 21 D 222. The same is true in England and the history and continuing justification of the rule in English law is explained by Eric Descheemaeker in '“*Veritas non est defamatio*”? Truth as a Defence in the Law of Defamation', (2011) 31 LS 1.

<sup>40</sup> See Descheemaeker (n 39). His argument, alluded to in the article's very title, is that in English law defamation is *by definition* false because the interest being protected is deserved reputation.

<sup>41</sup> Putting it at its simplest, the Scottish approach to defamation is that it protects *dignitas*, the third of Ulpian's bases of *iniuria*, before *fama*, which was the second: D. 47, 10, 1, 2.

caused through words and not only the form of verbal injury that we call defamation. So other types of verbal injury took on truth as an absolute defence even when they are non-defamatory. But since it is defamatoriness that justifies the court in presuming falsity (so that truth in defamation is properly a defence for the defender to prove), in non-defamatory cases of verbal injury falsity became part of the definition of the wrong (and so for the pursuer to prove).<sup>42</sup> Now, requiring falsity to be established in non-defamatory cases of verbal injury is actually very odd if the essence of the wrong is affront caused without legal justification. Clearly a person may legitimately be affronted in circumstances in which truth or falsehood really is neither here nor there. This did not really matter before 1859 where there was no real need to distinguish between defamation and other forms of verbal injury, but there have long been two particular types of allegation which, though clearly harmful, do not come within the modern definition of what is 'defamatory' in the *Sim v Stretch*<sup>43</sup> sense. With neither can falsehood be the essence of the wrong, and yet they have both, almost by default, been swept into the wrong of defamation. First there are allegations of bankruptcy. These might or might not be defamatory depending on whether any fraud or business incompetence or impropriety is implied but damages have long been recoverable under defamation even when no such innuendo is drawn:<sup>44</sup> the only explanation is that the pursuer has been affronted,<sup>45</sup> but affront does not make the statement defamatory, and truth may not diminish the affront. Secondly the drawing attention to disease or deformity<sup>46</sup> (in particular the

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<sup>42</sup> This is probably why pursuers have long preferred to squeeze their actions into defamation where they get the benefit of the presumption of truth, rather than raise their case in a more natural way under another action for verbal injury where they would have themselves to prove falsity. It is interesting to note that in 1936 a claim for what was effectively breach of privacy by unwarranted surveillance was raised as an action for defamation in *Robertson v Keith* 1936 SC 29 while in 2003 it was argued in privacy in *Martin v McGuinness* 2003 SLT 1424.

<sup>43</sup> [1936] 2 All ER 1237, 1240 (Lord Atkin): 'Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?'

<sup>44</sup> *Outram & Co v Reid* (1852) 14 D 577; *Anderson v Drummond and Graham* (1887) 14R 568, *Barr v Musselburgh Merchants' Association* 1912 SC 174; *Russell v Stubbs* 1913 SC(HL) 14; *Mazure v Stubbs Ltd* 1919 SC(HL) 112.

<sup>45</sup> In *Murray v Bonn* (1913) 29 Sh. Ct. Rep. 62 affront was the express basis of the award of solatium.

<sup>46</sup> Bankton included within defamation cases where a person charged the pursuer 'with a foul disease, whereby his character is blemished': I, 10, 24. Erskine, however, explicitly held it wrongful even when 'the infirmities of that sort imply no real reproach, either in themselves or in the just opinion of mankind': IV, 4, 80.

socially unmentionable impotency)<sup>47</sup> is clearly a matter of informational privacy, and its breach may well be a civil wrong, yet again it is constantly cited in the literature as an example of defamation.<sup>48</sup> In reality, both of these are affront-based verbal injuries that have been sucked into defamation when the category of non-defamatory verbal injury was squeezed almost out of existence.

The residual category of non-defamatory verbal injury was effectively limited to what we call the public hatred, contempt and ridicule cases<sup>49</sup> (or, again following Ulpian,<sup>50</sup> *convicium*). Yet even here from the 19<sup>th</sup> Century the law focused on truth and falsity, which hardly arises and explains why so few public hatred cases are successful - and those that are<sup>51</sup> are really actions for defamation argued a slightly peculiar way. There is some evidence that more recently the Scottish courts are beginning to refocus their enquiry in this direction.<sup>52</sup> If, however, truth as a defence is limited (as it should be) to the action based on lie-mongering (defamation) then the *actio iniuriarum* can much more comfortably be utilised to provide redress for hurt feelings when the truth is being broadcast in a way that has no legal justification.

### **The *actio iniuriarum* in modern Scots law**

So what of the *actio iniuriarum* in the modern law? Does it remain useful as a 'high-level principle' in the way that was disapproved by Lord Hoffmann in *Wainwright*?

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<sup>47</sup> 'That peculiar defect in respect of which marriage may be annulled' as Lord Deas archly put it in *Cunningham v Phillips* (1868) 6M 926, 928.

<sup>48</sup> Though, in truth, no case has been identified in which an action for defamation has been raised on this point alone. A false allegation that a person had contracted a sexually transmitted disease may amount to an allegation of sexual misconduct: *A v B* 1907 SC 1154. The allegation of insanity in *Mackintosh v Weir* (1875) 2R 877 may be taken, in that different age, to impute moral fault.

<sup>49</sup> *Sheriff v Wilson* (1855) 17D 528; *Cunningham v Phillips* (1868) 6M 926; *Macfarlane v Black and Co* (1887) 14R 870; *Paterson v Welch* (1893) 20 R 744; *Andrew v Macara* 1917 SC 247; *Lamond v Daily Record (Glasgow) Ltd* 1923 SLT 512; *Caldwell v Bayne* (1936) 52 Sh Ct Rep 334; *Steele v Scottish Daily Record* 1970 SLT 53.

<sup>50</sup> D. 47.10.15.15.

<sup>51</sup> Such as *Lamond v Daily Record (Glasgow) Ltd* 1923 SLT 512.

<sup>52</sup> See *Barratt International Resorts Ltd v Barratt Owners' Group* 2003 GWD 1-19, and comment thereon by K. Norrie in 'Actions for Verbal Injury' (2003) 7 ELR 390.

The concept continues to receive occasional, possibly increasing, judicial mention in the Scottish law reports, though in no modern case is it possible to say definitively that the judge decided the matter before him by application of the *actio iniuriarum* in a manner that would not have been possible had the *actio* never been received into our law. Perhaps, however, that is too strict a test for the continued relevance of the *actio* in Scotland today, because Scots law has traditionally eschewed any reliance on name-based classifications. It is possible to identify a number of cases that illustrate a willingness on the part of the Scottish courts to award monetary redress through the recognition of sometimes unarticulated notions of honour, dignity or esteem as legally protected interests that have been infringed by deliberate act done without legal justification. A starting point might be to compare the Scottish and English approaches to similar claimed wrongs where the two jurisdictions produce different results.

*Wainwright v Home Office*<sup>53</sup> is the well-known and important House of Lords decision that denied the existence of a 'high level right to privacy' from which different actions may emerge. The case involved the strip-searching of visitors to a prison, which was carried out in a manner contrary to prison regulations. The claimants were affronted at this indignity, but they failed in their action, the Court holding that there was no common law tort of invasion of privacy and that any gap between that proposition and article 8 of the European Convention on Human Rights could be filled by judicial development of existing actions. Interestingly, however, the judges did not entirely exclude the possibility that an action based on the intentional causing of distress that fell short of psychiatric harm might be actionable, though Lord Hoffman was clear to the effect that if such an action were to be successful it would have to be shown that the defendant actually intended to cause emotional distress, rather than simply intentionally doing an act that caused emotional distress. Imputed malice of the sort that founded liability in *Wilkinson v Downton*<sup>54</sup> would never, he made plain, be sufficient.

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<sup>53</sup> [2003] UKHL 53.

<sup>54</sup> [1897] 2 QB 57. Here the defendant had intended to do the act but not to cause the injury, but damages were still awarded on the theory of imputed intention (doing such a dangerous act imputes an intention to cause the harm that directly arises from it). In *Wainwright* Lord Hoffman said that 'imputed intention will not do' for

That English case may be compared with a similar Scottish decision, *Henderson v Chief Constable of Fife*,<sup>55</sup> where a woman who had been arrested during the course of an industrial dispute was required, on being placed in a police cell, to remove her bra. Now, this was a correct application of police procedure (unlike, be it noted, the strip-search in *Wainwright*) but nevertheless Lord Jauncey in the Outer House of the Court of Session (in one of his last judgments there before his elevation to the House of Lords) held that the unthinking and unjustifiable application of police procedure when it was unnecessary (for there was no possibility of this woman being a suicide risk, or using her bra to attack policemen) amounted to a wrong for which damages could be claimed. He made no explicit mention of the *actio iniuriarum* but the wrong suffered was clearly an affront:

I consider that Mrs Henderson has established that the request to remove her brassiere was an interference with her liberty which was not justified in law, from which it follows that she has a remedy in damages ... I consider that a figure 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>56</sup>

Now, in neither *Wainwright* nor *Henderson* was there any deliberate intent on the part of the police or prison service to humiliate or affront anyone and while that was enough to bring the case to an end in England, it was not enough in Scotland: in the English case fault was required to be found in direct intent to inflict emotional harm (which did not exist) while in the Scottish case fault was located in the lack of legal justification for the actions which caused the affront. Following correct procedure was not in itself a justification.

We again see fault being constructed as lack of legal justification for the act in question in the Scottish post-mortem cases.<sup>57</sup> In each of these three cases, decided in the early years of the 20<sup>th</sup> century, the bodies of deceased persons had been

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injuries short of psychiatric illness, such as affront. ‘The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not’: [2003] UKHL 53, [45].

<sup>55</sup> 1988 SLT 361.

<sup>56</sup> 1988 SLT at 367.

<sup>57</sup> *Pollok v Workman* (1900) 7 SLT 338; *Conway v Dalziel* (1901) 9 SLT 86; *Hughes v Robertson* 1913 SC 394.

interfered with for medical reasons without the knowledge or consent of the deceased's relatives, and while the discussion of actionability was for the most part obiter, the judges in each were willing to contemplate that damages might be awarded to the relatives for the distress that they suffered. They belong to the same group of cases as *Henderson*, since it was the lack of legal authority to act that rendered the post-mortems actionable. Whitty has argued, persuasively, that the only explanation for these cases is that the remedy applicable was solatium for affront which derives directly from the *actio iniuriarum*.<sup>58</sup> He quotes Bankton (who claims authority from the *Digest*) that 'Injury, may not only be done to the Living, but also in a manner to the Dead, by reproaching their memory, detaining their bodies from burial, lifting their bodies out of their graves, or defacing their monuments. The children or next of kin may prosecute the injuries done to the remains of their parent or relation'.<sup>59</sup>

The matter was discussed in a more modern case, and one that provides the most direct affirmation of the continuing authority in 21<sup>st</sup> century Scotland of the *actio iniuriarum*. In *Stevens v Yorkhill NHS Trust*<sup>60</sup> an action for damages was raised by a bereaved mother against a health board who had removed and retained the organs of her deceased baby child without her knowledge or consent. The action was explicitly based upon the mother's right not to be exposed to injury to her emotional health. The defence was that there was no doctor-patient relationship between the hospital and the mother such as would give rise to a duty of care. The temporary judge held that that defence might have been appropriate in an action for negligence, traced to the *lex aquilia*, but the claim at hand was in contrast one traced to the *actio iniuriarum*. He held that Scots law recognised as a legal wrong, for which damages by way of solatium could be claimed, the unauthorised removal and retention of organs from a dead body. It was the judge's view that the earlier post-mortem cases were not explained as an extended application of assythment (the native Scottish

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<sup>58</sup> Niall Whitty, 'Rights of Personality, Property Rights and the Human Body in Scots Law' (2005) 9 ELR 194, 216.

<sup>59</sup> I, 10, 29. This suggests, however, more a representational than a direct liability. In fact, the post-mortem cases, if based on injury as Whitty suggests, are examples of injury to feelings as opposed to affront to dignity.

<sup>60</sup> 2006 SLT 889 (OH).



remedy for wrongfully inflicted death)<sup>61</sup> but as an aspect of the *actio iniuriarum*, in particular because the damage being sued upon was the emotional distress suffered by the pursuers. Again, actionability is clearly founded on the lack of legal authority to do the act.<sup>62</sup>

*Stevens* might usefully be compared with the factually similar English case of *A v Leeds Teaching Hospital NHS Trust*<sup>63</sup>, where damages were denied, though that action was explicitly raised in negligence, and explicitly decided on the basis of the hospital's legal right to remove the organs. So there was no discussion of affront as the basis of the action, or of the nature of intent. But if the hospital did have legal authority to remove the organs the action is likely to have failed in Scotland too.

### Future developments

There is little doubt, then, 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. The question is, in what contexts today would it be appropriate to do so? There are clearly some interests, historically protected by the *actio iniuriarum*, which if they are interfered with today would not, in the eyes of the modern world, justify an award of solatium. Interference with family relations is an example. Rape<sup>64</sup> or sexual abuse was and is clearly a direct *iniuria* against the victim, and not just for the physical injury involved.<sup>65</sup> But the *actio iniuriarum*,

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<sup>61</sup> See Kenneth Norrie in *A History of Scottish Private Law* eds K. Reid and R Zimmermann, (OUP, 2000), 484-488.

<sup>62</sup> While the post-mortem examination of the dead child was not in this case unauthorised, the removal and retention of her brain tissue was.

<sup>63</sup> [2005] QB 506.

<sup>64</sup> In the modern sense, as well as the older sense of 'rapt', which included an element of abduction: see John Blackie (CHAPTER ?)

<sup>65</sup> In *G v Glasgow City Council* 2011 SC 1, [30] the Inner House of the Court of Session said this: 'Sexual abuse is not really about physical injury. It is more about affront and degradation'. A more old-fashioned way of seeing the matter, but still clearly as an aspect of *iniuria*, is shown in *A v C* (1919) 35 Sh Ct Rep 166 where a married woman's claim was held competent as a means of vindicating her character. (The competency of the action had been challenged by the defender on the ground that he had paid £20 'damages' to the husband and that the wife had no independent right of action).

protecting the family relationship as in itself a value, recognised more than one victim to rape. When a married woman was raped, the *actio iniuriarum* gave the husband a claim:<sup>66</sup> in Walker's words,

It is also a wrong to her husband, justifying an *actio iniuriarum* at his instance; the wrong consists in the gross affront to the husband, the hurt to his feelings, the violation of the husband's right to the exclusive possession of his wife's person, and the dishonour done to his marriage-bed by the other man.<sup>67</sup>

It is difficult to believe that such an action would succeed, on this basis, today. The state has an obligation under the European Convention on Human Rights to protect citizens from sexual attack<sup>68</sup> but that obligation is amply fulfilled through the criminal law, and an argument that there is something missing with the lack of civil remedy available to the husband of a rape victim will get nowhere under article 8 of the European Convention on Human Rights.<sup>69</sup> We simply do not see the husband and wife relationship today in terms that would found any action based on his affront at her rape (however real his emotional distress might be and however clearly there is a lack of legal justification for the act).

Adultery too was an actionable wrong<sup>70</sup> because it was an affront against the husband's honour (though not, revealingly, the wife's).<sup>71</sup> Again, the abolition of that action<sup>72</sup> involves no incompatibility with the European Convention. I see no gap in the law if we say today that, however much a man is genuinely affronted by his wife

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<sup>66</sup> See *Black v Duncan* 1924 SC 738.

<sup>67</sup> Walker *Delict* (2<sup>nd</sup> edn, OUP 1981), 714.

<sup>68</sup> Article 3 ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment') imposes positive obligations on the state to ensure that its criminal law provides sufficient protection to its citizens: *A v United Kingdom* [1998] 2 FLR 959.

<sup>69</sup> For similar reasons the husbands in *CR v United Kingdom*, *SW v United Kingdom* (1996) 23 EHRR 363 had no claim when the English courts moved away from the proposition that no man may rape his wife on the basis that her consent to marriage carries with it, for all time coming, consent to sexual intercourse. The Scottish courts had come to that conclusion a few years earlier: *S v HM Adv* 1989 SLT 469.

<sup>70</sup> Interestingly, this was recognised only relatively late in the development of the law: Hume *Lectures* III, 130.

<sup>71</sup> *Steedman v Coupar* (1743) Mor. 7337; *Kirk v Guthrie* (1817) 1 Mur 271.

<sup>72</sup> Divorce (Scotland) Act 1976, s. 10(1).

being unfaithful, or leaving him,<sup>73</sup> he cannot recover a monetary solace for his damaged self-esteem, or even for his hurt feelings. Our concepts of loss and damage can surely change to such an extent that what was once regarded as an affront ought no longer to be so.<sup>74</sup> Breach of promise of marriage, which was only recognised as giving rise to delictual liability in the early 19<sup>th</sup> century,<sup>75</sup> was explicitly abolished by s.1(1) of the Law Reform (Husband and Wife) (Scotland) Act 1984, and the affront and indignity of such a breach is no longer regarded by modern society as requiring monetary redress. Even if we cannot deny that (in some circumstances at least) breaking off an engagement might be personally devastating, it does not follow that we should see our personal relationships as part of our dignity and self-esteem: they are consensual relationships of equals, not enhancements of our honour and status.

At a broader level, it also seems to me that the very concept of 'honour' as a personal interest needs to be regarded with deep suspicion. In a society with virtually unanimity in its moral outlook (which is, surely, a hugely unattractive society) it might be possible to regard an attack on a person's honour as an 'injury', but today honour is an entirely self-defined notion with no generally accepted social content. Putting it at its most benign, 'honour' is characterised by pomposity and self-regard;

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<sup>73</sup> Enticing a woman to leave her husband amounted to a civil wrong against the husband and examples are found well into the 20<sup>th</sup> century: *Adamson v Gillibrand* 1923 SLT 328 (mother incited her daughter to leave her husband); *McGeever v McFarlane* (1951) 67 Sh Ct Rep 48 (husband's lover induced him to leave his wife). The action for enticement was abolished by s.2(2) of the Law Reform (Husband and Wife) (Scotland) Act 1984.

<sup>74</sup> Other wrongs against family relationships have been recognised by the law of Scotland. Plagium, or child-stealing, might well have been regarded in the Institutional period as a real injury, but it has survived only in its criminal aspects today. Damages do not lie in negligence for wrongful interference with the parent-child relationship (*McKeen v Chief Constable, Lothian and Borders Police* 1994 SLT 93) and, even if this is done with intent, it is difficult today to accept that the real harm done when one's child is kidnapped is an affront to one's dignity.

<sup>75</sup> *Hogg v Gow* 27 May 1812 FC. Previously, as Blackie points out (n10, 125) the simple withdrawal from an engagement, if not done in particularly egregious circumstances or in a particularly hurtful way, was not in itself regarded as an injury: *Johnston v Pasley* (1770) Mor 13916. He suggests (126) that the recognition of breach of promise in itself was a result of a growing sentimentality in the early 19<sup>th</sup> century, and a softening of the ideal of femininity. The judges in *Hogg v Gow* recognised that they were reflecting views of society that had not been held generally in Scotland in a (not much) earlier and rougher age. Another explanation for the historical absence from Scots law of breach of promise as an actionable wrong is the fact that, if the promise were followed by sexual intercourse, the parties became married in any case through operation of the Canon law doctrine of marriage *per verba de futuro subsequente copula*, which survived in Scotland until the Marriage (Scotland) Act 1939.

at its most malign, we are too distressingly used to hearing about ‘honour killings’ and the like to be much attracted to ‘honour’ as a legally protected interest. Some men probably are genuinely affronted by their sisters and daughters wanting to lead a life of social and sexual freedom, and their sense of religious duty might well compel them to attempt to force their wills upon their sisters and daughters by harsh physical means, but the modern law cannot give any value to ‘honour’ in this sense. Nor is there much attraction in expanding liability for hurt feelings beyond the narrow bounds set for it in negligence and the long-established, but ultimately peculiar,<sup>76</sup> claim for bereavement awards. However, it may be that hurt feelings combined with a social necessity for the law to give some recognition that a wrong has been committed is (just) enough to allow for the recognition of a claim based on breach of informational privacy, which is clearly an interest that is gaining in importance – but has not yet been fully accepted – in the modern world.<sup>77</sup>

Niall Whitty<sup>78</sup> has argued that the most obvious use of *iniuria* in the modern world is to provide a remedy for breach of personal privacy and he argues, surely rightly, that it would be far better to develop the law in this way than to require pursuers to attempt to squeeze breach of privacy into another action like defamation, breach of confidence or even breach of copyright<sup>79</sup>. The danger, as always, is that policy considerations applicable to one action might be inappropriately applied to the other action. What Whitty does not do, however, is to explain why it is better to use the traditional concept of injury rather than other, more contemporary, sources of privacy rights as the driver of this potential legal development. Elspeth Reid is doubtful whether an expanded concept of *iniuria* would really serve this purpose and she is much more attracted to the idea of using the European Convention on Human Rights

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<sup>76</sup> The true explanation for bereavement awards is that they serve the valuable policy purpose of ensuring that causing death is not cheaper to the wrongdoer than causing injury. No other general principle can be extracted, it is submitted, from the existence of bereavement awards.

<sup>77</sup> No-one now believes the statement of Lord Hoffmann in *R v Central Independent Television, plc* [1994] 3 All ER 641, 652 that there is no question of balancing free speech with any other interest, because freedom of speech is ‘a trump card which always wins.’

<sup>78</sup> (n 10), 174 et seq.

<sup>79</sup> The use of copyright to protect privacy is evidenced in cases like *Prince Albert v Strange* (1849) 1 H&W 1 (LC) and *Prince of Wales v Associated Newspapers* [2007] 2 All ER 139. Ibbetson (CHAPTER ?) explores the artificiality involved when claims are construed as defamation when, in reality, they are no such thing.

to drive the development of the law of privacy.<sup>80</sup> Her primary argument is that modern concerns, in particular informational privacy, can only be effectively protected if liability extends beyond intentional infringement.<sup>81</sup> This may well be true, but given that the true basis of liability in Scotland is lack of legal justification for doing the intentional act, the criticism does not really explain why the *actio iniuriarum* should not be used in addition to, or as foundational of rights developed in light of, the ECHR. The question in *Von Hannover v Germany*<sup>82</sup> or even in *Mosley v News Group Newspapers*<sup>83</sup> can as easily be structured as whether the newspapers had any legal justification for printing the stories about the celebrated personages in these cases. The answer to such a question would invariably require an assessment of the value of the right to free speech and whether that is truly interfered with by prohibiting publication – a similar analysis to that required under the European Convention. So I am not convinced that we face a stark choice, between looking back to the *actio iniuriarum* or looking forward to the European Convention on Human Rights, for the appropriate way of protecting privacy: the focus of enquiry in both is the search for the legal justification for the publication.

And there are other drivers to the development of the law of privacy, particularly the social need and growing desire to control an unruly press.<sup>84</sup> There is, for example, much to be gained by expanding and adapting the ‘responsible journalism’ defence from the law of defamation<sup>85</sup> as a useful way of balancing privacy and free speech.<sup>86</sup>

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<sup>80</sup> n 12, [17.12].

<sup>81</sup> Ibid, [17.13].

<sup>82</sup> (2005) 40 EHRR 1.

<sup>83</sup> [2008] EMLR 20.

<sup>84</sup> The ‘phone-hacking’ scandal that hit the UK press in the summer of 2011 reminded us that many journalistic practices, wide-spread and accepted, are anything but responsible.

<sup>85</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127; *Bonnick v Morris* [2003] 1 AC 300; *Jameel v Wall Street Journal Europe (No. 3)* [2007] 1 AC 359; *Flood v Times Newspapers Ltd* [2011] 1 WLR 153 (CA) (argued before the Supreme Court on October 17, 2011).

<sup>86</sup> Admittedly, the European Court of Human Rights resisted importing one aspect of ‘responsible journalism’ (notification to the subject of an intention to publish material about them) into the article 8 right of privacy in *Mosley v United Kingdom* (2011) 161 NLJ 703.

The concept of publication in the public interest<sup>87</sup> might also lend itself as a defence to an action based on an otherwise unjustifiable infringement of personal privacy, by providing legal justification. It is true that, in Scotland, that concept never caught on as a defence in the law of defamation<sup>88</sup> when truthful allegations were at issue,<sup>89</sup> but the policy considerations are so different when dealing with privacy that I think that there is some attraction in developing a public interest defence. In other words, existing notions of public interest, responsible journalism and a whole jurisprudence from the European Court are likely to act as drivers to the developing law of privacy, building upon the protection that *iniuria* affords to the individual's feelings.

### *Conclusion*

If the above analysis is correct, then the *actio iniuriarum* is certainly more than a romantic Romanism in Scots law, in that it serves to identify emotional hurt as a loss worthy, in some limited circumstances, of monetary redress by way of solatium. However, the law's general resistance to regarding emotional hurt as a loss is sound, and the identification of the circumstances in which that redress is justified is and should be driven by other forces than the ghosts of the past. A combination of the European Convention on Human Rights and domestic developments in the control of unbridled journalism (which we are likely to see more of) may well be the way of the future. Freedom from affront is no longer seen as a fundamental human interest. Privacy, on the other hand, is a fundamental human interest, like liberty, with which it has in common that it is an essential pre-condition for the development of our personality and talents: that is why we protect it. How protection of privacy develops will depend upon the modern imperatives of our contemporary society and not upon the extent to which it can be accommodated in our old law.

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<sup>87</sup> Which is the test in some jurisdictions: see for example Jonathan Burchell, 'Personality Rights in South Africa: Re-affirming Dignity', in *Personality Rights in Scotland*, (n 10), chap. 6.

<sup>88</sup> Bankton has not been followed when he said that truth is a defence to verbal injury (that is to say, not limited to defamation) 'if it concerned the good of the commonwealth to have the crime known, and is not said with design of reproach, otherwise the general rule is *veritas convitii non excusat a calumnia*': 1, 10, 31 (citing Voet).

<sup>89</sup> Unlike in South Africa and elsewhere: see Descheemaeker (n 39).