When the Exception is the Rule: Rationalising the 'Medical Exception' in Scots Law

I. INTRODUCTION

No medical practitioner who performs a legitimate medical operation on a patient (in the course of competently carrying out the duties of their profession)[1] commits a delict or a criminal offence.[2] This is so in spite of the fact that to infringe the bodily integrity of another person is plainly both a crime[3] and a civil wrong.[4] Notwithstanding the fact that the patient may desire the operation, the 'defence' of consent cannot possibly justify the serious injuries intentionally inflicted in the course of an operation to effect a kidney transplant, or to amputate a limb, or even to insert a stent, since these procedures are highly invasive and effect irreversible changes to the physicality of the patient(s).[5] The 'medical exception' has consequently and consistently been invoked by legal commentators when considering cases of invasive surgery, or procedures which involve serious wounding.[6]

Since consent is no defence to serious assault,[7] this exception to the general rule that to inflict such is to commit a crime must be justified by means other than an appeal to the

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[1] 'Proper' medical treatment is a prerequisite: Margaret Brazier and Sara Fovargue, *Transforming Wrong into Right: What is 'Proper Medical Treatment'?*, in Sara Fovargue and Alexandra Mullock, *The Legitimacy of Medical Treatment: What Role for the Medical Exception,* (London: Routledge, 2016), p.12

[2] See, generally, Sara Fovargue and Alexandra Mullock, *The Legitimacy of Medical Treatment: What Role for the Medical Exception,* (London: Routledge, 2016), *passim*.

[3] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) (Edinburgh: W. Green, 2017) para.33.46

[4] See Joe Thomson, *Delict,* (Edinburgh: W. Green, 2007) para.11.09. When speaking generally, the phrase 'civil wrong' will be preferred throughout this article. When speaking of Scots law specifically, the term 'delict' shall be used and the term 'tort' shall be employed when specific consideration is given to Common law jurisprudence.

[5] Indeed, 'drugging' well-known and nominate example of the crime of 'real injury' in Scots law (see *Grant v HM Advocate* 1938 J.C. 7) and so, but for the medical exception, even the anaesthetist who prepared the patient for surgery would be guilty of a specific crime but for the medical exception.

[6] Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355, p.356

[7] In criminal law; the defence of *volenti non fit injuria* would be available to a defender in any delictual case. A distinction in respect of the criminal law must here be drawn between Scots law and English law; in English law, it has been argued that consent is sufficient to negate 'trespassory touching', which might otherwise be a minor assault (or battery). In Scots law, however, there exists case law (*Smart v HM Advocate* 1975 J.C. 30, p.33) which suggests that consent is no defence to even minor assaults and the very notion of 'trespassory touching' is alien to that legal system: See Niall Whitty and Murray Earle, *Medical Law*, (Reissue) in *The Laws of Scotland: Stair Memorial Encyclopaedia*, para.242

willingness of the patient.[8] Quite where this justification lies, however, remains controversial and under-theorised. As a legitimate surgical operation may be elective or wholly cosmetic, such treatment cannot be legally justified on grounds of 'necessity'.[9] In 1967, Gordon's *Criminal Law* consequently concluded that the medical exception was *sui generis*.[10] This assessment has not much changed in the decades between the publication of this volume and the text's fourth edition.[11] The editors of the latest edition of Gordon's work provide no rationale for the existence of the medical exception, simply noting it is ***'probably'***[12] justified 'because the injuries are inflicted in such cases not for their own sake or in order to cause pain or gratify an intention to harm, but for the benefit of the patient'.[13] In considering the legal position within the Common law tradition, although Stephen could find no authority for the existence of the 'medical exception',[14] he nevertheless held that 'the existence of surgery as a profession assumes the truth of the exception'.[15]

There is no need, however, to rely on probability assessments or axioms in justifying the presence of the medical exception in Scots law, or indeed, as is later submitted, in the Common law world. Authority for the exception exists and has long existed, but the underpinnings of the exception have been thought so trite – and of such little practical consequence[16] – to those involved in recording the principles of law that they generally remained unarticulated and thus have, in due course, been forgotten. Nevertheless, it is

[8] Indeed, it has been observed that 'although it probably makes very little difference in practice, it should be noted that, in principle, consent is not a defence' to assault: Joe Thomson, *Delict,* (Edinburgh: W. Green, 2007) para.11.10

[9] See Glanville Williams, *Consent and Public Policy* [1962] Crim. L. R. 154, p.156

[10] Gerald H. Gordon, *The Criminal Law of Scotland,* (Edinburgh: W. Green, 1967), p.774

[11] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) Vol. II (Edinburgh: W. Green, 2017) para.33.39

[12] Present author's emphasis.

[13] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) Vol. II (Edinburgh: W. Green, 2017) para.33.39

[14] Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355, p.356

[15] J. F. Stephen, *Digest of the Criminal Law,* (St. Louis: 1878), pp.145-146

[16] See the discussion in Joe Thomson, *Delict,* (Edinburgh: W. Green, 2007) para.11.10

submitted that a study of the underpinnings of this rule is scholastically justified as such provides a rationalisation of the place and taxonomy of the contemporary crime and delict of 'assault' in Scots law. In 2012, Lewis provided an account of the history of the medical exception.[17] Her work did not, however, deign to discuss the Scottish position in any detail. This article, consequently, provides consideration of this topic.

Herein, it is submitted that the basis of the medical exception in Scots law lies in the etymology of the term 'injury' and the connection between this word in its specific legal sense and the concept of *iniuria* in Roman law and *ius commune* jurisprudence. The significance of this can be traced by considering the history of *iniuria* as a crime/delict[18] in early modern Scots law and considering the effect of the divergence of criminal wrongs and delictual wrongs which occurred in the nineteenth century.[19] At its core, the *actio iniuriarum* – the action to afford redress to one who has suffered injury, in the sense of 'insult' or 'affront' – serves to protect the dignity and social standing of individual legal persons.[20] More than this, however, the crime/delict also served to preserve and uphold *boni mores* – good morals.[21] Any conduct which intentionally and contumeliously affronted the dignity of a legal person could be classified *contra bonos mores*, and so amount to *iniuria*,[22] but it is apparent that *iniuria* may be effected even in instances in which there could be no subjective affront to the individual person.[23] This, it is submitted, provides a rationalisation for, and justifies the existence of, the

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[17] Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355

[18] See John Blackie and James Chalmers, *Mixing and Matching in Scottish Delict and Crime,* in Matthew Dyson, *Comparing Tort and Crime: Learning from across and within Legal Systems*, (Cambridge: CUP, 2015), p.286

[19] See John Blackie, *The Interaction of Crime and Delict in Scotland*, in Matthew Dyson (Ed.), *Unravelling Tort and Crime,* (Cambridge: CUP, 2014)

[20] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: Clarendon Press, 1996), p.1062

[21] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179, p.183; Reinhard Zimmermann*, Actio Iniuriarum*, in *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: Clarendon Press, 1996), p.1058

[22] See, e.g., *Delange v Costa* 1989 (2) SA 857 (A)

[23] As in the case of self- or voluntary castration, which was punishable regardless of the consent of the 'victim': See Damhauder, *Practiicke in Civile en Crimineele Saeken*, cap. 81

medical exception in Scots law; 'proper medical treatment' is not *contra bonos mores* and so cannot be said to amount to injury or assault. Hence, the framing of the 'medical exception' as an exception is wrongheaded; it is, rather, the consequence of the conceptual understanding of 'assault' and 'real injury' in that jurisdiction.

II. The Taxonomy of 'Assault'

A. 'Trespass' and 'Injury'

In English law, the torts of assault and battery are causes of action under the umbrella of the form of action known as 'trespass to the person'.[24] Actions in respect of trespass are among the oldest forms of action known to the Common law.[25] In addition to persons, trespass may be committed against patrimonial assets – whether 'real' (i.e., heritable)[26] or 'personal' (i.e., moveable).[27] Historically, trespass was a penal action for any transgression which fell short of amounting to a felony.[28] The nature of the wrong in a case of trespass was the 'breach of the King's peace' effected by laying hands on the plaintiff, or by taking his goods, or by

[24] Rachael Mulheron, *Principles of Tort Law,* (Cambridge: CUP, 2016), p.689; Mulheron stresses that 'trespass to the person is a ***form*** of action', while torts such as assault and battery are causes of action. For the significance and history of the forms and causes of action, see John Baker, *Introduction to English Legal History*, 5th Edn. (Oxford: OUP, 2019), Ch.4 (*passim*).

[25] F. W. Maitland, *Equity and the Forms of Action at Common Law: Two Courses of Lectures*, (Cambridge: CUP, 1910), p.342

[26] Lord Hailsham, *Halsbury's Laws of England,* Vol.97 (5th Ed.) (London: LexisNexis, 2015), para.536; Michael A. Jones, Anthony M Dugdale and Mark Simpson, *Clerk and Lindsell on Torts*, (22nd Edn.) (Sweet and Maxwell, 2017), para.19-01

[27] Lord Hailsham, *Halsbury's Laws of England,* Vol.97 (5th Ed.) (London: LexisNexis, 2015), para.602; Michael A. Jones, Anthony M Dugdale and Mark Simpson, *Clerk and Lindsell on Torts*, (22nd Edn.) (Sweet and Maxwell, 2017), para.17-130

[28] F. W. Maitland, *Equity and the Forms of Action at Common Law: Two Courses of Lectures*, (Cambridge: CUP, 1910), p.343. As Baker notes, the word in its original sense was not a term of art and so it was broad enough to encompass felonies as well as misdemeanours – See John Baker, *Introduction to English Legal History*, 5th Edn. (Oxford: OUP, 2019), p.67 (See also S. F. C. Milsom, *Trespass from Henry III to Edward III*, [1958] LQR 195, p.195 and Peter Birks, *The Early History of Iniuria*, [1969] The Legal History Review 163, p.163) – but as Maitland notes, as in English law 'throughout the Middle-Ages there is no such word as misdemeanour… the crimes which do not amount to felony are trespasses'.

invading his land.[29] Originally, such would require at least some degree of violence,[30] but such was the utility of the action for trespass that, over time, the fiction that mere trespassory touching amounted to a sufficient breach of this peace emerged.[31] To this day, even the most limited forms of touching – in the absence of consent – might be grounds for an action of battery.[32]

The wrong known as 'assault' in Scots law has little, other than its name, in common with this English tort.[33] The term itself was not a feature of Scots language or law until after the union which created the state of Great Britain in 1707,[34] but – likely as a result of the union[35] – the term began to enter both the common and legal vernacular during the course of the 18th century.[36] Though the word did eventually make its way into Scottish legal discourse, the underlying taxonomy of trespass was not adopted by Scots law.[37] Just as the phrase 'trespass to a chattel' would be 'perfectly unmeaning' in Scots law,[38] so too is the concept of 'trespass

[29] Ken Oliphant and Donal Nolan, *Tort Law: Texts and Materials,* (6th Ed.) (Oxford: OUP, 2017) p.4

[30] F. W. Maitland, *Equity and the Forms of Action at Common Law: Two Courses of Lectures*, (Cambridge: CUP, 1910), p.344

[31] See *Cole v Turner* (1704) 6 Mod Rep 149; the notion of 'breach of the King's peace' was itself described as a fiction by Deiser (see George F. Deiser, *The Development of Principle in Trespass,* [1917] Yale Law Journal 220, p.221), but this can itself be understood as a product of the superimposition of one's contemporary *mores* over an incomparable schema: See John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.56

[32] *F v West Berkshire Health Authority* [1990] 2 AC 1 (HL), p.73 (*per* Lord Goff).

[33] See Cassie Watson, *Doom for Demembring: Assault in Scots Law*, [2017] Legal History Miscellany; John Blackie, *The Protection of Corpus in Modern and Early Modern Scots Law,* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.158. Conduct which may be described as 'assault' in one jurisdiction would not necessarily be conceived of as such in the other.

[34] Until the late 17th century, the term 'assault' was only ever used by Scots in the sense of a military assault on a building; by the turn of that century, however, it found use in law, though only in a descriptive sense, in cases of real injury: John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), pp.52-54

[35] See Cassie Watson, *Doom for Demembring: Assault in Scots Law*, [2017] Legal History Miscellany, fn.20

[36] Although it did not emerge as a nominate crime and delict until the 19th century: See John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.104

[37] John Blackie, *The Protection of Corpus in Modern and Early Modern Scots Law,* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.158

[38] *Leitch & Co v Leydon* 1931 SC (HL) 1 at 8

to the person' utterly unknown to the courts north of the Tweed.[39] The roots of the Scottish conception of 'assault' are to be found in the taxonomy of the crime/delict *iniuria* – injury – rather than in any notion of 'trespass'.[40]

Iniuria was one of the four institutional delicts known to Roman law.[41] The term ordinarily appears twice in any list of the Roman delicts, which is taken to include *furtum* (theft), *rapina* (theft with violence), *damnum iniuria datum* (proprietary loss caused by wrongful conduct) and *iniuria*.[42] The fact that the term appears twice provides some small insight into its etymological complexity; in addition to its significance in the establishment of Aquilian liability, Justinian ascribed three other distinct meanings to the term. He held that, in general, the word might be used to denote any act done without legal justification;[43] secondly that it may mean the specific wrong done by a judge who imposes an unjust sentence;[44] thirdly, and finally, it may be used to refer to the specific delict which occurs when a subject causes compensable affront to another.[45] The last of these represents the specific delict *'iniuria'*; a contumelious attack on the dignity of a freeman, which may give rise to an *actio iniuriarum*.[46]

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[39] Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, (2005) Edin. L. R. 9 (2), 194, p.215

[40] Some Scots writers have, however, made use of the language of 'trespass', in a strictly non-technical sense, when discussing the crime/delict of 'injury' (Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730), p.175) or 'personal violence' (John Guthrie Smith, *A Treatise on the Law of Reparation*, (Edinburgh: T&T Clark, 1864), p.41. An interesting contrast can consequently be drawn with the work of Blackstone, wherein the jurist utilises the language of 'injury' (albeit in a similarly non-technical sense) to describe the nominate English wrong of 'trespass': William Blackstone, *Commentaries on the Law of England in Four Books,* vol. III (Oxford: Clarendon Press, 1765), Ch.8; Ch.12

[41] H. F. Jolowicz, *Historical Introduction to the Study of Roman Law,* (Cambridge: CUP, 1952), p.170

[42] See W. W. Buckland, *A Manual of Roman Private Law,* (2nd Ed.) (Cambridge: CUP, 1939), p.318

[43] *'Iniuria dicitur omne quod non iure fit'*: Justinian, *Institutes,* 4.4

[44] Justinian, *Institutes,* 4.4

[45] See Justinian, *Institutes,* 4.4; Dig. 47.10; C. 9.35. See also M. Kaster, *Das Romische Privatrecht,* I (Munich: Beck, 1955) pp.21-22; 139-140; 520-522

[46] A. M. Prichard, *Leages' Roman Law,* (3rd Ed.) (London: MacMillan and Co, 1961), p.417; Dig. 47.10.2

The *actio iniuriarum* serves as an action to protect the non-patrimonial interests of a legal person; i.e., it protects 'who a person is rather than what a person has'.[47] This Romanistic understanding of *iniuria* – or 'injury' – as a specific form of wrongdoing was adopted by the then-Lord Advocate Sir George MacKenzie in his textbook on *Matters Criminal*.[48] Therein, he posited that 'injury, in its more comprehensive sense, may give a name to all crimes; for all crimes are injuries, but injury as it is the Subject of this Title, is the same thing with contumely or reproach'.[49] Injuries, in this sense, were divided into two sub-categories – *iniuria verbalis* (verbal injuries, those injuries inflicted by words) and *iniuria realis* ('real' injuries inflicted by means other than words).[50]

At the time of MacKenzie's writing, there were no tertiary sub-categories of *iniuria verbalis*[51] (though the later delict of defamation has its origin as a sub-category of *iniuria* also),[52] however as Professor Blackie demonstrated, there were, by 1700, a complex array of sub-categories of *iniuria realis* which served to protect individual interests in bodily integrity, physical liberty, sexual morality, family life, privacy and dignity.[53] Such included (but were

[47] Niall R. Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law: A Comparative Perspective,* (Dundee: DUP, 2009), p.3

[48] Sir George MacKenzie, *The Laws and Customes of Scotland, In Matters Criminal. Wherein is to be seen how the Civil Law, and the Laws and Customs of other Nations do agree with, and supply ours,* (Edinburgh: James Glenn, 1678). Though the text is, as the title suggests, concerned with criminal law, at the time of MacKenzie's writing there was no substantial difference between the law of delict and the criminal law: See John Blackie and James Chalmers, *Mixing and Matching in Scottish Delict and Crime,* in Matthew Dyson, *Comparing Tort and Crime: Learning from across and within Legal Systems*, (Cambridge: CUP, 2015), p.286

[49] MacKenzie, *Matters Criminal*, Tit. XXX, I (p.304); this is closely paraphrased by Forbes in his *Institutes*: See William Forbes, *The Institutes of the Law of Scotland*, Vol. II (Edinburgh: John Mosman and Co, 1730), p.130

[50] MacKenzie, *Matters Criminal*, Tit. XXX, I (p.304)

[51] John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), pp.93-94

[52] See John Blackie, *Defamation,* in Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland,* (Oxford: OUP, 2000), pp.633-634

[53] John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.38

not limited to) bodily 'invasion',[54] hamesucken,[55] mutilation,[56] abduction,[57] false imprisonment,[58] adultery,[59] interference with dead bodies[60] and general insulting behaviour.[61] These specific sub-categories often received treatment under separate headings in legal texts of this time, although they all drew from the same – ultimately Romanistic – roots.[62]

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[54] In Bayne's account, 'if a blow or wound is given', such is sufficient 'by the very nature of the injurious act' to render to injury 'atrocious' and so actionable in law: Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730), p.181

[55] Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730), p.182; William Forbes, *The Institutes of the Law of Scotland*, Vol. II (Edinburgh: John Mosman and Co, 1730), p.130. The definition of this crime/delict given by Bayne and Forbes mirrors that given by MacKenzie in his *Matters Criminal*: See the discussion in John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.53

[56] This sub-category – along with another known as 'demembration', which concerned the severing of a limb from a freeman's body – was the subject of extensive treatment by Sir Alexander Seton, Lord Pitmedden, in his *Treatise of Mutilation and Demembration*, (Edinburgh: Andrew Andersen, 1699). It is worth noting that Pitmedden describes the first part of his treatise as 'medico-juridical', given the context of the present discussion: See p.5.

[57] Initially termed *raptus* or *plagium,* though in the late 18th century *plagium* came to refer to the abduction (or, indeed, 'theft') of children alone (see Jonathan Brown, *Plagium: An Archaic and Anomalous Crime* [2016] Jur. Rev. 129) and, even by Forbes' time, 'rape' or 'ravishing' had, come to obtain its meaning of 'the carnal knowledge of a woman or man by force and against the person's will': William Forbes, *The Institutes of the Law of Scotland*, Vol. II (Edinburgh: John Mosman and Co, 1730), p.125. It is notable, and indeed a point of great interest, that Forbes' definition of this crime/delict conceptualised it as one which might be committed against either a man or a woman (indeed, this observation is repeated in his *Great Body of the Law of Scotland:* Forbes, *Great Body*: Forbes Manuscript page ID: forbes-54-0214). A discussion of the provenance and significance of Forbes' conceptualisation of this crime/delict is outwith the scope of this paper, but would – in light of the commonly understood pre-2009 definition of 'rape' within Scots law – certainly merit further investigation.

[58] At common law, the specific sub-delict was initially styled *crimen privati carceris*, however this designation declined in importance after, likely under influence of the English term 'false imprisonment', the delict came to be styled 'wrongous imprisonment' (see *Oliphant v Wemyss* (1661) reported in E. G. Scott-Moncrieff, *The Records of the Proceedings of the Justiciary Court Edinburgh 1661-1678*, Vo. I. (Edinburgh: Scottish History Society, 1905), p.5) and in turn, though a common law claim remained possible as an alternative, was ultimately superseded by the introduction of the Act Anent Wrongous Imprisonment 1701: John Blackie, *The Protection of Corpus in Modern and Early Modern Scots Law,* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.160

[59] William Forbes, *The Institutes of the Law of Scotland*, Vol. II (Edinburgh: John Mosman and Co, 1730), pp.120-125

[60] William Forbes, *The Institutes of the Law of Scotland*, Vol. II (Edinburgh: John Mosman and Co, 1730), p.131. This sub-category receives no *nomen iuris*, but is presumably based (in Forbes' conception) on D.47.10.1.4, as – in a manner consistent with Ulpian's observation therein – Forbes provides that 'it is also reckoned injurious to a man, what is done against one whom he represents as heir, or nearest of kin'. See, also, Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730), p.188

[61] Some such activity may be *de minimis* and 'beneath the notice of the law': Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730), p.180

[62] See the discussion in John Blackie, *The Protection of Corpus in Modern and Early Modern Scots Law,* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.157; see also Grant Barclay, The Structure of Assault in Scots Law: A Historical and Comparative Perspective, [2017] University of Glasgow LLM(R) Thesis (accessible at http://theses.gla.ac.uk/8569/)

The essence of *iniuria* – the factor common to each of the sub-categories – was the contumelious effecting of affront to the *existimatio* – social standing or 'civil honour'[63] – of the victim.[64] This contumelious conduct could take potentially any form; as the Institutional writer Stair lamented, 'yea, there be innumerable such acts which the malice and cruelty of men can invent'.[65] In recognition of this, the general *actio iniuriarum* developed as an exceptionally flexible legal mechanism which proved able to ensure that 'as long as the wrongdoer's purpose was to bring his victim into disrepute, his conduct – whatever it was – was potentially actionable' as injury.[66] Thus, in modern Scots law, it has been suggested that the delict is of such wide scope that it can afford remedy to family members in cases of unauthorised post-mortems[67] as well as to victims of image-based sexual abuse.[68]

B. ***Actio Iniuriarum***

The *actio iniuriarum* was said to serve to protect the *corpus* (body), *fama* (reputation) and *dignitas* (dignity) of legal persons.[69] As indicated above, however, at a higher level, '*iniuria* as a delict sanctioning transgressions against someone else's *existimatio* could be traced back as far as Labeo or even earlier in the late Republic'.[70] In the context of most of the Roman sources, the word is generally used to refer to the perceived social standing of a human

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[63] See Abel H. J. Greenidge, *Infamia: Its place in Roman Public and Private Law*, (Oxford: OUP, 1894), Ch.2

[64] Reinhard Zimmermann*, Actio Iniuriarum*, in *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: Clarendon Press, 1996), fn.102

[65] James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland Deduced from its Originals and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations in IV Books,* (2nd Ed.) (Glasgow: UGP, 1981), IV, 40, 26

[66] In the words of Descheemaeker and Scott: See Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.13

[67] As in *Stevens v Yorkhill NHS Trust* 2006 SLT 889

[68] See Jonathan Brown, *Revenge Porn and the Actio Iniuriarum: Using 'Old Law' to Solve 'New Problems',* [2018] Leg. Stud. 396

[69] Dig. 47.10.1.2; Johannes Voet, *Compendium Juris Juxta Seriem Pandectarum, Adjectis Differentiis Juris Civilis et Canonici. ut et Defonitionibus ac Divisionibus Praecipuis Secundum Institutionum Titlos,* (Lugduni Batavorum: Cornelium Boutesteyn and Jodanum Luchtmans, 1707), Book IV Title IV (*de injuriis*), p.58

[70] Jacob Giltaij, *Existimatio as 'Human Dignity' in Late-Classical Roman Law,* [2016] Fundamina: A Journal of Legal History 232, p.236

being (whether a free *persona* or a slave).[71] This social standing could be diminished by the occurrence of some unanswered *iniuria* and so it can be inferred that the *actio iniuriarum* served as a response to a contumelious insult and, thus, a means of preserving the *existimatio* of a *persona*.[72]

As Kaser notes, the term *existimatio* is used only in a descriptive, non-technical sense by the Roman jurists.[73] This did not, however, prevent the writers of the *ius commune* from ascribing a technical meaning of import to the word.[74] In the 16th century, the French jurist Donellus drew on the concept of *existimatio* in developing a theory of subjective 'personality rights' which sought to see individual interests in life, body, liberty and dignity protected by law.[75] The concept of 'dignity' to which Donellus refers is not, as might be expected, drawn from the Ulpianic triad of *corpus, fama* and *dignitas* found in D.47.10.1.2; rather, the personality right of 'dignity' elucidated in Donellus' work is rooted in the Roman jurist Callistratus' conception of *existimatio*.[76] The *actio iniuriarum* thus developed, in the Continental European legal tradition, as a means of safeguarding 'dignity' in the all-encompassing sense of societal esteem. Such made the action attractive to medieval lawyers and legal scholars, who 'lived within a society that prized good name, dignity and honour highly'.[77]

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[71] This distinguishes the word from *dignitas*, as *dignitas* was only enjoyed by those imbued with legal personality: See James Gordley, *Reconceptualising the Protection of Dignity in Early Modern Europe: Greek Philosophy Meets Roman Law* in M Ascheri et al (eds.), *Ins Wasser geworfen und Ozeane durchquert*, (Böhlau Verlag Köln Weimar, 2003), p.286

[72] Matthias Hagemann, *Iniuria: von den XII Tafeln bis zur Justinianischen Kodifikation*, (Köln: Böhlau, 1998), pp.137-138

[73] Max Kaser, *Infamia und Ignominia in den Römischen Rechtsquellen*, [1956] Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 220, p.231

[74] Jacob Giltaij, *Existimatio as 'Human Dignity' in Late-Classical Roman Law,* [2016] Fundamina 232, p.237

[75] Donellus, *Commentarii de Iure Civili,* (1589) 2, 8, 3, pp.229-230

[76] Drawn from D.50.13.5.1

[77] Reinhard Zimmermann*, Actio Iniuriarum*, in *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: Clarendon Press, 1996), p.1062

The *actio iniuriarum* was consequentially, at least initially, an action of the utmost import in the Roman-Dutch legal tradition.[78] The notion (found in Grotius and other Dutch writers)[79] of *iniuria* as the occurrence of some deprivation of a natural right evidently influenced the Scottish Institutional writers.[80] Thus, early modern Scottish jurisprudence manifestly received, at this time, both the delict and the remedy of *solatium* for non-patrimonial loss effected by *contumelia*. Writing in the mid-eighteenth century, Bankton noted that one's interests in 'fame and reputation' could be affronted by 'injury specially so termed'.[81] In this conceptualisation, 'injury' was defined as 'an offence, maliciously committed, to the reproach and grievance of another, whereby his fame, dignity or reputation is hurt'.[82] As in MacKenzie's writings, 'injury' is divided into 'real' and 'verbal' injuries; the former is, in Bankton's work, specifically described as 'an assault'.[83]

Historically, the compensation payable on the occurrence of a successful claim for real injury was *solatium*, not damages, as the legal claim did not arise from the occurrence of *damnum injuria datum*.[84] Indeed, by dint of the maxim *dominus membrorum suorum nemo videtur* – 'no one is to be regarded as the owner of their own limbs' – free legal *personae* were initially barred from claiming for what would now be described as personal injury caused by negligence, since the *lex Aquilia* was, in substance, an action for property damage and a free

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[78] Though *actiones iniuriarum* were denigrated by later commentators on the Roman-Dutch law: See Robert Warden Lee*, Introduction to Roman-Dutch Law,* (5th Ed.) (Oxford: Clarendon Press, 1953), p.335

[79] See, e.g., Hugo Grotius, *De Iure Belli ac Pacis*, (Amsterdam: Joannem Blaev, 1690), p.294

[80] See Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.1-03

[81] Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations on the Agreement or Diversity between them and the Laws of England, in four books, after the General Method of the Viscount of Stair's Institutions,* (Edinburgh: R. Fleming, 1751), Book I, Tit. X, 29

[82] Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations on the Agreement or Diversity between them and the Laws of England, in four books, after the General Method of the Viscount of Stair's Institutions,* (Edinburgh: R. Fleming, 1751), Book I, Tit. X, 29

[83] Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations on the Agreement or Diversity between them and the Laws of England, in four books, after the General Method of the Viscount of Stair's Institutions,* (Edinburgh: R. Fleming, 1751), Book I, Tit. X, 29

[84] See Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.01

person was not, in law, a 'self-owner'.[85] The claim for *solatium* was not predicated on proof of loss or harm, but was penal and awarded in respect of the wounded feelings of the pursuer arising from the wrongdoing – the *iniuria* – that was effected by the defender.[86] Such manifestly expresses the link between the Romanistic *actio iniuriarum* and the Scots law of delict and crime.[87]

By the late nineteenth century, however, Scots law had come to recognise the competence of claims (misleadingly referred to as '*actiones injuriarum*')[88] for both patrimonial loss and *solatium* arising from 'personal injury' in the modern sense of the term.[89] Such 'injury' could be negligently caused; the salient element of the action was *culpa* (fault) rather than *contumelia* (affront).[90] Thus, in spite of the misleading nomenclature, and in spite of the fact that *solatium* could be concurrently claimed alongside damages under such an action,[91] its legal ancestor was the *lex Aquilia* rather than the *actio iniuriarum*.[92] Such, naturally, was said to be so liable to utterly confuse students of the Scots law of delict to the extent that 'either mental confusion, or contempt for the system, or both' was likely to be inculcated in their minds – hence the sub-title of T. B. Smith's 1972 article in the Scots Law Times; *Damn, Injuria, Damn*.[93]

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[85] See Lord Stewart's *dicta* in *Holdich v Lothian Health Board* [2013] CSOH 197, para.39; see also Kenneth Reid, *Body Parts and Property,* in Andrew Simpson, Roderick Paisley, Douglas Bain and Nikola Tait (Eds.), *Northern Lights: Essays in Private Law in Honour of David Carey Miller,* (Aberdeen: AUP, 2018), p.248

[86] See R. M. White and M. J. Fletcher, *Delictual Damages,* (Edinburgh: Butterworth, 2000), p.38; Niall R. Whitty, *Overview of Rights of Personality in Scots Law*, in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.217

[87] John Blackie, *The Protection of Corpus in Modern and Early Modern Scots Law,* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), pp.158-159

[88] See the discussion in T. B. Smith, *A Short Commentary on the Laws of Scotland,* (Edinburgh: W. Green, 1962), p.721

[89] T. B. Smith, *A Short Commentary on the Laws of Scotland,* (Edinburgh: W. Green, 1962), pp.719-722

[90] T. B. Smith, *A Short Commentary on the Laws of Scotland,* (Edinburgh: W. Green, 1962), pp.719-722

[91] T. B. Smith, *A Short Commentary on the Laws of Scotland,* (Edinburgh: W. Green, 1962), p.720

[92] T. B. Smith, *Designation of Delictual Actions: Damn, Injuria, Damn,* 1972 SLT (News) 125, p.125

[93] T. B. Smith, *Designation of Delictual Actions: Damn, Injuria, Damn,* 1972 SLT (News) 125, p.125

The emergence of this species of *'actio injuriarum'*, used in the sense of concurrent claims of patrimonial loss and *solatium*, can be traced to the case of *Eisten v North British Railway Co*,[94] wherein Lord President Inglis erroneously[95] described such a claim as 'a well-known class of actions in the civil law' and 'an action of damages to repair bodily injuries'.[96] Lord President Inglis' error went juridically uncorrected (though not completely unchallenged)[97] for over a century,[98] until Lord Kilbrandon, in the case of *McKendrick v Sinclair*,[99] expressly and forcefully affirmed that the *actio injuriarum* was 'truly based on insult or affront' rather than loss.[100] The clarification of this doctrinal muddle did not lead to a 'modern renaissance' of the *actio iniuriarum* proper, as some Scottish legal scholars hoped,[101] but at the very least it affirmed that the Romanistic *actio iniuriarum* was known to Scots law and that it was to be brought to bear only in cases in which a contumelious mind-state could be demonstrated on the part of the defender.[102]

The modern understanding of the Scottish *actio iniuriarum* is more appropriately Roman, although actions based upon the claim have rarely called before the courts in recent decades.[103] In 2006, however, the Court of Session – in the case of *Stevens v Yorkhill NHS*

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[94] (1870) 8 M. 980

[95] See T. B. Smith, *Damn, Injuria, Again,* 1984 SLT (News) 85, p.85

[96] *Eisten v North British Railway Co.* (1870) 8 M. 980, p.984

[97] See the comments of Lord Macmillan in *Stewart's Executrix v London Midland & Scottish Railway Co.* 1944 SLT 13, p.21; see also the comments of Lord Kinnear in *McEnaney (Leigh's Executrix) v Caledonian Railway Co* 1913 S.C. 838, wherein it was noted that the Scottish iteration of the *'actio injuriarum'* at hand had nothing in common with the Roman conceptualisation and that the term stood as nothing more than '*a convenient Latin term for expressing a class of actions known to our own law'* – p.847

[98] Indeed, it was bolstered by approval from a prominent successor to the office of Lord President, Viscount Dunedin: See *Black v North British Railway Co.* 1908 S.C. 444

[99] 1972 SLT 110

[100] *McKendrick v Sinclair* 1972 SLT 110, p.120

[101] See Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body,* [2005] Edin. L.R 194, p.200

[102] See Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body,* [2005] Edin. L.R 194, p.204

[103] In the 2003 case of *Martin v McGuiness* 2003 SLT 1424, counsel for the pursuer made a 'cautious' submission that the case might have been one of *iniuria*, but in the words of Lord Bonomy 'unfortunately [counsel] did not elaborate upon this, or attempt to establish by reference to authority the nature of and the basis for that remedy, nor indeed whether modern Scots law recognises it as a remedy'. (At para.27)

Trust[104] – vindicated an argument set forth by Professor Whitty the previous year to the effect that the *actio iniuriarum* could be utilised to afford redress to family members affronted by the occurrence of an unauthorised post-mortem.[105] In the words of Professor Whitty, 'the *actio iniuriarum* is important not only for medical law but also further afield over much wider tracts of Scots private law, such as assault, constraint on physical liberty, personal molestation, harassment, defamation, confidentiality and privacy'.[106] Much in the same way that 'trespass' might be said to be the 'fertile mother of actions'[107] and 'trespass to the person' might be described as a versatile umbrella-term covering many disparate causes of action, so too might *iniuria* be considered the progenitor and governess of many distinct forms of wrongdoing known to the law.

C. Elements of *Iniuria*

As alluded above, *iniuria* was an etymologically complex term. It carried different meanings depending on whether it was utilised within the context of the Aquilian *damnum iniuria datum* or in the sense of the specific delict *iniuria*. 'Injury' may now be understood as some hurt, wound or damage suffered by a person or animal; such, however, reflects the meaning of *damnum* within the context of the *lex Aquilia*, rather than *iniuria*, which, in this context, refers to wrongful conduct. The essence of the specific delict *iniuria* was not loss; indeed, pecuniary loss is immaterial in an *actio iniuriarum*.[108] Mere upset or annoyance is sufficient to substantiate a claim for *solatium* under the action.[109] In the words of Temporary Judge MacAulay QC, 'in principle *solatium* for "hurt feelings" caused by affront based upon

[104] 2006 SLT 889
[105] See Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body,* [2005] Edin. L.R 194
[106] Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body,* [2005] Edin. L.R 194, p.197
[107] See F. W. Maitland, *The Forms of Action at Common Law*, (1909), Lecture IV
[108] David M. Walker, *The Law of Delict in Scotland,* (2nd Ed.) (Edinburgh: W. Green, 1981), p.40
[109] See *Cruickshanks v Forsyth* (1747) Mor.4034

the *actio injuriarium* is a different animal to the *solatium* that can be awarded to a claimant for physical or psychiatric injury. *Prima facie* the threshold for recovery for hurt feelings is lower than that for psychiatric injury'.[110]

The upset or annoyance of the pursuer must be demonstrated for there to be a successful *actio iniuriarum* – indeed, such is a fundamental prerequisite, for in the absence of genuinely wounded feelings, it is unlikely that an individual would subject themselves to the financial and time costs associated with litigation – but subjective affront alone is not sufficient to ensure a pursuer's success in an *actio iniuriarum*. In order to establish *iniuria*, in the sense of the specific delict, the pursuer must show that the defender exhibited *contumelia*.[111] *Contumelia* – variously described as 'insult',[112] 'contempt',[113] and 'disrespect',[114] – can be demonstrated by establishing that the defender possessed sufficient *animus iniuriandi* in perpetrating the injurious conduct. Of the three proffered translations, the third is to be preferred, since the temptation to draw too close a parallel between *iniuria* and comparable Common law concepts should be resisted.

Though, as noted above, *contumelia* may be understood as 'insult',[115] Ibbetson has suggested that the better translation would be 'hubris' (and through this, disrespect), since the Romans evidently understood the delict in terms of this Greek idea.[116] 'It was in the very nature of *contumelia* [therefore] that the wrongdoer was deliberately acting without taking into

[110] *Stevens v Yorkhill NHS Trust* 2006 SLT 889, p.902

[111] Jonathan Brown, *Revenge Porn and the Actio Iniuriarum: Using 'Old Law' to Solve 'New Problems',* [2018] Leg. Stud. 396, p.410

[112] J. Paul Sampley and Peter Lampe, *Paul and Rhetoric* (New York: T&T Clark, 2010)

[113] Peter Birks, *Harassment and Hubris: The Right to an Equality of Respect,* [1997] Irish Jurist 1

[114] David Ibbetson, *Iniuria, Roman and English,* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013)

[115] See the discussion in David Ibbetson, *Iniuria, Roman and English* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.43

[116] David Ibbetson, *Iniuria, Roman and English* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.40

account the interests of the victim'.[117] Thus, whichever of the three potential translations of *contumelia* is preferred, it is plain that no pursuer would have had a claim if their feelings are hurt by the simple negligence of the defender; the defender must have contumeliously acted in such a manner so as to effect disgrace.

Animus iniuriandi is generally translated as intention to injure,[118] but it is here submitted that reckless or grossly negligent conduct may also impute sufficient *animus* for an *actio iniuriarum* to succeed.[119] In the case of *Stevens*,[120] the actions of the physicians who carried out the unauthorised post-mortem cannot be said to have been underpinned by intention or active malice. Rather, if the actions of the physicians were wrongful (as they were deemed to be), such stemmed from the wanton disregard shown to the feelings of the family members in deliberately conducting the post-mortem, rather than any design to effect disgrace.[121] *Animus iniuriandi* must, therefore, be understood as more than 'intention'; such is clear by dint of the fact that the Romans themselves did not truly draw any distinguish between conduct which might be described as intentional or reckless.[122] Given that *contumelia* is the salient feature of injurious conduct, it might be inferred that any requirement of *animus iniuriandi* refers not to the mind-state of the wrongdoer at the time of the wrongdoing, as the modern notion of *mens*

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[117] David Ibbetson, *Iniuria, Roman and English* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.40

[118] See, e.g., Helen Scott, *Contumelia and the South African Law of Defamation* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.120; see also the case of *Suid-Afrikaanse Uitsaaikoporasie v O'Malley* 1977 3 SA 394 (A), wherein the South African Appellate division, in the context of a defamation case, defined *animus iniuriandi* as *'intention to defame and knowledge of wrongfulness'* (para.73)

[119] This submission is in line with T. B. Smith's observation that, in Scots law *animus iniuriandi* may be demonstrated by showing either intent or 'negligence so gross as to be the equivalent of intent': T. B. Smith, Designation of Delictual Actions: Damn, Injuria, Damn, 1972 SLT 125, p.126

[120] 2006 SLT 889

[121] As Whitty noted in 2005, the *Final Report of the Review Group on the Retention of Organs at Post Mortem* (the McLean Report) found, in 2003, that *'many parents felt the need to continue to protect the child after death, and for them past post-mortem practice was seen as a betrayal of that protective role. They saw this as an insult in addition to their grief'* (at para.9).

[122] Kenneth McKenzie Norrie, *The Actio Iniuriarum in Scots Law: Romantic Romanism, or Tool for Today?* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013) p.54

rea requires in the context of criminal law, but rather the wrongdoer's general capacity to understand the wrongfulness of their actions in general combined with a hubristic disregard, borne of intention, recklessness or wanton carelessness, of the status of the victim.

The Roman jurists Paul and Ulpian appeared to disagree with one another as to the scope of *iniuria*.[123] It is often said that, in addition to proving that the defender displayed *contumelia*, any pursuer in an *actio iniuriarum* must also demonstrate that the conduct of the defender was *contra bonos mores*. This requirement has its roots in D.47.10.33, in which Paul suggests that one who carries out an act 'in the public interest according to sound morals, even though it is contumelious towards someone… is not liable to an *actio iniuriarum'*.[124] There is nothing comparable to this suggestion that the defender's conduct must be *contra bonos mores* ***and*** contumelious in the surviving works of Ulpian.[125] Professor Ibbetson has, however, put forth a convincing argument to explain this ostensible incongruity. In his view, it is likely that, for Ulpian, 'the impropriety of the defendant's conduct was bundled up in his notion of contumelia… whereas for Paul the two requirements were independent of one another, contumelia focusing on the subjective aspect of the defendant's conduct and *adversus bonos mores* focusing on its social interpretation'.[126] In modern terms, Ulpian conceptualised *contumelia* broadly, as being both subjectively and objectively injurious – in essence, anything which could be described as contumelious was inherently *adversus bonos mores*. Paul, conversely, understood *contumelia* as the subjective impetus of the affront suffered only, with the objective element of the injurious conduct being determined by separate reference to the

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[123] David Ibbetson, *Iniuria, Roman and English* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.43

[124] D.47.10.33; author's translation. (D.47.10.33 reads *'quod rei publicae venerandae causa secundum bonos mores fit, etiamsi ad contumeliam alicuius pertinet, quia tamen non ea mente magistratus facit, ut iniuriarum facit, sed ad vindicatam maiestatis publicae respiciat, actione iniuriarum non tenetur'*.)

[125] David Ibbetson, *Iniuria, Roman and English* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.43

[126] David Ibbetson, *Iniuria, Roman and English* in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Oxford and Portland, Oregon: Hart, 2013), p.43

public interest question of *bonos mores*. In practice, there is therefore little to distinguish the opinions of Paul and Ulpian; within the schema of both jurists, objective and subjective wrongdoing must each be demonstrated for *iniuria* to be successfully averred.[127]

As such, contumelious conduct, for the purposes of the *actio iniuriarum*, can consequently be defined as conduct, perpetrated by one who is *compos mentis*, which is *contra bonos mores* and which ultimately brings about some form of harm. Quite what is meant by the phrase *contra bonos mores* in law merits deeper consideration, however. As Professor Strauss indicates,[128] it is not to be understood as 'the customs of society or a particular social group', nor indeed 'of all ethical rules prevailing in society'.[129] *Boni mores* is an essentially legal criterion;[130] indeed, it is an essential element of the common law in Romanistic legal systems.[131] Strauss defines *boni mores*, therefore, as 'the juristic notions ('*regsopvattinge'*) of society' and notes that the term is both 'admittedly vague' and 'not expressed in exact rules'.[132] For this reason, the standard of *boni mores* can be compared with the more modern, yet equally vague, notions of 'public policy' or the 'public interest'.[133] Expressed in modern terms, therefore, the essence of *iniuria* can be said to be the occurrence of some wrongful act which causes harm to the victim. In order to be actionable, this wrongful act must be manifestly contrary to public policy or decency and must subjectively hurt the victim.

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[127] Such appears to be the case in modern South African law also, wherein any claimant in an *actio iniuriarum* must establish that they were subjectively affronted by the objectively wrongful conduct of the defendant: See *Delange v Costa* 1989 (2) SA 857 (A), p.862F; *Le Roux v Dey* [2011] 3 SA 274 (CC), para.70. See also Helen Scott, *Contumelia and the South African Law of Defamation* in Eric Descheemaeker and Helen Scott, Iniuria and the Common Law, (Oxford and Portland, Oregon: Hart, 2013), pp.129-133

[128] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179, p.183

[129] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179, p.183

[130] See W. A. Joubert, *Grondslae van die Persoonlikheidsreg* (Balkema, 1953), pp.109, 128; Hendrick J. O. van Heerden, *Grondslae van die Mededingingsreg*, (1963), p.99

[131] W. A. Joubert, *Grondslae van die Persoonlikheidsreg* (Balkema, 1953), p.146

[132] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179, p.183

[133] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179, p.182

The hurt effected by contumelious conduct may be psychological, physical, fiscal or simply emotional. It should be noted that any conduct which is intentionally designed to effect harm to the victim can be inferred to be both contumelious and *contra bonos mores*, but neither the mind-state of the perpetrator nor that of the victim is determinative in establishing that the conduct was *contra bonos mores* in all situations. It is clear that the law regards some hubristic shenanigans as so clearly *contra bonos mores* (or, so contrary to public policy) that the assent of the 'victim' cannot negate the occurrence of wrongdoing.[134] Such, on the face of it, explains the operation of the medical exception within Scots law. Consent does not act as a 'defence' in an *actio iniuriarum*, rather it serves – if at all – as no more than a means of negating the existence of subjective affront only – that is to say, in the civil law, such may preclude an *actio iniuriarum* on the grounds of *volenti non fit iniuria*.[135] It does not serve as a substantive justification for the wrongdoing. At most, it personally bars a potential pursuer from raising a delictual action.[136]

In the criminal law, given that the complainer in any criminal trial is simply incidental to the process and not a party to any action, the lack of subjective affront may be deemed irrelevant if the injurious conduct is so manifestly *contra bonos mores* that prosecution is

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[134] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179; *Smart v HM Advocate* 1975 J.C. 30

[135] Joe Thomson, *Delict,* (Edinburgh: W. Green, 2007) para.11.09

[136] *Volenti non fit iniuria* – as a delictual defence – is distinct from the concept of 'personal bar' (see Elspeth Reid and John Blackie, *Personal Bar*, (Edinburgh: W. Green, 2006), para.2-27) as *volenti* requires no more than an acceptance of risk on the part of the defender. Personal bar, by contrast, 'requires some element of interaction or communication between the parties'; 'the obligant must have been aware of the conduct on which the bar is said to be based'. Thus, in *Le Roux and Ors v Dey* 2010 (4) SA 210 (SCA), for instance, the school principal, in intimating that he was 'prepared to dismiss the episode', would be deemed to have suffered no actionable subjective affront and be personally barred from pursuing a claim. Conversely (and hypothetically) had he and Dr Dey consented, in advance (for whatever reason), to the schoolboy prank, they would have been *volens* and so deemed to have suffered no subjective affront. In any case, the actions of the boys remained (in some measure) objectively wrongful – though they were not sufficiently *contra bonos mores* to merit criminal prosecution, as some forms of *iniuria* might be even in the presence of consent. See Helen Scott, *Contumelia and the South African Law of Defamation* in Eric Descheemaeker and Helen Scott, Iniuria and the Common Law, (Oxford and Portland, Oregon: Hart, 2013), p.119

thought to be in the 'public interest'.[137] Society, not the individual, is said to feel the requisite affront when a manifestly wrongful act occurs.[138] Accordingly, it can be determined that an assault which is not intended to inflict any affront may nevertheless be regarded as criminal, if society as a whole has an interest in proscribing such assaults.[139] The essence of the wrongdoing present in assault is not the unwarranted physical contact – or attempt to effect such – but rather the hubris of the assailant.

III. Consent and Injury

A. Delictual Assault

'Consent' is generally presupposed to be a defence to any action of delictual assault.[140] It is thought trite law that 'the term assault of itself involves the notion of want of consent. An assault with consent is not an assault at all'.[141] As is pointed out in the leading textbook on *Delict*, however, 'although it probably makes very little difference in practice it should be noted that, in principle, consent is not a defence [to assault]. Rather, an absence of consent forms a

[137] In this sense, then, it may be thought that the procedural decision to charge and prosecute the accused 'in the public interest' constitutes an element of the offence itself, however, for such a prosecution to be successful, the court will, of course, have to agree with the judgement of the prosecutor in determining that the conduct of the accused in any instant case is sufficiently *contra bonos mores*. Such is demonstrated by the English case of *R v Wilson* [1997] Q.B. 47: Therein, the prosecution believed that it was in the public interest to prosecute a man who had 'branded' his wife in the course of a sex act, but the court ultimately held that it was 'firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to criminal behaviour' (at p.50). Indeed, the court went so far as to express that they found nothing immoral in Wilson's conduct, stating that 'had it been necessary for us to consider sentence we would have granted the appellant an absolute discharge' (at p.51).

[138] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179, p.182

[139] *Smart v HM Advocate* 1975 J.C. 30

[140] This is true in both the Common law (see John A. Devereux, *Consent as a Defence to Assaults Occasioning Bodily Harm - The Queensland Dilemma* [1987] U. Queensland L. J.. 151) and in Scots law: See *Craig v Glasgow Victoria and Leverndale Hospitals Board of Management* (23 March 1976, unreported); *Thomson v Devon* (1899) 15 Sh Ct Rep 209

[141] See *Schloss v. Maguire* (1897) Q.C.R. 337, p.339. Within the Scottish context, this is echoed in the unreported decision of *Craig v Glasgow Victoria and Leverndale Hospitals Board of Management* (23 March 1976, unreported), of which Professor Blackie remarked that 'the opinions of the court… proceed on an assumption that assault is what is at issue and the extent of the consent given by the pursuer is what has to be determined': John W. G. Blackie, *Scotland*, in E. Deutsch and H. L. Schreiber, *Medical Responsibility in Western Europe: Research Study of the European Science Foundation*, (Berlin: Springer-Verlag, 1985), p.579

part of the definition of the claim or offence'.[142] Such belies the delictual action's connection to the *actio iniuriarum*; as indicated above, if the 'victim' consents to occurrence of the contumelious conduct, they are *volens* and cannot claim to have been affronted by the defender's conduct. Alternatively, they may be deemed to be personally barred from claiming foul play.

The express importance of 'affront' in cases of assault was manifest in the nineteenth century authorities; however, it gradually receded in the course of the 20th century.[143] With that said, since the essence of the delictual action for assault remains 'affront', even if this remains only as an unarticulated undercurrent of the law,[144] it is submitted that the modern nominate Scottish delict of 'assault' continues to stand as a tertiary sub-category of the wider concept of *iniuria*,[145] even if Aquilian loss may also now be claimed in respect of such bodily injury.[146] Thus, it follows that the modern delict can – and ought to be – analysed with reference to the historical understanding of *iniuria*.

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[142] Joe Thomson, *Delict,* (Edinburgh: W. Green, 2007) para.11.09. The absence of consent may be presumed in the absence of evidence from the defender that there was some reasonable belief that the pursuer had consented – such is consistent with the presumption of *animus iniuriandi* in respect of defamation actions: See Kenneth McK Norrie and Jonathan Burchell, *Impairment of Reputation, Dignity and Privacy*, in Reinhard Zimmermann, Kenneth Reid, and Daniel Visser, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, (Oxford: OUP, 2005), p.551. Such circumvents the criticisms of the decision in *Freeman v Home Office* (No 2) [1984] QB 524 and – as defamation is itself a species of *iniuria*, remains consistent with the roots of 'assault' as an *actio iniuriarum*. See also Niall Whitty and Murray Earle, *Medical Law*, (Reissue) in *The Laws of Scotland: Stair Memorial Encyclopaedia*, para.242, wherein it is noted that *'the onus of proof is on the defender to establish that the pursuer consented'.*

[143] See Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.01

[144] See the discussion in *Rutherford v Chief Constable for Strathclyde Police* 1981 SLT (Notes) 119, wherein the potential for additional *solatium* in respect of an otherwise *Aquilian* claim for damages arising from an assault was recognised. See also T. B Smith, *A Short Commentary on the Laws of Scotland*, (Edinburgh: W. Green, 1962), p.650

[145] As it did on its emergence as a nominate delict in the 19th century: See John Blackie, Unity in Diversity, in Niall R. Whitty and Reinhard Zimmermann, Rights of Personality in Scots Law: A Comparative Perspective, (Dundee: DUP, 2009), p.103

[146] Brian Pillans, *Delict: Law and Policy,* (5th Ed.) (Edinburgh: W. Green, 2014), para.6-13

Indeed, the leading text on *Delict* describes the modern action for delictual assault as an *actio iniuriarum*.[147] This is so on the basis that 'the *actio injuriarum* root of Scots law infuses the delict [assault] as much as any development of the *lex Aquilia*'[148] and, properly so termed, assault remains a form of 'real injury' in both civil[149] and criminal law.[150] In Walker's *Law of Delict*, assault is described as 'a real injury, tending to the disgrace of the person assaulted, and the worst kind of *injuria*, closely akin to defamation'.[151] The salient element of any delictual assault is not, therefore, physical touching or wounding, or any attempt to effect such, but rather the insult that accompanies any intentional or reckless (i.e., hubristic) invasion of the victim's bodily integrity.[152]

Assault has been described as an intentional delict,[153] but only insofar as the fact that the negligence of a defender will not give rise to a claim of assault.[154] In *Reid v Mitchell*,[155] wherein it was recognised that the defender 'probably had not the slightest intention of injuring anyone',[156] Lord Young expressed the view that 'if a man playfully attacks another to make him engage in sport, I am of the opinion that that is an assault';[157] this opinion was further vindicated by the court in *Wilson v Exel UK Ltd.*,[158] wherein a form of 'horseplay' was

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[147] Joe Thomson (Ed.), *Delict*, (Edinburgh: W. Green and Sons, 2007), para.11.07

[148] Brian Pillans, *Delict: Law and Policy,* (5th Ed.) (Edinburgh: W. Green, 2014), para.6-13

[149] David M. Walker, *The Law of Delict in Scotland,* (2nd Ed.) (Edinburgh: W. Green, 1981), p.488

[150] See Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) (Edinburgh: W. Green, 2017) para.33.01. Scottish criminal law remains largely uncodified and most serious crimes (with the exception of rape, since the passing of the Sexual Offences (Scotland) Act 2009) remain governed by the common law.

[151] David M. Walker, *The Law of Delict in Scotland,* Vol. II (Edinburgh: W. Green, 1966), p.494; David M. Walker, *The Law of Delict in Scotland,* (2nd Ed.) (Edinburgh: W. Green, 1981), p.488

[152] See David M. Walker, *The Law of Delict in Scotland,* (2nd Ed.) (Edinburgh: W. Green, 1981), p.488, fn.15

[153] Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.10

[154] Tellingly, 'assault' is not afforded treatment by Norrie in his elucidation of the intentional delicts known to Scots law: See Kenneth McK. Norrie, *The Intentional Delicts* in Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland,* (Oxford: OUP, 2000), pp.477-516

[155] (1885) 12 R. 1129

[156] *Per* Lord Justice Clerk Moncrieff; *Reid v Mitchell* (1885) 12 R. 1129, p.1131

[157] *Reid v Mitchell* (1885) 12 R. 1129, p.1132

[158] 2010 SLT 671

nevertheless deemed actionable as assault.[159] These cases, concerned, as they are, with 'injury' in the modern sense of that term (and termed 'actual' assaults by Walker),[160] do not have their root in the Romanistic *actio iniuriarum*, but are rather cases of Aquilian liability.[161] The 'injuries' suffered by the pursuers in these cases are forms of *damnum*, thus any *injuria* within the context of these discussions must be understood as Aquilian in substance and in root. Damages are the appropriate form or reparation in cases of this kind; as these cases are not concerned with contumelious wrongdoing – and so not with 'assault' in its sense as a species of 'real injury' – *solatium* is not appropriate remedy.[162]

The category of 'indirect assault' described by Professor Walker – and, indeed, some elements of what he termed 'notional assaults'[163] – more clearly indicate the connection between the modern delict of assault and the historical crime/delict of injury.[164] As restated and emphasised by Professor Reid, 'it is doubtless equally an assault deliberately to do any act… which results in the person's being affronted **or** put in a state of alarm, **or** physically hurt'.[165] Though Reid records the fact that authorities for assault based on affront are slender in Scotland,[166] she likewise notes that some cases such as *Henderson v Chief Constable of Fife*,[167] wherein a prisoner was subjected to an invasive strip-search, would have been 'more logically categorised as infringing privacy alone' and so actionable on grounds of an *iniuria*-based claim

[159] *Wilson v Exel UK Ltd* 2010 SLT 671, para.10

[160] David M. Walker, *The Law of Delict in Scotland,* (2nd Ed.) (Edinburgh: W. Green, 1981), p.491

[161] The same is true of the recent case of *Somerville v Harsco Infrastructure Ltd* [2015] SCEDIN 71

[162] The pursuer in *Reid v Mitchell* (1885) 12 R. 1129 sought damages and *solatium*, but was awarded only damages, with the interlocutor pronounced making no mention of *solatium*: (1885) 12 R. 1129, p.1132

[163] See Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.18

[164] See David M. Walker, *The Law of Delict in Scotland,* (2nd Ed.) (Edinburgh: W. Green, 1981), p.492

[165] See Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.19, citing David M. Walker, *The Law of Delict in Scotland,* (2nd Ed.) (Edinburgh: W. Green, 1981), p.492 (Reid's emphasis).

[166] Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.19

[167] 1988 SLT 361

of assault,[168] rather than on the authority of the English case of *Lindley v Rutter*[169] on which the decision in *Henderson* ultimately turned.[170]

That the decision in *Henderson* was founded on English precedent rather than the principles of Scots law can be explained by the fact that Scotland's judiciary was not liable to recognise the importance of the Romanistic *actio iniuriarum* in the 20th century. Indeed, it has been suggested that 'it is questionable whether [the *actio iniuriarum*] *offers a sustainable model for the development of personality right protection'*.[171] Since the advent of the 21st century, however, there has been some indication that this the judiciary is more willing to entertain arguments predicated on the occurrence of *iniuria*.[172] It has been suggested that this willingness to entertain arguments pertinent to 'dignity' has arisen as a result of the 'bringing home' of human rights which occurred by the introduction of the Human Rights Act 1998.[173] In light of this renewed willingness to consider the *actio iniuriarum* as a mechanism to afford redress to Scottish litigants,[174] it is submitted that were a case akin to *Henderson* to once again call before the Scottish courts, the judiciary might be more likely to entertain a claim founded on historical Scottish principles rather than comparatively recent English precedent.

Such, of course, is mere speculation. With that said, whether or not the *actio iniuriarum* roots of the modern delict of assault attain juridical recognition is largely immaterial; the salient elements of delictual assault remain practically tied to the essential elements of 'real injury' as

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[168] Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.20; para.17.08

[169] [1981] QB 128

[170] *Henderson v Chief Constable of* Fife 1988 SLT 361, p.637

[171] See Elspeth C. Reid, *Protection of Personality Rights in the Modern Scots Law of Delict*, in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.305

[172] See, e.g., the discussion in *Martin v McGuinness* 2003 SLT 1424

[173] Brian Pillans, *Delict: Law and Policy,* (5th Ed.) (Edinburgh: W. Green, 2014), para.7-01; Kenneth McK. Norrie, *The Scots Law of Defamation: Is There a Need for Reform? i*n Niall R. Whitty and Reinhard Zimmerman, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), pp.433-451

[174] See, also, the discussion in Jonathan Brown, *Revenge Porn and the Actio Iniuriarum: Using 'Old Law' to Solve 'New Problems',* [2018] Leg. Stud. 396

that term was understood by the Institutional writers, whether or not such is juridically articulated. Thus, a delictual assault in Scotland is constituted by the occurrence of some contumelious action designed – or manifestly likely to – harm the *corpus* of the victim. Indeed, *per* Lord Reed's opinion in *Rorrison v West Lothian College*,[175] it seems that the door remains open for modern Scots law to recognise the actionability for an assault on a person's *dignitas*, or wider *existimatio*, as well as their *corpus*.[176]

The action constitutive of assault must be subjectively and objectively wrongful to be legally actionable; that is, the victim must feel that they have been assaulted by the defender's conduct and the defender's conduct must be demonstrably *contra bonos mores*. In delict, the former is demonstrated by the simple fact of the pursuer having raised the claim; the latter is, practically, the only point at issue in proof. Should it be deemed that the defender's conduct is not *contra bonos mores*, the pursuer will have no claim, however terribly that they themselves feel they have been assaulted. The standard of *boni mores*, as a functional analogue to the modern concept of 'public policy' is variable and capable of rapid change and adaptation. Conduct which might have been considered to contravene public policy a mere decade ago may no longer be seen to do so;[177] likewise, an action previous perceived as 'innocent' may now be regarded as an egregious wrong.[178] This statement is as true in respect of criminal assault as it is in respect of delictual assault.

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[175] 2000 SCLR 245, at p.250

[176] See the discussion in Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.23. Lord Reed's comments may be read narrowly, as they relate only to the specific pleadings and make no comment on the possibility of a positive action for redress in the event of intentionally caused psychiatric injury, however in light of Macaulay QC's observation that 'in principle solatium for "hurt feelings" caused by affront based upon the actio injuriarium is a different animal to the solatium that can be awarded to a claimant for physical or psychiatric injury. Prima facie the threshold for recovery for hurt feelings is lower than that for psychiatric injury', it is submitted that a wider reading is to be preferred: See *Stevens v Yorkhill NHS Trust* 2006 SLT 889, para.63

[177] See the discussion *infra*.

[178] Consider, for example, the hypothetical 'outing' of a homosexual in public life. Throughout the 20th century, it was regarded as a matter of public interest that the identities of 'closeted' individuals should be made known in

B. Criminal Assault

The *actio iniuriarum* roots of the civil action for assault are now obscured in Scots law, but the connection between the criminal conception and the notion of *iniuria* is even less clear. Rather than 'affront', the salient element of a criminal assault is now generally understood to be an 'attack', whether that attack proves effective (i.e., whether it succeeds in harming the victim) or not.[179] Nevertheless, as the law pertinent to assault has never been codified in Scotland, it is not inaccurate to continue to describe the crime as a species of 'real injury',[180] albeit it one which maintains a place of prominence in that taxonomical family.[181] Indeed, criminal assault is expressly recognised as a form of real injury by the leading textbook on Scottish criminal law,[182] although it is a form which is said to be distinguishable from other forms of real injury by the requirement of an 'attack' (broadly defined).[183] It has, thus, long been unnecessary to aver that the occurrence of an assault was wrongful, as such is inherent in the very notion.[184]

As noted above, the term 'assault' was not known to the early Scottish Institutional writers. Until the end of the 17th century, the word possessed only the non-technical meaning of an organised attack on a building.[185] Jurists including MacKenzie, Bayne and Forbes do

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the media. By the turn of the century, however, public opinion had manifestly turned against the press as tabloid readers had come to *'find unwarranted intrusion offensive'*: See http://news.bbc.co.uk/1/hi/uk/212737.stm

[179] See *Lord Advocate's Reference (No.2 of 1992)* 1993 JC 43

[180] A. M. Anderson, *The Criminal Law of Scotland*, (Edinburgh: Sweet & Maxwell, 1892), p.81

[181] Indeed, the index of Alison's *Practice* redirects the reader to the heading of 'assault' under the entry for 'real injury' – see Archibald J. Alison, *Practice of the Criminal Law of Scotland,* Vol. II, (Edinburgh: Bell and Bradfute, 1833), p.715

[182] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) (Edinburgh: W. Green, 2017) para.33.01; see also the discussion in Timothy H. Jones and Ian Taggart, *Criminal Law*, (6th Ed.) (Edinburgh: W. Green, 2015) para.9-04

[183] See Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) (Edinburgh: W. Green, 2017) para.33.01

[184] See *Wilson v Bennett* (1904) 6 F 269

[185] John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.53

employ the term when discussing the criminal law of 'injury', but only in the context of the crime/delict 'hamesucken'[186] which, as discussed above, existed as a sub-category of 'real injury'. 'Of all real injuries', according to Bayne, this nominate wrong 'is punished with the greatest severity' as the delict is 'atrocious' by dint of its being committed by 'assaulting a man in his own house'.[187] Since the attack on the pursuer in his home (that is, in a building of some kind) is central to this species of injury, the jurists' use of the term 'assault' is potentially ambiguous.[188] As the Edinburgh Justiciary court had begun to employ the term 'assault' as a synonym for an 'invasion of the person'[189] from as early as 1667,[190] it may reasonably be concluded that by the beginning of the 18th century the word carried with it some connotation of an 'attack' on a person, in its modern sense.

In any case, it is clear that though the term might have been used by lawyers and jurists throughout the 18th century,[191] it appeared only as a descriptive and non-technical term.[192] 'Assault' was not a crime/delict in its own right and it did not come to be regarded as such until the turn of the 19th century.[193] 'Notwithstanding the development of "assault" as an apparent nominate delict [and crime], certain aspects continued to reveal the *ius commune* heritage [of the wrong].[194] Although limited to occasions in which there has been an 'attack', 'the crime of

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[186] Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730), p.182; William Forbes, The Institutes of the Law of Scotland, Vol. II (Edinburgh: John Mosman and Co, 1730), p.130

[187] Alexander Bayne, *Institutions of the Criminal Law of Scotland*, (Edinburgh: Ruddimans, 1730), p.182

[188] See the discussion in John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.53

[189] See the discussion in John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.53

[190] Thus pre-dating the publication of the first edition of MacKenzie's *Matters Criminal* by some three years.

[191] See, e.g., *Murphey* (1732) reported in J. Imrie, *The Justiciary Records of Argyll and the Isles (1705-1742)* (Edinburgh: Stair Society, 1969), p.236; Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: With Observations on the Agreement or Diversity between them and the Laws of England, in four books, after the General Method of the Viscount of Stair's Institutions,* (Edinburgh: R. Fleming, 1751), Book I, Tit. X, 29

[192] John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.104

[193] Hume, *Commentaries*, vol. I, p.327

[194] John Blackie, *Unity in Diversity,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), pp.108-109

assault at common law covers a very wide spectrum of harmful or alarm-producing behaviour'.[195] MacDonald emphasises that the 'assault' need not wound the victim at all.[196] The requisite level of 'intention' necessary for a criminal assault is, however, higher than the standard for delictual assault. While the latter must be read broadly, as any deliberate conduct leading to harm (physical, psychological or to feelings),[197] in criminal law the *mens rea* of assault is 'evil intention',[198] generally understood as an intention to effect bodily injury (in its modern sense) for no legitimate purpose.[199] This means that, for there to be a criminal 'assault' in law, the accused must have 'attacked' the victim while demonstrating a manifest intention to do them unwarranted bodily harm.[200]

Unlike in civil law, 'consent' is not generally conceived of as a defence to criminal assault,[201] unless there is demonstrably no intention to cause physical wounds (or 'injury', in its modern sense of 'wounds').[202] Prior to the latter half of the 20th century, the claim that consent was an absolute defence was arguable;[203] the first edition of Gordon's *Criminal Law* noted that at the time of its publication there had been 'hardly any consideration given in Scotland to the position of consent as a defence to a charge of assault'[204] and, although English legal scholars had, at this time, critically engaged with the question, it is notable that they had

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[195] Timothy H. Jones and Ian Taggart, *Criminal Law*, (7th Ed.) (Edinburgh: W. Green, 2018) para.9-04

[196] See John H. MacDonald, *A Practical Treatise on the Criminal Law of Scotland,* (5th Ed.) (Edinburgh: W. Green 1948), p.115

[197] Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law,* (Edinburgh: W. Green, 2010), para.2.10

[198] *HM Advocate v Phipps* (1905) 4 Adam 616, p.630 (*per* Lord Ardwall).

[199] See Timothy H. Jones and Ian Taggart, *Criminal Law*, (7th Ed.) (Edinburgh: W. Green, 2018) para.9-16

[200] *Smart v HM Advocate* 1975 J.C. 30, p.33; *Lord Advocate's Reference (No.2 of 1992)* 1993 JC 43, p.53C-D *McDonald v HM Advocate* 2004 SCCR 161, para.23

[201] See Timothy H. Jones and Ian Taggart, *Criminal Law*, (7th Ed.) (Edinburgh: W. Green, 2018) para.9-19

[202] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* Vol. II (4th Ed.) (Edinburgh: W. Green, 2017) para.33.38

[203] The 19th century case of *Fraser* (1847) Ark. 280 appeared, in fact, to suggest that consent did provide a defence to a criminal assault; see p.302, *per* Lord Mackenzie.

[204] Gerald H. Gordon, *The Criminal Law of Scotland,* (Edinburgh: W. Green, 1967), p.773

not achieved *'any definite result'*.[205] Scots law was, however, clarified by the 1975 case of *Smart v HM Advocate*,[206] wherein the court definitively held that consent was no defence to the crime of assault where both the *mens rea* and *actus reus* of the crime could be demonstrated.[207]

The case of *Smart* concerned two individuals who elected to partake in a 'square go'; common Scottish parlance for a 'fair fight' (or, at least, a fight with no recourse to weapons).[208] The panel (i.e., the accused and appellant) was apprehended and charged, on indictment, with assaulting the other party to the fight. It was argued, at first instance and on appeal, that the panel could not be guilty of the crime of assault as both he and the victim had consented to the risk of bodily harm. The court rejected this argument with reference to the opinion of Lord Justice-Clerk Cooper, who had held in the case of *H.M Advocate v Rutherford* that consent was no defence to a charge of murder.[209] *Per curiam*, the court posed the question: 'is there any justification for applying this line of authority to serious assaults but not to minor assaults?',[210] before quickly answering that 'in our opinion there is not'.[211]

The connection between the court's judgment and Strauss' conception of *boni mores*,[212] as the standard to be applied in any case predicated on *iniuria*,[213] may be noted in the final paragraph of the opinion in *Smart*: 'it is in the public interest that it should be decided and made known that consent to a "square go" is not a defence to a charge of assault based on that

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[205] Gerald H. Gordon, *The Criminal Law of Scotland,* (Edinburgh: W. Green, 1967), p.773

[206] 1975 J.C. 30

[207] *Smart v HM Advocate* 1975 J.C. 30, p.33

[208] The term has made its way into the Collins English dictionary: See https://www.collinsdictionary.com/dictionary/english/square-go

[209] See 1947 J.C. 1, p.6; the court in *Smart* also made reference to the unreported case of *Purves* (High Court, Edinburgh, February 1964), in which the court affirmed Lord Cooper's opinion in respect of assault to the danger of life with a knife.

[210] *Smart v HM Advocate* 1975 J.C. 30, p.33

[211] *Smart v HM Advocate* 1975 J.C. 30, p.33

[212] See *supra*.

[213] S. A. Strauss, *Bodily Injury and the Defence of Consent,* [1964] S. African L. J. 179, p.183

agreed combat'.[214] Thus, the continuing influence of the historic *actio iniuriarum* can be seen in respect of the modern crime of assault; as in the law of delict, the standard to be used in ultimately determining whether or not the wrong has occurred boils down to considerations of public policy.[215] Consent is relevant only insofar as public policy recognises its potential to turn wrong into right; some actions might be considered *contra bonos mores* (and so 'assault') only in the absence of consent, while others will be considered *contra bonos mores* (and so 'assault') even where consent is present. This, it is submitted, rationally justifies the existence of the 'medical exception' within Scots law.

C. The Medical Exception

As indicated above, on almost any occasion in which a patient truly and knowingly provides consent in advance of a medical procedure,[216] they will be unable to raise a delictual claim of assault. This is not, however, the case because the operating physician can raise a 'defence' of consent, rather it is the case because, in the presence of consent, the patient is barred from claiming that they were subjectively affronted by the physicians conduct. It should be noted, here, that the medical operation need not be 'legitimate' for this form of bar to the claim to arise. Indeed, the operation of this doctrine is not a proper example of the 'medical exception' at all; rather, the proscription of the delictual claim arises by operation of the familiar rule *volenti non fit injuria*.

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[214] *Smart v HM Advocate* 1975 J.C. 30, p.34

[215] *Lord Advocate's Reference (No 2 of 1992)* 1993 JC 43 does not mention 'public policy' directly and the reasons given as to why, for instance, the physical contact necessarily involved in the course of a game of rugby does not constitute 'assault' are not analysed in detail. It is simply noted that 'for conduct in a sporting game to be criminal, it would require to be shown to be outwith the normal scope of the sport' (citing Butcher v. Jessop 1989 J.C. 55). This analysis tracks with the analysis contained within this article, however; playing a recognised contact sport within the rules is justifiable, breaching those rules to the injury of another is *contra bonos mores* and so potentially 'assault'.

[216] Though, in 2014, it was justifiably said that the doctrine of 'informed consent' has not yet found its way into Scots law (See Brian Pillans, *Delict: Law and Policy,* (5th Ed.) (Edinburgh: W. Green, 2014), para.6-05), and indeed the American understanding of that term has not, it is generally been thought that a patient must be thought to understand the nature of the procedure to which they assent in order to have properly 'consented' to the treatment in law: See Sheila A. M. McLean, *Autonomy, Consent and the Law*, (London: Routledge, 2009)

The 'medical exception', properly so termed, as it can be said to operate in the civil law, applies only in cases in which the patient did not consent to what was otherwise a legitimate medical procedure.[217] It is trite to say that the actions of the physician, in conducting such an operation, are deliberate; thus, in delict, the requirement for 'intention' on the part of the 'wrongdoer' is demonstrated in any case of surgery.[218] The real question for the court, should a patient sue a physician, is whether or not the actions of the physician, in performing the operation, could be said to be *contra bonos mores* (i.e., the question is whether or not the occurrence of the operation itself was against public policy). If public policy was contravened by the physician's actions, say by the physician subjecting an unconscious patient to an untested and novel means of treatment, the patient could legitimately raise an *actio iniuriarum* (likely in the form of a claim for assault), otherwise, since the physician's actions were not *contra bonos mores*, there could be no delictual claim and thus the medical practitioner might be said to have been exempted from liability.

Since modern *mores* (i.e., public policy) regard bodily invasions, in the absence of consent, as more universally repugnant than such would have been thought in bygone days,[219] there is limited scope for the application of the exception in the 21st century. The presence of the patient's consent tends to be necessary in order to ensure that the operation is seen, in law, as 'legitimate'.[220] While, at one time, the judiciary might have been wary of interfering in

[217] E.g., it might be said to apply in the case of an unconscious patient who, after suffering an accident, was rushed to hospital while unconscious and subjected to an emergence operation.

[218] Practically, however, cases of this kind are ordinarily dealt with by means of negligence claims, given the prominence which negligence has obtained within both the Scots law of Delict and the Common law of tort. This practical consideration does not, however, detract from the theoretical discussion contained in this article.

[219] The principle of 'autonomy' has now superseded the previous paternalistic approach to medicine; thus, as patients are generally perceived to possess a robust 'right to autonomy', the General Medical Council recognises that in straightforward cases, individuals have the right to determine their own 'best interests' and so they should not be subjected to any medical treatment without their express consent: See GMC, *Confidentiality: Draft Guidance for Consultation,* (2009)

[220] See Margaret Brazier and Sara Fovargue, *Transforming Wrong into Right: What is 'Proper Medical Treatment'?*, in Sara Fovargue and Alexandra Mullock, *The Legitimacy of Medical Treatment: What Role for the Medical Exception,* (London: Routledge, 2016), pp.13-14

decisions made by doctors,[221] as patients are now conceptualised as persons – indeed, as consumers – holding rights and exercising choice,[222] it follows that to rob such persons of choice is regarded as a more egregious wrong – and consequently more contrary to public policy[223] – than to take an action which, while in their best interests, they have not consented to.[224] Thus, there is more scope for individuals to pursue a claim of delictual assault, or indeed negligence, in respect of operations which occurred without their express consent.

The absence of an 'attack' in medical operations may be said to preclude a charge of criminal assault,[225] as can the absence of the *mens rea* of 'evil intent', but this does not adequately explain why a surgeon or physician may not be convicted if charged with effecting some other form of real injury. As noted in Gordon, 'all intentional infliction of physical injury is criminal'.[226] The crime of 'real injury', of which assault is a species, is, like its Romanistic legal ancestor *iniuria realis*, both flexible and broad[227] and has been held to cover matters as varied as supplying 'glue-sniffing kits' to children[228] as well as torture[229] and other forms of

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[221] See the comments of Lord Bingham (then Master of the Rolls) in *Frenchay NHS Trust v S* [1994] 2 All E.R. 403, p.411; see also the discussion in Margaret Brazier and José Miola, *Bye-Bye Bolam: A Medical Litigation Revolution?* [2000] Med. L. R. 85, p.93

[222] *Montgomery v Lanarkshire Health Board Scotland* 2015 S.C. (U.K.S.C.) 63, para.75; this case, though Scottish in origin, has exercised a notable influence on the English law pertinent to medical treatment and assault: See Emma Cave*, The Ill-Informed: Consent to Medical Treatment and the Therapeutic Exception* [2017] Common Law World Review 140. On the present analysis, the case may be read as redefining (in part) what constitutes *boni mores*.

[223] See also *Chester v Afshar* [2005] 1 A.C. 134, para.56 where it was said that *'the function of the law is to protect the patient's right to choose'* (*per* Lord Hope of Craighead)

[224] Indeed, it has always been open for a mentally competent adult to refuse medical treatment: See *Re T (Adult)* [1992] 4 All ER 649 ; consider, also *Williamson v East London and City Health Authority* [1998] 41 BMLR 85

[225] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) (Edinburgh: W. Green, 2017) para.33.39

[226] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) (Edinburgh: W. Green, 2017) para.33.46

[227] *Per* Hume, *'if it amount to a real injury, it shall be sustained to infer punishment… no matter how new or how strange the wrong'*: Hume, i, pp.327–328

[228] See *Khaliq v HM Advocate* 1984 J.C. 23

[229] Known in such circumstances as 'stellionate': John H. A. MacDonald, *A Practical Treatise on the Criminal Law of Scotland,* (Edinburgh: William Paterson, 1867), p.186; Archibald J. Alison, *Principles of the Criminal Law of Scotland,* Vol. I, (Edinburgh: Bell and Bradfute, 1832), p.196, though *'this term is no longer in use'*: See *Principal Reporter v N* 2014 G.W.D. 30-592, para.189

direct physical wounding.[230] In seeking to justify why 'in the case of surgical operations consent is a defence [to assault and other forms of real injury] even where the injuries are likely to cause danger to life', Gordon and his later editors were unable to state with certainty the legal reason that such actions gave rise to no criminal liability, relying instead on a probability assessment.[231] The standard of probabilities has no place in criminal law, whether in proof or in the designation of crimes, however, and a more intellectually satisfactory rationale for the preclusion of criminal liability is required, particularly as it may be difficult to argue that *all* medical procedures are carried out for the benefit of the patient.

As in delict, because roots of 'assault' and 'real injury' in criminal law lie in the *actio iniuriarum*, the existence of the 'medical exception' can be justified on grounds of public policy. The law does not regard a competent physician appropriately discharging their duty to be acting *contra bonos mores* and so it follows that no physician who conducts a legitimate medical operation can be liable for assault or effecting real injury. Indeed, in classical terminology, since the physicians' actions cannot be said to be *contra bonos mores*, no 'injury' is inflicted to the patient at all. Thus, it has been demonstrated that the 'medical exception' need not be justified by axioms or by reference to assessment of probabilities, but rather that there remain good taxonomical reasons in Scots law precluding criminal liability in cases of legitimate medical treatment. Expressed in such terms, it seems that the medical exception is not, in fact, an 'exception' at all. There is no general rule that to cause bodily wounds, in the absence of affront, is a civil wrong or a crime; rather, it appears that the 'exception' arises as a consequence of the ordinary rules of law underpinning the Scottish conceptions of 'assault' and 'real injury', rather than a *sui generis* deviation from those usual rules. Such does not rely on any differentiation between major and minor injuries, nor does it rely on the consent of the

[230] A. M. Anderson, *The Criminal Law of Scotland*, (Edinburgh: Sweet & Maxwell, 1892), p.81

[231] Fiona Leverick and James Chalmers, *Gordon's Criminal Law of Scotland,* (4th Ed.) (Edinburgh: W. Green, 2017) para.33.39 - see fn.10 *supra*.

patient;[232] such also appropriately – if not satisfactorily[233] – affords guidance in respect of what Lewis termed 'new and controversial medical procedures'.[234]

As Lewis notes, 'formal legal change – judicial decisions or legislation – on new and controversial medical procedures is rare in Common law jurisdictions'.[235] So, too, has this been rare in the mixed jurisdictions of Scotland and South Africa. Often, in such jurisdictions, new procedures come to be regarded as legitimate implicitly, by way of the provision of state funds for some or all patients,[236] but this is not necessarily sufficient.[237] It is, however, clear that the change often arises 'informally'. Consequently, it appears that the impetus for informal change, as understood by Lewis, is driven by changing *mores*. The allocation of state funding for the purposes of providing new or controversial medical procedures is but one way in which changing *mores* might implicitly be recognised within a state; consideration of empirical research,[238] a judicial sense of public opinion[239] and, indeed, the judges' own experience and interpretation of the conduct in question might also lead to the legitimation of controversial forms of treatment.[240]

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[232] Neither of which, *per Smart*, are relevant to a charge of criminal assault in Scots law: See *Smart v HM Advocate* 1975 J.C. 30, pp.33-34

[233] The vagueness of the discussed conception of *boni mores* or 'public policy' is accepted to be problematic, as vagueness does not lend itself to good guidance. It is, however, submitted that vague guidance is better than no, or erroneous, guidance.

[234] Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355, p.355

[235] Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355, p.365

[236] Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355, p.365

[237] Consider, for instance, the fact that abortion, in Scotland, was (indeed, remains) a common law crime, yet in 1963 (and prior to the introduction of the Abortion Act 1967) 2% of women received state-funded abortions: See Jonathan Brown, *Scotland and the Abortion Act 1967 – Historic Flaws, Contemporary Problems*, [2015] Jur. Rev. 135, p.136

[238] Although it has been noted that *'judges in Ireland and Britain are less open to considering relevant empirical research than their peers elsewhere'*: See Mark Coen and Imogen Jones, *Evidence, Advocacy and the Social Sciences*, [2018] International Journal of Evidence & Proof 189, p.189

[239] See the discussion in Malcolm Langford and Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, [2018] European Journal of International Law 551, pp.561-562

[240] See *Montgomery v HM Advocate* 2003 1 AC 641, p.674 (*per* Lord Hope)

As the determination of *mores* rests entirely in the hands of the judiciary, the determination that the medical exception is most rationally conceptualised as an exercise of judicial discretion in applying public policy may be considered problematic by those who agree with the widespread criticism of the place of public policy in courtroom practice. The present piece, however, has sought only to present an analysis of how the medical exception operates at present in Scots law; any comment on the appropriateness, or otherwise, of this understanding is beyond the scope of this article.

Within the context of the 'exception', therefore, consent is no more than one of but many doctrinal working tools which can be employed to turn 'wrong' into 'right', as a matter of public policy. Indeed, as (extra-juridically) expressed by Lord Atkin[241] and Glanville Williams,[242] within the context of the medical exception *'one asks whether the patient's consent is consistent with public policy'*.[243] If public policy determines that the patient's consent nullifies the occurrence of 'injury', then no crime nor civil wrong will have been committed. Conversely, if the operation is deemed to be beyond the bounds of acceptable medical practice as a matter of public policy, the physician will be liable in criminal for performing the operation even if consent has been obtained.[244]

[241] Lord Justice Atkin, in response to a paper read by Lord Riddell, *The Legal Responsibility of the Surgeon* (1924-1925) 19 Transactions of the Medico-Legal Society 83, Discussion pp.93-97

[242] Glanville Williams, *The Sanctity of Life and the Criminal Law,* (London: Faber and Faber, 1958), p.102

[243] See Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355, pp.357

[244] Consider, for example, the practice of female genital mutilation. Even in the absence of specific legislative prohibition (as has been effected throughout England and Wales by the Female Genital Mutilation Act 2003 c.31) it is likely that such a procedure would be deemed *contra bonos mores* (i.e., against public policy) even if performed by a licenced medical practitioner with the consent of their patient.

Public policy may also, however, deem the consent of the patient irrelevant,[245] or hold that it has not been (or cannot be),[246] as a matter of law, properly given.[247] In each of these circumstances, in spite of the absence of patient consent, the physician's conduct may remain lawful.[248] Thus, it follows that not only can the 'medical exception' not be justified by reference to 'consent' in the Common law, but that 'consent' cannot be regarded, as has hitherto been contended,[249] to be a prerequisite for the operation of the exception. 'Consent' is only relevant to the medical exception insofar as it is deemed possible to render conduct *contra bonos mores* ultimately *boni mores* and there are other legal pathways which might be employed to achieve this objective.

IV. CONCLUSION

Ultimately, from the above discussion it is clear that the 'medical exception' cannot, in fact, be termed an 'exception' within the context of Scots law as it does not operate as an exception to any general rule, but rather exists as a consequence of the general rule that invasions of bodily integrity must be juridically deemed *contra bonos mores* in order to be actionable in civil or criminal law. As Scottish criminal law remains largely governed by common law rules, and so principles of *ius commune* jurisprudence, it appears that there is no general rule that the deliberately inflict wounds is to commit a crime or civil wrong. Rather, for such conduct to be criminal or delictual, it must be 'injurious' in the classical sense; that is,

[245] See, e.g., *Marshall v Curry* [1933] 3 DLR 260, but contrast this with the decision in the later case of *Williamson v East London and City Health Authority* [1998] 41 BMLR 85. It is here submitted that the difference in the decisions made in these cases arose as a result of changing *mores.*

[246] As in the case of a non-Gillick competent child: See *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] AC 112

[247] See the discussion in G. T. Laurie, S. H. E. Harmon and G. Porter, *Mason and McCall Smith's Law and Medical Ethics,* (10th Ed.) (Oxford: OUP, 2016), ch.4

[248] See, e.g., *Re M B* (Medical Treatment) [1997] 2 F.L.R 426

[249] See Penney Lewis, *The Medical Exception,* [2012] Current Legal Problems 355, pp.357-358

it must be deliberate conduct which is manifestly *contra bonos mores* (that is, contrary to public policy).

This is the case as a result of Scotland's institutional connection to the Romanistic *actio iniuriarum*. In Scottish civil law, the action for delictual assault remains an *actio iniuriarum* and in criminal law 'assault' is a species of 'real injury' and so retains a connection to the institutional, and therefore Roman, concept of *iniuria*. As a physician who carries out a 'legitimate' medical procedure cannot be said to have engaged in injurious conduct, they cannot logically be prosecuted, or held liable in civil law, for performing that procedure. As such, without reference to axioms or probability assessments, nor to any suggestion that the medical exception might be *sui generis,* the existence of the 'medical exception' within Scots law is both rationalised and explained.

The standard of *boni mores* is admittedly vague, but – as indicated by Strauss – it is no more or less vague than the generally accepted references to 'public policy'. Indeed, Strauss notes that the standard of *boni mores* and considerations of public policy might be equated; conduct which is *boni mores* is consistent with public policy, conduct *contra bonos mores* contravenes it. It is consequently difficult to determine whether or not a new or controversial medical procedure might be legitimately carried out in law in the absence of judicial direction. Though this is problematic, it is ultimately no different from the position in respect of any legal problem which turns on juridical considerations of public policy, such as the extension of the principles of vicarious liability. Accordingly, despite some suggestions to the contrary, it must be concluded that 'consent' is not as central to the 'medical exception' as is typically thought; rather, 'consent' serves as but one of many ways in which conduct which would otherwise contravene public policy might be deemed not to do so.

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