

BOOK REVIEW

RIGHTS OF PERSONALITY IN SCOTS LAW: A COMPARATIVE PERSPECTIVE

Niall R Whitty and Reinhard Zimmermann (eds)

Dundee: Dundee University Press, 2009, 614 pp, £50, ISBN 978-1-84586-027-1

In 2004 Dr and Mrs Murray were walking down an Edinburgh street with their young son when a member of the paparazzi drove up in a car and took a number of photographs of the family. One of those photographs was subsequently published in the *Sunday Express*. Whilst Mrs Murray, aka JK Rowling, was no doubt growing accustomed to seeing her picture in the paper, she and her husband drew the line at the paparazzi taking photographs of their son. They successfully sued on their child's behalf for breach of privacy. All well and good, but the concern for Scots lawyers was that the Murrays sued in London despite the breach of privacy occurring just around the corner from the Court of Session in Edinburgh. The time was ripe for a review of the Scots law of personality and, in particular, the protection afforded to rights of privacy.

In 2006 Lord Hope welcomed judges, legal practitioners and academic lawyers to a conference at Strathclyde University to discuss rights of personality in a comparative context. The papers given at that conference form the basis of the twelve essays that make up this work. The result is a fascinating survey of personality rights in common law, civilian and mixed legal systems.

As the reader of this work quickly discovers, the category of personality rights is a large one. Personality rights protect “who a person is rather than what a person has” and extend to attributes such as a person's dignity, bodily integrity, autonomy, liberty, reputation, privacy, name, voice and image. The study of personality rights requires a multi-disciplinary approach and there are contributions in this work from the fields of legal history, human rights law, medical law, defamation, delict, and intellectual property.

There are three key themes. The first is how to develop the Scots law of privacy; the second is the extent to which a “publicity right” should be recognised and protected; and the third is whether Scots private law should develop a systematic doctrine of personality rights. The imperative for looking at these issues is two-fold. Firstly the enactment of the European Convention of Human Rights into UK law by the *Human Rights Act 1998* requires the courts to ensure protection of an individual's fundamental rights not only against intrusions by organs of the state but also against impairment by private persons. Secondly the rise of the cult of celebrity means that the courts need to provide adequate protection for privacy whilst, at the same time, developing legal principles to deal with the increasing trade in commercialisation of personality.

It is impossible to do justice to the breadth of ideas covered in this work in a short book review. Instead what follows is a brief summary of the main topics covered in the twelve essays. Each essay is clearly written, contains thought-provoking arguments and deserves careful study.

In their introductory chapter the editors identify the three key themes and look at the ways in which privacy protection can be developed in Scots private law. As they explain there are a number of options. One is to modernise the *actio iniuriarum* (the Roman remedy for impairments of personality rights to physical integrity, reputation and dignity). Another is to introduce breach of privacy as a new head of delictual liability. A third option is to use aspects of the *actio iniuriarum* and delictual liability to fashion a flexible form of protection.

A comprehensive history of the protection of personality rights in Scots law is provided by John Blackie to enable the reader to understand the historical context of the debate. Blackie's overview covers the period from the sixteenth to the mid-nineteenth centuries and gives the reader a real feel for the sheer breadth of personality rights. Cases concerning protection of rights of bodily integrity, physical liberty, protection of family life and moral sexual relations and privacy are discussed against the religious, social and cultural backdrop of the times. Some fascinating cases are covered and the contrast between the use of privacy laws today by celebrities seeking to prevent dissemination of details of their extra-marital affairs and the very public punishment for adultery in the seventeenth century (which entailed standing before the congregation wearing sackcloth every Sunday) is stark.

The feasibility of Scots private law developing a uniform system of personality rights is considered by Niall R Whitty. In his essay Whitty identifies a possible classification system for personality rights and identifies the extent to which those rights are already protected by Scots law. He concludes that where gaps in protection exist the most appropriate way to fill them is by revitalising the delict of real and verbal injury (which is based on the Roman *actio iniuriarum*).

Elsbeth Reid is sceptical that the *actio iniuriarum* can be revitalised in the way suggested by Whitty. Whilst acknowledging that the South African courts have developed the action to meet modern conditions she argues that such development has not occurred in Scotland. So, for example, the *actio iniuriarum* in Scots law requires malice in the sense of intention to injure. It is doubtful that a privacy action requiring proof of malice will adequately meet the requirements of Article 8 of the European Convention on Human Rights. She urges Scots law to look to the jurisprudence of the English and European courts and to develop breach of privacy as a category of delictual liability.

The approach taken in mainland Europe to personality rights is examined by Gert Brüggemeier. He looks at the development of personality rights in the French, German and Italian legal systems. He also analyses the European Court of Human Rights' decision in the leading case of *Caroline von Hannover v Germany* and considers how the jurisprudence of the Strasbourg courts sits with the jurisprudence of the national courts.

Jonathan Burchell's essay provides material to enable readers to assess the competing arguments of Whitty and Reid. He describes the way in which the *actio iniuriarum* has been used by the South African courts to protect reputation and privacy and pays particular attention to its ability to protect dignity interests.

A review of the jurisprudence of the English courts is provided by Hazel Carty. She looks at the way in which the courts have expanded the tort of passing off and the equitable wrong of breach of confidence to meet new challenges. She discusses the leading cases of *Irvine v Talksport*, *Campbell v MGN* and *Douglas v Hello!*

In his essay David Vaver poses the question “does intellectual property have personality?” He looks at the extent to which moral rights, copyright, trade names and trade marks are capable of providing protection for some attributes of personality such as names and images. His discussion of the European Court of Justice’s trade mark decision in *Elizabeth Emanuel* raises interesting questions about the consequences of permitting commercialisation of personality rights.

Kenneth Norrie looks at the Scots law of defamation. Recognising the dual nature of the law of defamation; on the one hand it protects a person’s honour and dignity and on the other it protects the economic aspects of reputation; he concludes that reform is needed. He suggests a recasting of the law to give explicit recognition to the two different types of interest currently protected (personal and economic) and alter the conditions for liability for each to ensure a better balance between free speech and reputation.

The recognition of the concepts of autonomy and dignity by the Courts of Scotland and England and Wales in medical cases is examined by Graeme Laurie. To date this has occurred in the context of negligence actions and he discusses whether it is appropriate to confine these concepts to the law of negligence or whether Scotland should develop the *actio iniuriarum* to deal expressly with impairments of these personality interests. Laurie cautions that whatever approach is adopted arguments based upon autonomy should be kept within proper bounds to ensure due regard to competing rights and interests.

The comparative lawyer will be particularly interested in the penultimate chapter of the work in which Charlotte Waelde and Niall R Whitty present the results of a comparative survey into personality rights in twelve jurisdictions. Six civil law jurisdictions (Argentina, France, Germany, Italy, the Netherlands and Spain), three common law jurisdictions (Australia, Canada and England and Wales) and three mixed systems (Quebec, Scotland and South Africa) are considered. A very useful illustration of the way in which similar problems are dealt with in each jurisdiction is provided by reference to two case studies, one concerning portrait rights and the other merchandising rights. At the end of their chapter the authors suggest five areas for future research. Those interested in undertaking a deeper investigation of comparative systems are directed towards the online personality database which AHRC Script has developed.

The concluding chapter of the book is entitled “A Hitchhiker’s Guide to Personality Rights in Scots Law, mainly with regard to privacy”. Hector L MacQueen provides a very useful summary of the leading cases under European, English and Scots law as well as taking a look at the legislation that does exist to protect particular privacy interests, such as the Data Protection Act. Whilst Scots law still needs to address the fundamental structure of a law of privacy, MacQueen is confident that the Scottish courts have the materials available to them to fashion a principled scheme for protection of privacy rights. He considers that the English approach of extending the breach of confidence action can be brought into play alongside the *actio iniuriarum*. Drawing an analogy with *The Hitchhiker’s Guide to the Galaxy* he finishes the volume with the following thought as to where the Scot’s law of privacy stands:

“almost through the How and Why phases of legal development and beginning to reach out to the Where”.

In his foreword to this work Lord Hope describes it as a “remarkable collection of essays”. The collection provides a wealth of material that is invaluable to those lawyers, academics and policy makers who will come to craft the Scots law of privacy. A cohesive and principled approach is encouraged by the discussion of privacy interests alongside interests in personality more generally. The work is a rewarding and stimulating read and one which will form the basis for future research in this exciting area of law. Those interested in personality rights, whether in Scotland or elsewhere, should obtain a copy. Academics, practitioners and students alike will find it an invaluable reference and a fruitful source of ideas for future study.

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