

# “Common” law? Privacy in Scotland

Guido Noto La Diega

# Overview

- Common, civil, mixed
- Scots private law
- Devolution
- Human rights
- Privacy in Scotland – the Roman way?
- Action for breach of privacy in Scotland today

# The place of Scots law among world systems

- There are two principal families of legal systems in the legal world. These are the civil law system and the Anglo-American common law system.
- The civil law system, which has its stronghold in Continental Europe, is derived from the *ius commune* which in its turn was derived from Roman law and medieval canon law. The systems of law which are to be found in Continental Europe have now, almost without exception, been codified.
- The Anglo-American common law system has its origins in the common law of England. It was exported to the colonies and now forms the basis for the legal systems that have been developed throughout large parts of the Commonwealth and the United States of America. (Gloag and Henderson 14<sup>th</sup> [1.18])

# Mixed systems

- Scotland belongs to a third legal family whose systems of law are composed of a mixture of the civil law and the common law (Zimmermann and Visser 1996)
- The expression “mixed system” is used by comparative lawyers to describe those systems in which there are combined major features from these two legal traditions, which are generally thought to represent opposed ways of looking at law (MacQueen and Thomson 2012).
- The legal systems of most members of this family have their origins in the civil law. They have become mixed because their development has been influenced by the common law but not completely overtaken by it e.g. Quebec and South Africa.
- Scotland is the oldest member of this family, as it was already a mixed system before the Union in 1707. Apart from Israel, which became mixed by choice after it achieved independence in 1948 following the end of the British mandate, Scotland is the only one of these systems that became a mixed system by indigenous development. All of the others were the result of a transfer of sovereignty from a civilian to a common law colonial power

# Scots private law - Three elements

- Scots private law relating to persons, obligations and property is mainly civilian in origin, and it still retains significant civilian elements
- As for commercial law (e.g. sale of goods), both Scots and English mercantile law drew substantially on the law merchant of Continental Europe. But after the Union of 1707, Scots law was increasingly harmonised with English mercantile law, with which it has now for the most part been assimilated by statute
- Scottish land law developed from the medieval feudal system, and although not entirely uninfluenced by Roman law concepts, cannot be classified either with civilian or with common law systems (Gordon 2009)

# “Common” law? Scots law

- Whereas the United Kingdom is a unitary state in international law, it comprises three major (and other minor) legal systems, those of England and Wales, Scotland, and Northern Ireland.
- Historically, the common-law system in England (applied to Wales since 1536) has directly influenced that in Ireland but only partially influenced the distinct legal system in Scotland
- At the union of the parliaments of England and Scotland in 1707, the legal systems of the two countries were very dissimilar. Scotland, mainly in the preceding century, had adopted as a guide much of the Roman law that had been developed by the jurists of Holland and France
  - Scots only turned to Roman, or civil, law when there was a gap in their own common or customary law
  - Considerable infusion of civil law, not least in legal nomenclature and in the emphasis on principle rather than precedent
- Since 1999 the Scottish Parliament has the power to make laws on a wide range of issues (devolved matters). Some issues are the responsibility of the UK Parliament (reserved matters)
  - UK Internal Market Act allows the UK Government to in effect impose standards in a large number of areas that are devolved ([devolution undermined report](#))

# Devolution

- Under the settlement embodied in the Scotland Act 1998, the power to legislate on certain matters is devolved to the Scottish Parliament and Government.
- The UK Parliament retains the power to make legislation applying to Scotland without restriction as to subject matter, but there developed a well-established constitutional convention, known as the Sewell Convention, under which the UK Parliament and Government would not normally legislate on devolved matters without the consent of the Scottish Parliament.
- The Sewell Convention was given legislative recognition in s.2 of the Scotland Act 2016; however, the UK Supreme Court has held that this provision is not justiciable (*R (on the application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5)

# Scottish primary legislation

- Under s.28 of the Scotland Act 1998, the Scottish Parliament can pass primary legislation—called Acts of the Scottish Parliament—in relation to Scotland, but subject to restrictions specified in s.29.
- The three restrictions are:
  - (i) the Scottish Parliament cannot legislate on matters defined as “reserved” (i.e. areas reserved for the Westminster Parliament);
  - (ii) it cannot modify certain “protected enactments” including the Human Rights Act 1998; and
  - (iii) it cannot make legislation which is incompatible with any of the ECHR rights
- Acts of the Scottish Parliament are subject to judicial review on those grounds



# Reserved matters

- The matters reserved to the Westminster Parliament are listed under eleven heads.
- Included in the reserved matters are:
  - Home affairs (incl. **data protection** and access to information);
  - Financial services (e.g. currency)
  - Trade and industry incl. business associations; insolvency; competition; **intellectual property**; and **consumer protection** (e.g. sale and supply of goods, trading stamps, consumer credit and package holidays)
  - Energy
  - Transport
  - Social security
  - Regulation of the professions
  - Employment
  - Health and medicines
  - Media and culture incl. broadcasting and public lending right
  - Miscellaneous e.g. control of weapons, outer space

# Human rights in Scotland: devolved

- Human rights is a subject **devolved** to Scotland by the [Scotland Act 1998](#). The Scottish Parliament also has competence to observe and implement international human rights treaties.
- Civil and political rights are protected by the [Human Rights Act 1998](#) and provisions in the Scotland Act 1998
- Other rights are also recognised under international treaties which apply to Scotland. These are mainly economic, social and cultural rights.
- The Scotland Act 1998 ensures that **laws passed by the Scottish Parliament can be challenged and overturned** by the courts if they are not compatible with rights identified in the ECHR.

# Supreme Court on HR-related competence

- In the 20 years since the three devolved legislatures were created, most UKSC challenges have involved devolved compliance with the ECHR or EU law (Torrance 2019)
- In March 2021, Scottish Parliament passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill to give effect in Scots law to a treaty to which the UK is a signatory: the United Nations Convention on the Rights of the Child ("the UNCRC")
- *Reference by the Attorney General and the Advocate General for Scotland – United National Convention on the Rights of the Childe (Incorporation) (Scotland) Bill* [2021] UKSC 42 Scottish Parliament's decision to incorporate the UNCRC into Scots law is recognised to be a matter for the Scottish Parliament...
- ...but breaches the limitations imposed on the legislative competence of the Scottish Parliament by the Scotland Act

# Reasoning in the UNCRC case

- Section 28(7) of the Scotland Act preserves the unqualified power of the UK Parliament to make laws for Scotland
- UNCRC Bill s 19(2)(a)(ii), which provides that, "[s]o far as it is possible to do so", an Act of the UK Parliament "must be read and given effect in a way which is compatible with" the UNCRC would require the courts to give statutory provisions a meaning and effect which conflicts with that intended by the UK Parliament **[26]**.
- S 20(10)(a)(ii), which would enable the courts to strike down and invalidate provisions of Acts of the UK Parliament which are incompatible with the UNCRC, provided the relevant Act of Parliament was enacted before Bill comes into force – allowing existing legislation to remain in force unamended is one of the ways in which the UK Parliament exercises its power to make laws for Scotland **[42]**
- For other points see <https://www.supremecourt.uk/cases/uksc-2021-0079.html>

# Scottish institutional framework

- The ICO regulates data protection across the country, including in Scotland
- Scotland has its own Information Commissioner who regulates the Freedom of Information Law which covers Scottish public authorities and Scotland-based UK authorities e.g. BBC Scotland
  - [Freedom of Information \(Scotland\) Act 2002](#) (FOISA) - An Act of the Scottish Parliament which gives everyone the right to ask for any information held by a Scottish public authority
  - [Environmental Information \(Scotland\) Regulations 2004](#) (the EIRs) give everyone the right to ask for environmental information held by a Scottish public authority (and some other bodies)
  - [INSPIRE \(Scotland\) Regulations 2009](#) require Scottish public authorities to make spatial datasets (e.g. map data) available

# FOI v data protection

Section 38 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains four exemptions relating to personal information. Information is exempt from disclosure if it is:

- a. the personal data of the person requesting the information (s 38(1)(a));
- b. the personal data of a third party – the personal data must be disclosed unless the public interest in withholding the personal data outweighs the public interest in disclosing it (s 38(1)(b));
- c. personal census information (s 38(1)(c)); or
- d. a deceased person's health record (s 38(1)(d)).

A and b no matter how old the info is (but death), c and d up to 100yrs

More info: [Section 38 exemption briefing](#)

# Defamation as an action for breach of privacy

- Pursuers attempt to squeeze breach of privacy into another action like defamation, breach of confidence or even breach of copyright (e.g. *Prince Albert v Strange* (1849) 1 H&W 1 (LC); *Prince of Wales v Associated Newspapers* [2007] 2 All ER 139 )
- Drawing attention to disease or deformity is clearly a matter of informational privacy, and its breach may well be a civil wrong, yet again it is constantly cited in the literature as an example of defamation
  - In particular impotency, '(t)hat peculiar defect in respect of which marriage may be annulled' as Lord Deas archly put it in *Cunningham v Phillips* (1868) 6M 926, 928
- In 1936 a claim for what was effectively breach of privacy by unwarranted surveillance was raised as an action for defamation in *Robertson v Keith* 1936 SC 29 – pursuers have the benefit of the presumption of truth
- In 2003 it was argued in privacy in *Martin v McGuinness* 2003 SLT 1424 “it does not follow that, **because a specific right to privacy has not so far been recognised, such a right does not fall within existing principles** of the law. Significantly my attention was not drawn to any case in which it was said in terms that there is no right to privacy.” [68]

Admission of evidence gathered by surveillance of private investigators would not be incompatible with a pursuer's right to respect for his private and family life because he was bound to anticipate that his conduct might be scrutinised and such surveillance could conceivably be proved as having been reasonable and proportionate steps to be taken on defender's behalf to protect his rights in terms of art.8(2) (injuries sustained in a road accident)

# A tort of breach of privacy in Scotland?

- English law has set itself against a broad tort of invasion of breach of privacy, even though the misuse of private information is used also with regards to such invasions
- The underlying structural considerations for the English approach not to recognise such broad tort do not apply in Scotland and it has been argued that Scots law is well equipped to develop the law in this area independently (Reid 2010)
- The historical influence of the actio iniuriarum (infringements of personality rights) has provided the basis for actions for solatium (compensation for pain and suffering resulting from injury) arising from affront. One consequence of this influence is the **recognition in Scots law of infringements of dignity as giving rise to remedies**



# Remedies without cause of action

- A crucial difference between England and Scotland is that the former requires recognition of a cause of action e.g. a tort for there to be a remedy – and the creation of new torts is believed to be beyond judicial competence (Reid 2010 [17.15])
- **Remedies in Scotland have never depended upon causes of action** and expansion of the ambit of civil liability requires no more than judicial recognition of invasion of privacy as a wrong (Gloag and Handerson [29.30])
  - In *Wainwright v Home Office*, an English appeal concerning the strip searching of visitors to prison, the House of Lords confirmed that no actionable wrong had taken place
  - In *Henderson v Chief Constable of Fife Police*, 1988 S.L.T. 361 damages were awarded for an unjustified infringement of the pursuer's liberty when police officers removed the bra of a striking laboratory worker taken into police custody (correct application of police procedure but unnecessary as no indication that she might harm anyone and she was only being detained pending checks)
    - “Mrs Henderson has established that the request to remove her brassiere was an **interference with her liberty** which was not justified in law, from which it follows that she has a remedy in damages ... I consider that a figure of £300 would fairly reflect the **invasion of privacy and liberty** which Mrs Henderson suffered as a result of having to remove her brassiere”

# Privacy as an aspect of dignity

- **Protection of privacy is, arguably, an aspect of protection of dignity** and as such its invasion would be wrong to be compensated and so no quantum leap would be required to secure protection against infringements of privacy within the broader field of recognised personality rights
- There is debate about the way in which the law should be developed (Whitty and Zimmermann 2009). It has been suggested that the **actio iniuriarum serves as an available model for development** (Whitty 20052), and certainly it continues to be invoked in legal argument (*Stevens v Yorkhill NHS Trust*, 2006 S.L.T. 889), but this view has been countered on a number of grounds (Reid 2010 [17.12]).
- Whereas liability under the actio iniuriarum depends on **animus iniuriandi** it has been suggested that adequate protection of privacy in modern circumstances may require a **balancing** of lawful, but conflicting, interests (Reid 17.13–17.14)

# The Scots' love of principles

- Scots lawyers have always been fond of claiming that their system is one derived from principle rather than practice, that it has developed through the intellectual thought of our writers rather than through the piecemeal and arbitrary evolution of rules that is a defining characteristic of the common law (Norrie 2013)
- *Actio iniuriarum* - an injury to dignity: it was an attack on a person's honour, dignity or status – was regarded as a “high-level principle” by Lord Hoffmann in *Wainwright v Home Office* [419] which as an analytical tool he rejected as being of no value to the development of the law on privacy
- That rejection reflects a peculiarly English mindset which has far less purchase in Scotland, for Scottish lawyers have never had a structural distrust for high-level principles from which we might extract particular rules of liability.

# Roman Law or the ECHR?

- Scottish courts, if they are so minded, could build upon the concept of *iniuria* in order to provide monetary redress in the form of solatium in appropriate contexts
- it may be that hurt feelings combined with a social necessity for the law to give some recognition that a wrong has been committed is (just) enough to allow for the recognition of a claim based on breach of informational privacy, which is clearly an interest that is gaining in importance
- Niall Whitty has argued that the most obvious use of *iniuria* in the modern world is to provide a remedy for breach of personal privacy
- Why is it better to use the traditional concept of injury rather than other, more contemporary, sources of privacy rights as the driver of this potential legal development? Elspeth Reid is more attracted to the idea of using the European Convention on Human Rights [17.12] - modern concerns, in particular informational privacy, can only be effectively protected if liability extends beyond intentional infringement
- Norrie: the true basis of liability in Scotland is lack of legal justification for doing the intentional act, the criticism does not really explain why the *actio iniuriarum* should not be used in addition to, or as foundational of rights developed in light of, the ECHR.

# Beyond the binary

- **“existing notions of public interest, responsible journalism and a whole jurisprudence from the European Court are likely to act as drivers to the developing law of privacy, building upon the protection that *iniuria* affords to the individual’s feelings”** (Norrie 2013, 22)
- Much to be gained by expanding and adapting the ‘responsible journalism’ defence from the law of defamation as a useful way of balancing privacy and free speech
- The concept of publication in the public interest might also lend itself as a defence to an action based on an otherwise unjustifiable infringement of personal privacy, by providing legal justification.
- The question in *Von Hannover v Germany* or even in *Mosley v News Group Newspapers* can as easily be structured as whether the newspapers had any legal justification for printing the stories about the celebrated personages in these cases.

# The persistent relevance of Roman law

- *Actio iniuriarum* is certainly more than a romantic Romanism in Scots law, in that it serves to identify emotional hurt as a loss worthy, in some limited circumstances, of monetary redress by way of solatium
- identification of the circumstances in which that redress is justified is and should be driven by other forces than the ghosts of the past
- A combination of the European Convention on Human Rights and domestic developments in the control of unbridled journalism (which we are likely to see more of) may well be the way of the future.
- Privacy, on the other hand, is a fundamental human interest, like liberty, with which it has in common that it is an essential pre-condition for the development of our personality and talents: that is why we protect it. How protection of privacy develops will depend upon the modern imperatives of our contemporary society and not upon the extent to which it can be accommodated in our old law

# Privacy in Scotland – some early cases

- *Beggs v Scottish Ministers* [2015] CSOH 98 - B claimed that his mail from the Information Commissioner's Office had been opened on 14 January 2013, other confidential mail addressed to him had been opened in August, September, November, and December 2013, and he had suffered delayed receipt of mail of a confidential nature in April and August 2014 and January 2015; there was no efficient system of delivery of mail, leading to delay, and there was no efficient system of sorting privileged mail from other mail.
- “I find that the petitioner's rights under art.8 have been breached although I make no finding that anything was done deliberately or maliciously” [39]
- S had been well aware of B's concern about his mail over a period of approximately 12 years, they had failed in the implementation of policies to conform to the rules in respect of the opening of privileged mail; they had taken too long to instruct the mail handling officers on ICO's address and had also failed to instruct the persons handing out the mail on the appearance of mail from a double envelope, or failed to stamp the envelope when it was removed from the outer envelope, and those failures were such as to show that the system put in place during the time relevant to the complaints relating to privileged correspondence had been insufficient in its actual working to enable B's right to respect for his correspondence to be upheld

# Art. 8 and extradition

- The approach to be taken to art.8 in relation to extradition proceedings was explained by the Supreme Court in *Norris v Government of the United States of America (No.2)*. Lord Phillips set out at [2010] 2 A.C., p.496, para.9, the analytical framework: “... (i) In this case... extradition of Mr Norris from this country will interfere with his exercise in this country of his right to respect for his private and family life, (ii) This interference will be in accordance with the law. (iii) The critical issue in this case is whether this interference is ‘**necessary**’ in a democratic society ... for the prevention of disorder or crime’, (iv) Resolving this issue involves a test of **proportionality**. The interference must fulfil a ‘pressing social need’. It must also be proportionate to the ‘legitimate aim’ relied upon to justify the interference.”
- *H v Lord Advocate* – sold chemicals to customers in the United States, knowing that they would be used to manufacture methamphetamine, a controlled drug, and deliberately \*1018 mislabelling the chemicals in order to avoid detection
- public interest in extradition arrangements is always important, but is of particular importance in relation to crime with an international or cross border dimension (*King v United Kingdom*)
- offences to which the extradition requests relate are of an extremely serious nature
- there is a risk that the children may require to be taken into care, and that there is a risk, in that eventuality that they will require to be separated. At the same time, it is necessary also to bear in mind that, even if that eventuality, were to come to pass, social services would ensure that contact continued between the siblings, and between them and their parents [97]
- “seriously damaging consequences for the public interest in the prevention of crime if an accused person with family dependencies such as those which bind Mrs H and her children was thereby rendered immune from being extradited to be tried for very serious wrongdoing... It is a sad, but unavoidable, fact of life that the consequences of criminal proceedings often affect most severely the family of the wrongdoer rather than the wrongdoer herself” [100].



# There is a right to privacy in Scots law

- In June 2019, **for the first time**, the Outer House of the Court of Session in Edinburgh confirmed the existence of the **right to privacy in Scots law** in *B C and others v Chief Constable Police Service of Scotland and others* [2019] CSOH 48 (see [ruling](#))
- In this case, 10 police officers claimed that they had their privacy rights infringed when messages they had exchanged over WhatsApp groups were relied on to bring misconduct charges against them. The messages had been recovered during a separate investigation into sexual offences by another police officer.
- Lord Bannatyne was satisfied that a right of privacy exists in terms of the common law of Scotland. He was able to reach this conclusion readily based on **case law in England and Wales**, which established such a right in the common law of that jurisdiction and in the **absence of any previous Scottish case in which the courts had ruled against the existence of a common law right in Scotland**

# English common law

- Lord Nicholls in *Campbell*: "In this country (...) there is **no over-arching, all embracing cause of action** for 'invasion of privacy'" [11]
- Lord Bannatyne: "Thus the question arises: has the common law developed to protect a **right of privacy first in England**: the answer to that question is clearly **yes**" [109]
  - "The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence." (Lord Nicholl in *Campbell* [13])
  - "This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature... Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information" (ibid [14])
  - *Campbell* used the values which form the basis of Article 8 ECHR rights and to accept that these should be reflected in the common law (ibid [17])
- *Campbell* is often referred to, however, it had not been expressly approved by the Scottish Courts
- Lord Bannatyne: "In Scotland an action based on breach of confidence is a well understood remedy and the law in that field in Scotland has been explicitly accepted as being the same as in England (see: *Lord Advocate v Scotsman Publications* per the speech of Lord Keith of Kinkell at page 164)" (C v Chief Constable [111])

# There is a common law right of privacy in Scotland

- there are Scottish authorities which implicitly recognise this right e.g. *Henderson v Chief Constable of Fife Police 1988 SLT 361* at page 367 – “the case law in so far as there is any in Scotland tends to support the existence of such a right” [118]
- Discussion in Reid, *Personality, Confidentiality and Privacy in Scots Law* at paragraphs 17.03 to 17.05
- Lord Bannatyne: the English “approach of developing the common law in light of Convention rights and in particular the development of the common law by seeking to reflect in it the values which underlie the Convention rights would in my view find favour in the Scottish courts” [113]
- “given privacy is a fundamental right I think it highly likely that it exists in the common law of Scotland. Beyond that if it does not exist in Scots common law a very odd conclusion is reached that Scottish and English law in relation to this fundamental matter are entirely different. I think that is an inherently unlikely result” [ibid 116]

# Justification for protection of a right of privacy at common law

- Lord Nicholls of Birkenhead in *Campbell*: "But it (respect for an individual's privacy), too, lies at the heart of **liberty in a modern state**. A proper degree of privacy is essential for the **well-being and development of an individual**. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in *R v Dymont*, [1988] 2 S.C.R. 417, 426." [12]
- Lord Bannatyne in *C v Chief Constable*: "It seems to flow from the centrality of the role of privacy in a **democratic society** and particularly in a society where electronic storage of information and **electronic means of intrusion** into the private lives of a citizen **by government, private organisations and individuals** are growing exponentially the common law should recognise the right to privacy" [107]

# On the merits

- On the merits, the Court of Session said that while a common law right to privacy does exist in Scots law, the police officers had to show that they had a reasonable expectation of privacy in relation to those messages for their privacy rights to apply. Lord Bannatyne said, though, that because the contents of the messages were pertinent to the question of whether the officers were observing statutory-set police standards they had sworn to uphold, the officers **did not have a reasonable expectation of privacy** in those messages
- Although not mentioned in the ruling, the newly confirmed common law right to privacy in Scots law exists **in parallel with the statutory data subject rights** that are built in to the **General Data Protection Regulation**, in particular the right to be informed about the nature of data processing

# *BC and others v Chief Constable of Police Service of Scotland* [2020] CSIH 61 ('Livingstone')

- On 16 September 2020, in the reclaiming motion by *BC and others v Chief Constable of Police Service of Scotland* [2020] CSIH 61 ('Livingstone'), in [obiter](#) remarks, the Lord Justice Clerk, has cast **doubt** upon the conclusion of Lord Bannatyne that there is a common law right to privacy in Scotland
- There was no reclaiming motion before the court on this point and so there was no argument before the court on the issue. However, at para 86 of the Lord Justice Clerk's Opinion in the reclaiming motion, the Lord Justice Clerk states: "*I beg leave to doubt that it has reached the absolute stage suggested by the Lord Ordinary*". Lord Menzies shares the Lord Justice Clerk's concerns in his Opinion (para 124). The Opinions can be found [here](#)

# Reasons to doubt

- The appeal judge “see no reason to think that the effect of articles 8 and 10 in respect of this area of the law in Scotland is any different to that in England, but it does not mean that there has thereby been created a widely applicable general right of privacy” (*Livingstone* [83])
- “The Lord Ordinary sought to strengthen his conclusions by reference to *Henderson v Chief Constable of Fife Police* and *Martin v McGuinness* but again, I beg leave to doubt whether these cases have that effect” (*Livingstone* [84])
- *Henderson* (the ‘bra’ case) was essentially about liberty, ‘privacy’ appears only in the concluding paragraphs about damages for interference with, or invasion of “privacy and liberty” – “Here I can only take a very broad axe **unaided by authority**. I consider that a figure of £300 would fairly reflect the invasion of privacy and liberty which Mrs Henderson suffered as a result of having to remove her brassiere” (*Henderson* [367])
- *Henderson* held that the law should protect individuals from infringements of liberty despite no precedent considering forced undressing as a wrong “as the law of England did in very similar circumstances in *Lindley v Rutter*” [1981] 1QB 128 – even though the latter contains general references to the desirability of protecting the personal freedom, privacy and dignity of citizens (“It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands” [134]) it was in reality determined on the basis of action taken in excess of authority

# Reasons to doubt

- Lord Justice Clerk in *Livingstone*: “In *Martin v McGuinness* Lord Bony, in an entirely *obiter* section, summarised submissions made to him about the possibility that there existed a general right of privacy. The submissions were largely based on the extended approach being developed in respect of misuse of information cases such as *Campbell*, with a side excursion into the *actio iniuriarum*. His Lordship reached no decision on the issue” [86]
- In referring to *Martin*, Lord Bannatyne though had admitted that Lord Bony had expressed “obiter and tentative views” (*C v Chief Constable* [123])
- Lord Bony: “I have done no more than reflect the submissions made. Whether an infringement of art 8 by one private individual causing loss to another, which has not in the past given rise to a successful claim, should now have that result, and the basis on which such a claim may be made remain to be determined in a case where these questions arise as live issues” (*Martin* [30])



# Where are we now?

“There is no doubt that the law in this area continues to evolve, and that the scope of protection given to private information has expanded considerably, but I beg leave to doubt that it has reached the absolute stage suggested by the Lord Ordinary.” (*BC and others v Chief Constable of Police Service of Scotland* [2020] CSIH 61 [86])

# References

- Gloag and Henderson, *The Law of Scotland*, 14<sup>th</sup> ed, ch 29
- Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), paras 17.15–17.17
- *N.R. Whitty*, “Rights of Personality, Property Rights and the Human Body in Scots Law” (2005) 9 *Edin. L.R.* 194
- N. Whitty and R. Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: Dundee University Press, 2009)
- Kenneth McK Norrie, *The Actio Iniuriarum in Scots Law: Romantic Romanism or Tool for Today?* [2013]
- *Snowie v Stirling Council* [2008] 4 *WLUK* 594
- *Gloag v Perth and Kinross Council* [2007] 6 *WLUK* 213
- *Birse (Gordon Dickson) v HM Advocate* [2000] 4 *WLUK* 394
- *Hunter v Renfrew Assessor* [1964] 1 *WLUK* 284
- *Cheyne v McGregor (Robert)* [1940] 10 *WLUK* 30