

5-1-2011

## N. Whitty & R. Zimmermann, Rights of Personality in Scots Law

Olivier Moréteau

*Louisiana State University Law Center, [olivier.moreteau@law.lsu.edu](mailto:olivier.moreteau@law.lsu.edu)*

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### Repository Citation

Olivier Moréteau, *N. Whitty & R. Zimmermann, Rights of Personality in Scots Law*, 4 J. Civ. L. Stud. (2011)

Available at: <http://digitalcommons.law.lsu.edu/jcls/vol4/iss1/8>

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## BOOK REVIEW

RIGHTS OF PERSONALITY IN SCOTS LAW:  
A COMPARATIVE PERSPECTIVE  
(Niall R. Whitty and Reinhard Zimmermann eds., Dundee  
University Press, 2009)  
Reviewed by Olivier Moréteau\*

This book features a collection of papers presented at a Conference organized on May 5 and 6, 2006, at the University of Strathclyde in Glasgow. The Conference aimed at giving an overview of issues and options available in Scots law regarding the protection of personality rights. The perspective was comparative, covering various civil law and common jurisdictions and other mixed jurisdictions. The concept of personality right is of civil law fabric. Rooted in Roman law, the term ‘rights of the personality’ was coined by 20th century civilian doctrine to describe the protection of non-patrimonial aspects of the human person, such as life, bodily integrity, personal security, physical liberty, reputation, dignity, privacy, image, moral right to copyright, family relationships, rights of deceased’s relatives. The essays gathered in the book tend to prove however that the Scottish approach is more remedy-based than right-based, the focus being on the tort action and its conditions. Personality rights are all too often entangled with patrimonial rights, and the identification of a personality rights will at most help identify a primary right that deserves protection even where the loss is entirely non-pecuniary.

There is much focus on the taxonomy of personality rights, checking what is included here and excluded there. It is common knowledge, at least in civil law jurisdictions, that personality rights are inalienable, imprescriptible, and cannot be abandoned. The book offers little discussion however of what personality rights are in essence. Such rights can indeed be monetized, and the

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\* Professor of Law, Russell B. Long Eminent Scholars Academic Chair, Director of the Center of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University; Editor-in-Chief, Journal of Civil Law Studies.

borderline between the extra-patrimonial and the patrimonial rights is not always an easy one to draw, as some cases discussed in the book may show. The right an actress has on her image under French law may serve as an example. A case decided in Paris in 1975 featured French superstar Catherine Deneuve.<sup>1</sup> She had consented to the publication of photos taken at a time when she was acting as a professional model, occasionally posing in the nude. The magazine who had published such photos sold them to another magazine that republished those years later, at a time when Catherine Deneuve had become an iconic and highly respected actress. Though the magazine owned the pictures, Catherine Deneuve was allowed to object to the publication and argue that her personality right to her image had been invaded. The court held that the magazine was supposed to request her consent prior to publication. Any attorney or scholar familiar with French cases knows that the more a person protects her privacy or image rights, the more likely she is of being awarded higher damages in case of infringement of such rights. On the contrary, famous people who usually tolerate the publication of gossip and photos taken within the realm of their private life, though not losing the right to protection—after all it is inalienable and may not be abandoned—are more likely than not to get minimal or nominal damages. Given the fact that tabloids will anyway publish gossip to maximize their sales, celebrities, by choosing not to tolerate any infringement, can monetize their private life and image by selling *ex ante* the right to publish under pre-determined conditions, or collecting *ex post* in the form of damages that French courts try to keep sufficiently high to serve as deterrent. That point is strongly criticized by both editors of the book: Niall Whitty in his essay in the book<sup>2</sup> and Reinhard Zimmermann in his major book on the law of obligations.<sup>3</sup> The reading of the book shows that Scotland looks at personality rights with tort law lenses rather than with over-permissive subjective rights lenses, thereby limiting the risk of commodification of extra-patrimonial rights, all too real in French

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1. Dame Dorléac dite Catherine Deneuve v. Société anonyme Presse-Office, Dalloz 1976, 291, note R. Lindon (Court of Appeal of Paris, judgment of May 14, 1975).

2. At 197.

3. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1089 (1990).

jurisprudence, where the right to respect of one's image was once based on property rights.<sup>4</sup>

One may compare this with the moral right of the author or artist under copyright law. In most civil law jurisdictions and under the Bern Convention, the artist or author of copyrighted work may sell the copyright, which is intellectual property and therefore patrimonial, yet keeping at all times a moral right allowing her to object to a use of the work that in the opinion of the author would distort the artistic value of the work. This moral right being attached to the personality of the creator is inalienable and cannot be abandoned, and is therefore a personality right. The study by David Vaver (Chapter 8)<sup>5</sup> shows that the moral right is much weaker at English law where it may be waived. In jurisdictions where it is stronger, it may be monetized much like the right to one's image in the example above.

Born and developed in the matrix of private law, the concept of personality right has grown a constitutional dimension, which is not surprising given the fact that it enshrines personal freedom and human dignity. This constitutional dimension is a central feature of several of the papers gathered in the book. The European Convention on Human Rights (ECHR) indeed strengthens the fundamental rights dimension with Article 8(1) that provides: "Everyone has the right to respect for his private and family life, his home and his correspondence," the same Convention protecting liberty of expression and freedom of the press in its Article 10. It was not until the year 2000 that the ECHR was to acquire the force of law in the United Kingdom and therefore in Scotland, by the effect of the Human Rights Act 1998. The impact of the ECHR in Scotland is carefully researched by Elspeth Reid (Chapter 4),<sup>6</sup> who investigates to what extent Convention rights, in so far as they address rights of personality, already find protection in Scots law. She uses comparative law to identify possible gaps and

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4. Karine Anterion & Olivier Moréteau, *The Protection of Personality Rights Against Invasions by Mass Media in France*, in *THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA* 124, (Helmut Koziol & Alexander Warzilek eds. 2005).

5. *Does Intellectual Property Have Personality?*, 403.

6. *Protection of Personality Rights in the Modern Scots Law of Delict*, 247.

developments that may be needed. She clearly indicates that one has to look beyond England, and points out to South Africa, another mixed jurisdiction, and countries of continental Europe.

South Africa is ubiquitous in the volume, which is not surprising, since much like Scotland, it is a mixed jurisdiction without a civil code. Jonathan Burchell offers a detailed presentation in Chapter 6, with a focus on human dignity.<sup>7</sup> He shows the use of the *actio iniuriarum*, “the general Roman remedy for impairments of personality rights to physical integrity, reputation, and dignity”<sup>8</sup> as a basis of the protection of personality rights in South Africa before and after the Constitution of 1996. Post-apartheid developments include the right to housing, the right to social security and appropriate social assistance for those unable to support themselves,<sup>9</sup> the right to family life, due process rights, showing flexible adjustments. The Roman law concept of *iniuria* indeed easily adjusts to the new constitutional and legislative requirements to favor the enforcement of human rights. Professor Burchell’s contribution is a plea in favor of the delictual *actio iniuriarum*: “The objective criterion will allow a court to balance the interests involved, engage in a proportionality inquiry weighing issues such as need, available resources, degree of harm, urgency of relief, including availability of alternative remedies, and recognize those defences that reflect reasonable behavior.”<sup>10</sup> He shows “the pivotal nature of dignity” as a right and not just a value. He reminds the Scots that T.B. Smith was in favor of a rejuvenated *actio iniuriarum* focused on the concept of “affront” (*contumelia*).<sup>11</sup> Much in this contribution is of great interest for Scotland as well as other mixed jurisdictions such as Louisiana.

The laws of Continental Europe are explored in Chapter 5, written by Gert Brüggemeier, covering France, Germany, and Italy.<sup>12</sup> Professor Brüggemeier rightly points to the hybrid nature of personality rights, which constitute in his opinion a sort of

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7. *Personality Rights in South Africa: Re-Affirming Dignity*, 349.

8. At 351.

9. At 367.

10. At 377.

11. At 381. See T.B. SMITH, A SHORT COMMENTARY ON THE LAW OF SCOTLAND 653-654 (1962).

12. *Protection of Personality Interests in Continental Europe: The Examples of France, Germany and Italy, and a European Perspective*, at 313.

“private human rights.”<sup>13</sup> Born in the realm of private law from the Roman law of injuries (*actio iniuriarum*), it was given constitutional protection after World War II, in national constitutions and also in the ECHR. He concludes his survey of the law in the three countries by a section on the ECHR and an analysis of the *Caroline von Hannover v. Germany* case, decided by the European Court of Human Rights in 2004. The case shows how difficult it is to balance the protection of private life (Art. 8 ECHR) with freedom of expression and of the press, also protected by the Convention (Art. 10 ECHR), an issue that has been carefully studied in the context of European tort law.<sup>14</sup> It also indicates a possible diversity of approach regarding the protection of the private life of celebrities. French courts insist that everyone, including celebrities, is entitled to the protection of one’s private life on the basis of the overreaching provision of Civil Code, Art. 9. This places the burden on journalists to prove that they have obtained prior consent before publishing stories or pictures featuring celebrities in their private life, even when the story takes place outside private walls, in the eye of the public. Neglecting these details, the author rightly insists on the somehow constitutional nature of Art. 9.<sup>15</sup>

Germany has a different approach in the sense that courts, following a law enacted in 1907, accept that pictures of public figures can be taken and published without their express consent except where taken within their residential areas.<sup>16</sup> In *Caroline von Hannover v. Germany*, the European Court held that even pictures taken outside the private residence had to be authorized, Art. 8 extending the protection to everyone, including celebrities. It is only when public figures perform in an “official function,” that the right to privacy is not to be applied, a position long adopted by French law, which is in compliance with Art. 8 ECHR. Regarding the right to informational privacy, Scots law had a restrictive

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13. At 317.

14. The Protection of Personality Rights against Invasions by Mass Media, *supra* note 4.

15. At 322. After all, the French Civil Code has been represented to be the “civil constitution” of the country: *see* Olivier Moréteau, *The Future of Civil Codes in France and Louisiana*, 2 JCLS 39, 44 (2009).

16. Details at 342.

approach in the sense that protection was only afforded when the information was wrong or malicious (malicious falsehood). The scope is considerably enlarged with the implementation of ECHR, Art. 8.

Whether they are familiar with Scots law or not, readers will learn a lot reading the first chapters of the book. Issues and options are clearly exposed by the editors in Chapter 1, which gives an overview of the subject insisting on the historical and political background that makes Scotland such a unique place before and after devolution.<sup>17</sup> The editors then focus on what they view as the key issues, and not surprisingly these include the integration of the ECHR right to privacy. Other questions pop up such as how to protect rights of personality, whether a right to publicity should be introduced, and whether personality rights should be codified, a question that in their opinion deserves a negative answer.

Following chapters address these questions. In what appears to be the longest contribution in the book (Chapter 2 counts over 110 pages), John Blackie gives a rich and detailed overview of the history of personality rights in Scots law, from the 16th century to the mid-19th century,<sup>18</sup> looking backwards (doctrinal history), sideways (comparative law), and forward (law reform proposals) to make informed decision as to where to go.<sup>19</sup> Readers having a lesser interest in legal history will value the Editors' summary of John Blackie's findings.<sup>20</sup> His well-documented exploration shows how much Scots law was based on the *ius commune* until it received English influence during the 19th century. Real injury (*iniuria realis*) and verbal injury (*iniuria verbalis*) evolved and developed as sub-categories of *iniuria*, generating a complex and confusing taxonomy. The full page figures at p. 38 (the delict of *iniuria* in Scotland in 1700) and 103 (the delict of injury in 1850) give a fascinating overview of shifting categories and the text reveals the fertility and flexibility of the delict of injury to cover new situations, such as invasions of privacy once people's sphere of privacy started to expand.

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17. *Rights of Personality in Scots Law: Issues and Options*, at 1.

18. *Unity in Diversity: The History of Personality Rights in Scots Law*, at 31.

19. See the Editors comment, at 24.

20. At 10-12.

Niall Whitty, co-editor of the book, gives a full overview of rights of privacy in Scots law (Chapter 3).<sup>21</sup> His hundred-page long chapter insists on categories that vary from one system to another. After defining the fundamental concepts, and particularly those of real and verbal injury derived from Roman law, but also those of dignity, autonomy, and privacy, he ventures into categorizing, using Johan Neethling's typology as a starting point.<sup>22</sup> Such personality rights are primary rights and their infringement is a delict, imposing a secondary obligation on the wrongdoer to repair or remedy. The primary right might be imprescriptible, the secondary one is not and may be extinguished by prescription. He then describes the thirteen personality rights identified by Neethling: right to life, the rights to bodily integrity and to personal security, the right to physical liberty, the right to honor and reputation, the right to dignity in the narrow sense (self-esteem; honor; and freedom from insult), the right to privacy (seclusion from intrusion), the right to informational privacy (non-disclosure of private information), the right to identity or image, the right to publicity (appropriation of image and reification of right to privacy and image), the moral right to copyright, the right to autonomy (still debated in Scotland), personality rights in family relationships, personality rights after death. Professor Whitty's treatment of the elements of liability for infringing rights of personality shows the paramount importance of tort law concepts in this area and as everywhere in his essay the approach is comparative, showing familiarity with European projects such as the *Principles of European Tort Law*. Transmissibility of the action and remedies are also discussed in this very rich essay.

There is much more in the book, including the already mentioned Continental European and South African perspectives to which one must add a very informative discussion of English law perspectives, by Hazel Carty, showing how English law remains "mistrustful of generalised rights" (Chapter 7).<sup>23</sup> The final

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21. *Overview of Rights of Personality in Scots Law*, at 147.

22. At. 164. Reference is made to JOHAN NEETHLING, J.M. POTGIETER & P.J. VISSER, *NEETHLING'S LAW OF PERSONALITY* (2d ed. 2005). See also J. Neethling, *Personality Rights*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (J. Smits ed. 2006), at Chapter 48.

23. *Personality Rights and English Law* 383, at 384.



chapters cover defamation,<sup>24</sup> autonomy in medical law,<sup>25</sup> and a presentation of the very impressive personality database covering a number of significant legal systems, that has fed a comparative survey, discussed by Charlotte Waelde and Niall Whitty.<sup>26</sup> Hector McQueen's Hitchhiker's guide to personality rights in Scots law concludes the volume, road mapping the complex personality rights galaxy in Scots law.<sup>27</sup> May be for the reason that it primarily addresses privacy, it has not been placed at the beginning of the volume, where the reader would be happy to find a road map. It inevitably repeats some information available elsewhere in the book but offers a most valuable guide, starting with the impact of the Human Rights Act 1998 and ending with a survey of other relevant statutes, also promenading through English cases on breach of confidence and the *actio iniuriarum* of Scots law.

Altogether, this is a remarkable and most informative comparative law book that every scholar interested in personality rights in Scotland, Europe, or in any other jurisdiction must read or consult. More generally, the book shows the great vitality of the civil law tradition of Scotland and the many ways it interacts both with English law and European law and keeps developing as a very dynamic mixed jurisdiction, connected to so many others. In the reviewer's opinion, there is no better place than mixed jurisdictions to test legal theories and doctrines, see how they interact and identify what is working best. Scotland has developed a pragmatic view of what personality rights are, half way between the generalization of the French and the casuistic approach of the English, proving in this field as in others that Scots law is a modern continuation of Roman law. A French scholar trained in France and having migrated to another mixed jurisdiction, the reviewer cannot help thinking that the late H el ene David<sup>28</sup> and

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24. Kenneth Norrie, *The Scots Law of Defamation: Is there a Need for Reform?*, at 433.

25. Graeme Laurie, *Personality, Privacy and Autonomy in Medical Law*, at 453.

26. This is a major project conducted at the University of Edinburgh: *A Right of Personality Database*, at 485.

27. *A Hitchhiker's Guide to Personality Rights in Scots Law, Mainly with Regards to Privacy*, at 549.

28. HELENE DAVID, *INTRODUCTION A L'ETUDE DU DROIT ECOSSAIS* (Paris, 1972).

T.B. Smith<sup>29</sup> would have liked and valued this book, much as they would also have enjoyed *Mixed Jurisdictions Compared, Private Law in Louisiana and Scotland*, edited by Vernon Palmer and Elspeth Reid,<sup>30</sup> published that very same year, also containing an essay on personality rights.<sup>31</sup>

Together with the Dundee University Press, the editors have done a great job making the book easy to read and navigate, with a sequential numbering of chapters and sections, detailed tables of content at the beginning of every chapter, and useful indexes and tables. This review will end where the book starts: the short foreword by Lord Hope is a must read. It offers insightful thoughts on the impact of academic work on the judiciary and the vital importance of comparative law on the development of Scots law, of which the book is a brilliant demonstration.

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29. See A MIXED LEGAL SYSTEM IN TRANSITION, T. B. SMITH AND THE PROGRESS OF SCOTS LAW, (Elspeth Reid & David Miller eds. 2005).

30. Edinburgh University Press, 2009.

31. Elspeth Christie Reid, *Personality Rights: A Study in Difference*, at 387.