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## Rights of Personality in Scots Law: A Comparative Perspective. Ed by Niall R Whitty and Reinhard Zimmermann

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*HM Advocate* 2004 JC 103 on the corroboration of sexual offences and *res gestae*; *McCutcheon v HM Advocate* 2002 SLT 27 on mixed statements; and *HM Advocate v Higgins* 2006 SLT 946 on the admissibility of confessions obtained through deception, all of which are dealt with in the text. For the most part, though, wholesale changes to the law have been few and far between in the eight years since the second edition, but this is not to underestimate the amount of updating that has taken place: the third edition references over 300 new cases, most of which concern minor but nonetheless important issues of interpretation.

The aim of Walker and Walker has always been simply to state the law or, where the law is unclear, to offer, as the authors of the third edition put it, “a view on interpretation, aided by themes that emerge from this wide ranging text and the legacy of its original authors” (vii). In this, the authors succeed admirably. The text is clearly well respected within the legal profession and the third edition has already been used as an authority in court on a number of occasions (see e.g. *Beggs v HM Advocate* [2010] HCJAC 27 at paras 50, 51 and 56 and *HM Advocate v M* 2010 SLT 5 at paras 6-8 in the criminal context, and *McGraddie v McGraddie* [2009] CSOH 142 at paras 28 and 32 and *Scottish Ministers v Stirton* 2009 SCLR 541 at para 21 in the civil context). What the text does not do, and nor does it aim to, is to engage with wider theoretical debates. For this, readers are better directed to the SULI book, F Davidson, *Evidence* (2007), or, for a more comprehensive discussion, P Roberts and A Zuckerman, *Criminal Evidence* (2004).

In short, the third edition of Walker and Walker is a valuable text which has developed sufficiently beyond the second edition in terms of updating to make it worth purchasing. Its main appeal is likely to be to practitioners, as its price almost certainly places it beyond the reach of most students or academic researchers, although it will provide an important library resource for the latter. It may not be too long, however, before a fourth edition becomes necessary. The Criminal Justice and Licensing (Scotland) Bill proposes some major changes to the law of criminal evidence in areas including the compellability of spouses and civil partners, witnesses anonymity orders, prosecution disclosure and double jeopardy (see the Bill as introduced and subsequent amendments). In addition, work is in progress at the Scottish Law Commission on similar fact evidence and the *Moorov* doctrine (see *Eighth Programme of Law Reform* (Scot Law Com No 220, 2010) 27). Legislative intervention has been rare in evidence law to date, the result of which has sometimes been a complex and contradictory set of cases, leaving the law in a less than satisfactory state (similar fact evidence and the *Moorov* doctrine being a good example of this). If these areas of the law are eventually placed on a statutory footing, this should make the job of the authors in preparing a fourth edition a little easier.

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**RIGHTS OF PERSONALITY IN SCOTS LAW: A COMPARATIVE PERSPECTIVE.**  
**Ed by Niall R Whitty and Reinhard Zimmermann**

Dundee: Dundee University Press, 2009. xvi + 614 pp. ISBN 9781845860271. £50.

For those who attended the Rights of Personality conference at the University of Strathclyde in May 2006, this edited collection of the conference papers has been eagerly awaited. *Rights of Personality in Scots Law: A Comparative Perspective* contains a valuable collection of essays, many of which have been significantly expanded upon since their original presentation.

While personality rights are a familiar legal concept to civilian lawyers, they have no obvious home in Common Law jurisdictions and, despite its mixed heritage, Scots law is generally perceived as falling within the latter camp with respect to such rights. Chapter 1 therefore provides an essential introduction to the issues surrounding personality rights in Scots law, including a definition: “[i]t is commonly said that rights of personality protect the non-patrimonial or dignitary aspects of the human person – who a person is rather than what a person has” (3). Chapter 1 also sets out the aim of the collection, to consider how best to develop personality rights in Scots law. This is most urgently required in the case of the right to privacy, where the gap in Scots law is now revealed by the need to meet our obligations under the European Convention on Human Rights as implemented by the Human Rights Act 1998. While English law has rapidly built up a body of case law on privacy in the decade since the Human Rights Act entered into force, Scots law has seen considerably less civil litigation. With the dearth of litigation comes the opportunity to take a more considered and principled approach to protecting human rights. Can personality rights fill the gap?

In answering this question a grasp of the historical basis is essential, and Professor Blackie provides an exhaustive account of “personality rights” in his chapter (at 116 pages it should perhaps more accurately be called a thesis). His research offers an account of the historical development of personality rights in Scots law and provides a wealth of scholarly detail, including previously unreferenced material from the Argyll Justiciary records. Blackie reviews personality rights from the sixteenth to the mid-nineteenth centuries and rather helpfully equates earlier doctrines to the modern terminology. Thus, his references to ravishment and *plagium* appear under the heading “liberty of the person”. This provides a useful context in which to continue the debate.

Professor Whitty’s own chapter (which is 100 pages long: together with Professor Blackie’s, it accounts for over one third of the book) attempts the first typology of personality rights in Scots law. Although he claims it is a “working” typology which could form a starting point for future discussion (164), it is difficult to see what more could be added to it. This typology is arguably the single most important contribution to Scots law in the collection, and it is to be hoped that it will inform future work in the area.

The other chapters can be divided into two broad classes. Those in the first cover aspects of personality-type rights extant in Scots law, including modern delictual responses (Elspeth Reid), defamation (Kenneth Norrie), and privacy (Hector MacQueen). The second class draws on expertise from other jurisdictions and from related subject areas, including medical law and autonomy (Graeme Laurie) and whether intellectual property has the potential to protect personality, through the complex and often random interaction of statutory rights and personality interests (David Vaver). Gert Brüggemeier offers an account of personality protection in continental Europe, while Jonathan Burchell addresses the South African position, founded on the protection of dignity through the *actio iniuriarum*.

Although Scots law is not in a position to adopt much of the rich heritage from these jurisdictions or to “rediscover” latent concepts such as the *actio iniuriarum* (Reid, for example, is clear that the South African approach could not be replicated or appropriated in Scotland: 304), such comparative work is invaluable for providing new ways of analysing shared problems. In the absence of statutory intervention, however – and such intervention is considered a dubious prospect by the editors (25; also see section 1.3.2) – Scots law will need to examine its existing doctrines, to see if and how these can be developed to best reflect the needs of future generations.

In light of this, it seems likely that, if any jurisdiction is to have influence, it will be our nearest (geographical) neighbour, England. Hazel Carty provides a critical and valuable analysis of “personality rights” in English law. As she notes, however, English law

resists generalised rights, so there is therefore no coherent concept of personality rights. Instead, there are a number of individual actions that can be used to protect specific privacy and publicity interests – primarily breach of confidence/article 8, and passing off. This chapter therefore provides an alternative approach to protecting personality rights, through incremental development of discrete rights and actions, and Carty demonstrates the judicial willingness to “reshape” existing doctrines to meet these perceived needs.

In any review of an edited collection such as this it is not possible to comment in detail on each contribution. However, special mention should be made of “A Rights of Personality Database” (ch 11), which was co-written by Niall Whitty and Charlotte Waelde. It provides an account of work done by the AHRC Research Centre for Studies in Intellectual Property and Technology Law at Edinburgh University, in their personality rights project. This work has included the creation of an online database providing an account of personality rights in fourteen jurisdictions, including accounts of leading cases from each jurisdiction. In addition to this resource, the project has also conducted a comparative exercise using eight case studies. Reporters from each jurisdiction were asked to provide responses to these case studies, so that legal responses from around the world can be collated and compared. The results of this project are recounted in the chapter, with critical insights and proposals for further work being included by the authors. Not only does this chapter provide a comprehensive survey of personality rights across a wide range of jurisdictions, it also offers an excellent example of the possibilities for future comparative research using technology such as online databases or wikis, and the benefits that can be derived from sharing knowledge in this way.

As one would expect, not all the authors agree on the direction or classification of “personality rights”. There are various approaches taken to personality rights in Scots law in the twenty-first century within the collection, and questions are raised as well as answered. What is unquestionable, however, is the value of this undertaking. Through both the conference and this collection, Professors Whitty and Zimmermann have made a significant contribution to the development of Scots law, by providing a rich and learned basis for future debate about the recognition of rights of personality in Scots law.

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**Daniel J Solove, UNDERSTANDING PRIVACY**

Cambridge, MA: Harvard University Press ([www.hup.harvard.edu](http://www.hup.harvard.edu)), 2008 (hb), 2010 (pb).  
ix + 257 pp. ISBN 9780674027725 (hb). £33.95. ISBN 9780674035072 (pb). £14.95.

If we are to believe the popular press, privacy is under attack, fast becoming a relic of a distant, more civic past – an era when the “sanctity” of the mail, or indeed the telegram, was respected, the family home was inviolable and, in the mind of US Justice Joseph Story at least, the notion of interference with another’s private affairs was almost too odious a thought to contemplate. By contrast, today it would appear that each month brings a new media warning concerning CCTV, or the breaking news of a major corporate data breach or some spectacular loss of confidential information. Even minor changes to privacy policies on social networking sites, or the latest celebrity scoop, are presented as firm evidence of a steady erosion of the private space and the cherished right “to be let alone”. These incidents and threats, be they real or imagined, often prompt calls for new legislation or stiffer sanctions aimed at safeguarding our privacy. Yet what is it that the law should seek to protect, what sanctions should society impose