Beyts v Trump International Golf Club Scotland Ltd

Beyts v Trump International Golf Club Scotland Ltd: Caught Short on Data Protection and Privacy

Small claims[1] in the sheriff court do not often fire the imagination of the national press, and Ms Beyts herself seems previously to have figured in the local newspapers only to the extent of small print on charity swims[2] and an award-winning photograph of nacreous clouds over rural Aberdeenshire.[3] In April this year the defenders' presidential associations in *Beyts v Trump International Golf Club Scotland Ltd*[4] bucked this trend, sending Ms Beyts' name down the newswires from Catterline to Yekaterinburg. A regrettable omission from that press extravaganza, however, was proper discussion of the intriguing legal issues which this case raised.

A. THE FACTS

Whether or not Ms Beyts would subscribe to the accolade of "environment activist" awarded to her by *The Guardian*,[5] she was one of the group of individuals in the local community who had opposed the defenders' golf resort development on the Aberdeenshire coast at Menie. On the day in question she and a friend had used a public right of access across the golf course on their way to the beach, pausing, however, to take a photograph of a flagpole that was the subject of a disputed planning application. In doing so they were noticed by a Trump employee, who, along with two colleagues (all men), drove on to the course to observe the pursuer and her friend. Meanwhile the pursuer, who was affected by a medical condition, felt an urgent need to answer a call of nature and she found for this purpose a spot in the sand dunes which she believed was secluded. She was unaware that 230 metres away she was being watched by the three Trump employees, one of whom used his mobile phone to take a picture of her urinating, and thereafter reported the incident to the police. The first intimation that the pursuer received of this[6] was at 10 pm that evening when two police officers arrived at her home and charged her with a contravention of the Civic Government (Scotland) Act 1982, section 47, which provides that "any person who urinates…in such circumstances as to cause, or to be likely to cause, annoyance

[1] Now replaced by Simple Procedure (Act of Sederunt (Simple Procedure) 2016, SSI 2016/200).

[2] See *http://www.scotsman.com/news/social-worker-to-take-a-spin-in-the-corryvreckan-for-charity-1-1559545*

[3] See *http://rmets-scotland.weebly.com/paton-competition.html*

[4] [2017] SC EDIN 21; 2017 GWD 12-187.

[5] *The Guardian*, 3 April 2017.

[6] Recounted in a *Facebook* post at *https://en-gb.facebook.com/rohan.beyts/posts/10154739584267786* .

to any other person shall be guilty of an offence". Criminal proceedings were never brought, and instead the pursuer raised an action against the defenders based upon the defenders' breach of the Data Protection Act 1998. As narrated by Sheriff Donald Corke, the injury that she had suffered was constituted by distress about: (i) the circumstances of being charged with a criminal offence (ii) the fact that men had watched her urinating; and (iii) the fact of being photographed in this act.

B. APPLICATION OF THE DATA PROTECTION ACT 1998

It was uncontroversial that the digital photograph taken by the Trump employee was personal data and that the defenders were the data controller in terms of the Data Protection Act 1998, section 1. The defenders had not, however, registered as such, as required by section 17 of the Act, which section 21 states to be an offence. Ms Beyts therefore invoked section 13 which allows for damages to be awarded to individuals who suffer distress due to contravention of the Act. Reference was made also to the Court of Appeal decision in *Vidal-Hall v Google Inc*,[7] which clarified that compensation could be awarded in terms of section 13 where the individual had suffered distress only, even if there was no other type of loss. However, the pursuer did not look beyond this to cite a breach of any of the eight data protection principles to which data controllers are bound to adhere as stated in section 4 and listed in Part I of Schedule 1 of the Act. The sheriff noted: "Her solicitor advocate was specific in stating that were it not for the failure to register, we would not have been here considering the case."[8] Thus the fatal gap in the pursuer's argument as pled was the absence of a causal connection between the *failure to register* and the undoubtedly real distress which she experienced during this episode. The sheriff therefore had no option but to dismiss the claim.

This conclusion meant that there was no need to consider the defence that the defenders would have put forward under section 29 of the 1998 Act, to the effect that the offending data was being processed for "the prevention or detection of crime" of "the apprehension or prosecution of offenders". This defence would in any event have been "unattractive"[9] given that in crossing the golf course the pursuer had been exercising an access right permissible in terms of the Land Reform (Scotland) Act 2003, and in finding a discreet place to urinate she had acted

[7] [2015] EWCA Civ 311; [2016] QB 1003.

[8] At para 19.

[9] At para 21.

within the Scottish Outdoor Access Code 2005.[10] The sheriff was not therefore impressed by the "defenders' examples of men urinating in shop doorways or of shoplifters".[11] Indeed, despite the claim being dismissed, there was little doubt which party had the moral high ground. Although he would have assessed fair compensation at only £750, rather than the £3,000 sought by the pursuer, the sheriff was clear that "the pursuer should not have been photographed", and he even went on to warn that "officious bystanders taking pictures of females urinating in the countryside put themselves at very real risk of prosecution, whether for a public order offence or voyeurism". [12] At the same time, he remarked that "Both sides were represented and it was not for me to go looking for some different basis of the case which might have been arguable."[13]

It is not obvious why the pursuer did not invoke a breach of the data protection principles. Those who are data controllers within the meaning of section 1 of the 1998 Act are obviously not absolved of the obligation to adhere to the data protection principles simply by their failure to register in terms of section 17. As observed by Lord Hodge from the Privy Council in *Baronetcy of Pringle of Stichill*, where a party is deemed to have been a data controller under the 1998 Act, there is a requirement *both* that it should have registered *and* that it should have complied with the data protection principles.[14] Although the pursuer apparently did not cite them, the sheriff himself noted the principles, as recently discussed in another sheriff court case, *Woolley v Akram*.[15] In *Woolley*, significant compensation was awarded to the upstairs neighbours of a ground floor proprietor who had trained CCTV and audio recording devices on their property. This was found to be in breach of *inter alia* the first principle (processing to be fair and lawful) and the third principle (processing to be adequate, relevant and not excessive). The circumstances were very different as between *Woolley* and *Beyts*, but the relevance of the first and third principle to the latter might usefully have been considered. It seems at least arguable that breach of those principles by the defenders *did* cause the distress of the type the pursuer suffered and might therefore have been actionable in terms of section 13.

C. BREACH OF PRIVACY?

[10] Made in terms of s 10 of the 2003 Act: see *http://www.outdooraccess-scotland.com/*

[11] At para 21.

[12] At para 21.

[13] At para 20.

[14] [2016] UKPC 16; 2016 SC (PC) 1 at para 71.

[15] [2017] SC EDIN 7, cited at para 6.

Several of the many newspaper accounts seized upon this case as dealing with "breach of privacy", but in fact breach of privacy as a basis for delictual liability was neither pled nor discussed. This was perhaps a missed opportunity.

Admittedly breach of privacy has hitherto seen very little litigation in the Scottish courts.[16] For the last decade or more the English courts have had countless opportunities to develop the new tort born out of breach of confidence and Article 8 ECHR's requirement to protect private life, and christened in *Campbell v MGN* as misuse of private information.[17] Yet there has so far been no opportunity for a judicial pronouncement on whether the equivalent delict is recognised.[18] That said, the wrong suffered by Ms Beyts could not properly be characterised as misuse of private information, since the offending photograph was deleted almost immediately, when the police told the phone's owner that it was not needed as evidence of the suspected criminal offence. Moreover, the distress that she suffered related not to any *use* of the photograph, but to the *fact* of being photographed, and the knowledge that three men had watched her urinate. In the famous scheme of privacy torts pioneered by the US scholar William Prosser, this was not disclosure of private facts but "intrusion", as perpetrated by intruding upon "the plaintiff's seclusion".[19] On the English side of the Atlantic privacy protection is much less certain in relation to this type of wrong. Although recognition of the rights enshrined in Article 8 ECHR provided the impetus to establish a new tort of misuse of private information, Article 8 has not thus far entered "into the very content"[20] of the common law to the extent of creating a wider privacy tort encompassing privacy of personal space and privacy of the person.[21] Yet Article 8 clearly does look beyond informational privacy to wider concerns of "physical and

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[16] See Stair's comments (*Inst* 1.4.9) on the dearth of actions for verbal injury in Scotland as compared with in England. Three hundred years later the same can be said of breach of privacy.

[17] [2004] 2 AC 457 per Lord Nicholls at para 14.

[18] *X v BBC* 2005 SLT 796 did not go this far, and *Response Handling v BBC* 2008 SLT 51 turned upon breach of confidence. However, in *A v Secretary of State for the Home Department* [2014] UKSC 25; 2014 SC (UKSC) 151 at paras 46-48 Lord Reed appeared to indicate that Scots law would follow English law in this respect.

[19] "Privacy" (1960) 48 Cal L Rev 383 at 389-392. (The other three were public disclosure of embarrassing private facts, publicity placing the plaintiff in a false light, and appropriation of the plaintiff's name or likeness.) See also American Law Institute, *Restatement (Second) of Torts* § 652B.

[20] *McKennitt v Ash* [2008] QB 73 per Buxton LJ at para 11 (describing Article 8's impact upon misuse of private information).

[21] See in particular *Wainwright v Home Office* [2004] 2 AC 406 rejecting the suggestion that a general tort of invasion of privacy should be recognised.

psychological integrity" and to protection against intrusions upon the person as threatening "the most intimate aspect of one's private life".[22] Indeed judicial dicta acknowledging as much are beginning to appear in the English courts,[23] and the standard textbook predicts that "further development in the common law of protection of physical privacy…seems likely".[24] But so far the obstacle has been that the courts must first "identify another cause of action to act as a peg on which any liability for non-informational breaches of privacy can be hung".[25]

Does Scots law place itself differently? For many years prior to 2004, there was a thriving academic literature on whether, in the face of the English refusal to admit such a tort, the more flexible superstructure of the Scots law of delict allowed for a wrong of breach of privacy in a general sense.[26] That debate continues to fill the library shelves,[27] and there is certainly Institutional authority to support delictual liability for injury to dignity as well as assaults upon the person or reputation,[28] but recent case law has been as rare in these aspects of privacy as it is in its informational aspects. As Lord Bonomy memorably observed in *Martin v McGuiness* all that can be said for sure is that: "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."[29]

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[22] See *YF v Turkey* (2004) 39 EHRR 34 at para 33; see also C von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (2008) providing not only that breach of confidence should be reparable (VI.-2:205), but also infringement of dignity, liberty and privacy (VI.-2:203(1).

[23] See, e.g., *R v Broadcasting Standards Commission* [2001] QB 885 per Lord Mustill at para 48: "An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate." See also *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719 per Lord Bingham at para 11.

[24] N A Moreham and M Warby (eds), *Tugendhat and Christie: The Law of Privacy and The Media* 3rd edn (2014) para 10.98; see also N A Moreham, "Beyond information: physical privacy in English law" (2014) 73 CLJ 350.

[25] Moreham and Warby (n 23), para 10.93 (the "peg" for misuse of private information having been breach of confidence).

[26] See, e.g., Lord Kilbrandon, "The Law of Privacy in Scotland" (1971) 2 *Cambrian Law Review* 35; D M Walker, *The Law of Delict in Scotland* 2nd edn (1981) 703-708.

[27] See, e.g., N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law* (2009); E C Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010).

[28] See Bankton, *Inst* 1.10.21; Bell, *Prin* §§ 2028-2057 on the "absolute rights of individuals".

[29] 2003 SLT 1424 at para 28 (a case involving surveillance by a private detective, ultimately regarded as justified in the context of a personal injuries litigation.)

There have, however, been one or two cases in which "intrusion" upon the privacy of the person has been acknowledged as actionable, although the basis for delictual liability was not clearly articulated. In *Henderson v Chief Constable, Fife Police*[30] a woman detainee was awarded solatium to compensate for the invasion of "privacy and liberty"[31] suffered by being compelled to remove her bra while in police custody. Admittedly the Lord Ordinary, Lord Jauncey, could identify no "Scottish case in which it had been held that removal of clothing forcibly or by requirement could constitute a wrong",[32] but adopting a "broad axe" approach he reasoned that "since such removal must amount to an infringement of liberty I see no reason why the law should not protect the individual from this infringement".[33] In another case more directly in point, *McKie v Chief Constable of Strathclyde*,[34] the pursuer claimed that the manner of her wrongful arrest and detention, constituted "an invasion of her privacy and liberty and an assault".[35] Her indignities included being watched while she urinated and showered, as well as undergoing an inappropriate strip search. The incident occurred before the ECHR was incorporated into domestic law and before direct action against public authorities was made possible by the Human Rights Act 1998, and the case failed because the pursuer could not prove malice, which actions against the police were thought to require.[36] However, the Lord Ordinary, Lord Emslie, did concede that such wrongs could provide the basis for delictual liability:[37]

> the intimate watching of the pursuer as she prepared herself to leave the house [and] the intimate nature of the search carried out…could… conceivably be held, depending on how the evidence came out, to have gone well beyond what was necessary in the circumstances and to have amounted to assaults on the pursuer for the purposes of a civil claim.

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[30] 1988 SLT 361.

[31] At 367.

[32] At 367. In fact he relied on an English case, *Lindley v Rutter* [1981] 1 QB 128 (inappropriate strip search regarded as an "affront to the dignity and privacy of the individual", at 135), now to be read in the light of *Wainwright v Home Office* [2004] 2 AC 406.

[33] At 367.

[34] 2002 Rep LR 137; aff'd 2003 SC 317.

[35] At para 8.

[36] For discussion see E Reid, "The Sheriff in the Heather", in J P Grant and E Sutherland (eds), *Pronounced for Doom* (2013) 161 at 175.

[37] Para 31.

Although they do not provide a secure basis for doing so, *Henderson* and *McKie* point therefore in the direction of recognising infringements of the privacy in this sense as delicts against the person.

And on a wider view, the Scots framework is not limited to the extent that the pigeon-hole system of discrete nominate torts constrains the development of English law. The law of delict has a more flexible structure, in which specific categories of delictual liability are underpinned by general principle. As Lord Hope characterised cross-border difference:[38]

> With us, of course, delict is a part of the law of obligations. It is a broad concept, embracing all civil claims for reparation which lie outside the area of contract. In England the law of torts has grown up by the use of precedent. Lawyers accustomed to relying upon precedent are troubled when they come across something new. The creation of a new tort is a bold, some would say an irresponsible, exercise – not to be undertaken lightly. To embrace something new within the concept of delict is so much easier.

As noted above there is persuasive authority for acknowledging privacy of the person as deserving of protection. It seems that in England the future availability of a remedy for intrusions of the type experienced by Ms Beyts will depend upon finding an appropriate "peg" on which to hang it. For the Scots, on the other hand, the primary concern is not the remedy but the right. As Lord Dunedin succinctly reflected: "You may not get what you want, but that will be because you failed to show that you had the right to get it".[39] Did the pursuer suffer relevant harm as a consequence of the defender infringing a protected interest? In circumstances where the defender has flouted the pursuer's "reasonable expectation of privacy",[40] as alleged to have occurred here, that question deserves to be asked.

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[38] "The strange habits of the English", in H L MacQueen (ed), *Miscellany VI* (Stair Society vol 54, 2009) 308 at 317.

[39] "The divergencies and convergencies of English and Scottish law" (Fifth lecture on the David Murray Foundation in the University of Glasgow, 21 May 1935); see also *Micosta SA v Shetland Islands Council* 1986 SLT 193 per Lord Ross at 198.

[40] Acknowledged by the sheriff at para 13.