'Still a Part of Me': 'Functional Unity' and the Human Body in Scots Law

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Introduction

In late October 2020, Ms. Janette Ritson – a cancer patient at the NHS Golden Jubilee National Hospital, Clydebank – underwent a twelve-hour procedure which saw her left tibia subjected to radiation treatment. This occurrence may not appear at first sight to be out of the ordinary, given that radiation treatment is a common form of therapy for cancer patients, but Ms. Ritson's case was in fact somewhat unusual. While she remained based at the NHS Golden Jubilee, the problematic shin-bone was removed from her body and transported to the Beatson West of Scotland Cancer Centre approximately seven miles away. Following treatment of Ms. Ritson's tibia in the absence of the rest of her body, it was thereafter returned safely and securely to the NHS Golden Jubilee and successfully reattached to her. This 'out-of-body'[1] radiation treatment was here necessitated by the peculiar circumstances arising from the Covid-19 pandemic and associated lockdown(s).[2] That particular notwithstanding, the fact that such a medical marvel has in fact occurred gives cause to revisit certain questions posed by Lord Stewart in the 2013 case of *Holdich v Lothian Health Board*.

In *Holdich*, it was noted that no Scottish court had (at that point in time) ruled on the question of whether or not damage to stored bodily material could constitute 'bodily injury' as a matter of law.[3] Against this background, Lord Stewart asked whether or not to answer this question in the affirmative would 'do violence to the law', 'run counter to current norms of medical practice', 'be inconsistent with the regulatory regimes [*i.e.*, the Human Tissue (Scotland) Act 2006, *inter alia*]' or 'offend morality'.[4] Though these questions were posed by his Lordship, in a judgment which he himself noted might 'irritate' academics due to its 'failure to address the philosophical, ethical and policy considerations' of the case,[5] they were not answered. This was not due to any failure on the part of the judge, but rather because the pursuer's counsel omitted to predicate any argument, even an alternative argument, on these grounds[6] and so Lord Stewart was naturally forced to 'judge the case, as it is presented, on the basis that it is not a claim for bodily injury with consequential mental injury'.[7]

Not being bound by procedural constraints, the present author proposes to address the four questions posited by Lord Stewart in *Holdich*. In doing so, the German theory of *eine Funktionale Einheit* [the 'functional unity'] will be explored and its ability (or inability) to 'fit' within the present framework of Scots private law commented upon. This theory, in short, holds that while, as a general rule, body parts and human tissue separated from the person

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[1] To adopt the phraseology of Lord Stewart from *Holdich v Lothian Health Board* [2013] CSOH 197, at para.6

[2] See *Cancer Patient's Leg Treated in Separate Glasgow Hospital*, (BBC News, 29/10/2020)

[3] *Holdich*, para.6

[4] *Ibid*.

[5] *Ibid*., para.5

[6] Indeed, 'pursuer's counsel, junior and senior, categorically repudiate[d] the idea that damage to sperm samples could be injury to the pursuer's body': *Ibid*., para.9

[7] *Ibid*., para.7

whence they came are 'things' subject to the rules of property law, if the purpose of separation is implantation or re-implantation in a legal subject, then the parts concerned remain a part of the person from whom they were taken.[8] Hence, should such material be subjected to wrongdoing, the wrong must be categorised as one effected against the person, rather than merely against property.[9] The English Court of Appeal expressly rejected this analysis as a mere 'fiction' in the case of *Yearworth v North Bristol NHS Trust*,[10] and this decision clearly influenced the submissions made by counsel north of the border in *Holdich*, but it appears plain that the Court of Session was altogether more willing to entertain the notion separated body parts and human tissue may remain 'functionally united' with the person from whom they were taken.[11] Hence, in recognising that the general structure and foundational concepts of the Scots law of property and obligations is fundamentally distinct from the position in England and Wales,[12] the article as a whole will make the case that the pursuer's counsel in *Holdich* was wrong to predicate their argument on the authority of *Yearworth*.[13] Instead, it is submitted, it appears that reliance on native Scots and comparative Civilian jurisprudence might have better aided the pursuer's case as well as the more satisfactory development of the law in this area.

'Bodily Injury' and 'Personal Injury'

[8] BGHZ 124, 52 VI. Civil Senate (VI ZR 62/93).

[9] See David Price, *Human Tissue in Transplantation and Research: A Model Legal and Ethical Donation Framework*, (Cambridge University Press, 2009), at 268.

[10] [2010] Q.B 1, at para.23.

[11] *Holdich*, para.9.

[12] 'In Scotland, the publication in 1681 of the *Institutions of the Law of Scotland* by James Dalrymple (Viscount Stair) cemented a Roman concept of obligation in Scots law': Martin Hogg, *Obligations, Law and Language*, (Cambridge University Press, 2017), at 32. Conversely, while in Scotland there is no doubt that conceptually and taxonomically there exists a 'law of obligations', which contains institutional concepts – such as 'unilateral promise' and *negotiorum gestio* – that are unknown to (or at the very least unarticulated in) Anglo-American jurisprudence, some Common law scholars doubt that a comparable umbrella concept is necessary or useful within their jurisprudential tradition and indeed caution that 'as a term of art (or perhaps some should say science) its [the institutional idea of a 'law of obligations'] fundamental connection to the Civil law tradition gives rise to a number of problems for anyone who might want to employ it as an analytical tool within the Common law tradition': see, e.g., Geoffrey Samuel, *Law of Obligations & Legal Remedies*, (Cavendish, 2013), at 1. Further, as noted by MacCormick in the Stair Memorial Encyclopaedia, 'especially in relation to civil wrongs (not delicts only, but also breaches of contract and of trust, breaches of statutory duty and defects in the performance of public duties), the law of Scotland has always been represented, and correctly so, as founding more upon principles than upon precedents' (SME, *General Legal Concepts* (Reissue), (LexisNexis, 2008), para.11. The Common law, conversely, is foundationally based on the doctrine of *stare decisis* and – though 'buried', *per* Maitland, the legacy of the 'forms of action' continues to exercise an ongoing influence over the development of jurisprudence in that tradition even today. Hence, while in respect of the Common law it has been said that 'the creation of a new tort is a bold, some would say irresponsible, exercise… to embrace something new within the concept of delict is so much easier': Lord Hope of Craighead, 'The Strange Habits of the English', in Hector L. MacQueen (Ed.), *Miscellany VI*, (Stair Society, 2009), p.317. In respect of property law, the divide between Scots and English law is even more stark: as noted by Reid in the Stair Memorial Encyclopaedia, 'modern Scots law may be classified along with the Civilian legal systems of Western Europe… [and] has little in common with English law… [as such], a lawyer trained in Scotland can without difficulty other than linguistic difficulty read and understand a book about the law of property in Germany or, indeed, in Japan… but he is likely to be perplexed and bewildered by a book on the law of property in England': SME, *Property*, (Vol.18), para.2. Against this background, it is thought that any case – such as *Yearworth* or *Holdich* – which concerns the definition of a central institutional term, or the meaning of 'fundamental structural language', such as the word 'property' or 'injury' – should be approached with caution by lawyers from differing legal traditions.

[13] [2010] Q.B 1

To address whether or not recognising damage done to separated body parts and human tissue as 'bodily injury' would 'do violence to the law', it is first necessary to define what is meant, in law, by 'bodily injury'. Lawyers might be tempted from the outset to equate 'bodily injury' with 'personal injury', since cases of such (where caused by the fault of another) are thought to be 'paradigmatic' examples of delictual liability,[14] but one who wishes to provide an accurate and complete definition of 'injury' ('bodily' or otherwise) must avoid doing so.[15] In Scots law, since the Institutional period, the word 'injury' has possessed a technical meaning which, it must be said, does not find common use in the courts today.[16] Defined by the Institutional writer MacKenzie as 'the same thing with contumely or reproach',[17] and divided into two categories: 'verbal' and 'real',[18] the word, in this sense, denotes the 'legal ancestor' of contemporary nominate delicts such as assault,[19] defamation[20] and rape.[21] These nominate actions are – at their core – predicated on a different basis of liability from that of the *lex Aquilia*, in which the modern action for 'personal injury', and indeed wider conception of liability based on *culpa*, is said to be rooted.[22] Such was recognised by Walker, who in his 1981

[14] See Joe Thomson (Ed.), *Delict*, (W. Green, 2007), p.v.

[15] In rejecting the proposition that damage to a substance generated by a person's body could constitute 'personal injury' in *Yearworth*, the Court of Appeal relied on the definition of that term provided in the (English) Limitation Act 1980 (at s.38 (1)) which does not extend to Scotland (s.41 (4)). Thus, to the Court in that case, 'personal injury' denoted a specific 'impairment' to a person's 'mental or physical condition'. As discussed *infra*, 'injury' – 'personal', 'bodily' and otherwise – has a much broader meaning within Scots jurisprudence.

[16] The term 'injury' may be taken as an example of 'fundamental structural language' (of which, see Hogg, *Obligations: Law and Language*, (Cambridge University Press, 2017), at 1-11), since it has long been historically embedded as a core concept within the law of delict (see T. B Smith, *A Short Commentary on the Law of Scotland*, (W. Green, 1962), at 654, where it is noted that '*contumelia* inflicted *animo iniuriandi* has perhaps as many aspects as *culpa* in the *damnum injuria datum*'), yet the sense in which it is used in ordinary parlance has served to obscure the technical meaning of the term in Scots legal practice. Properly speaking, an 'injury' is an 'affront' compensable in the Scots law of delict without proof of *damnum* [loss], but in recent decades it has been more often employed in a sense which renders it synonymous with 'loss' or 'damage' (see Douglas Brodie (ed.), *Stewart on Reparation: Liability for Delict*, (W. Green, 2021), para.A5-003). Hence, even in cases such as those involving sexual abuse – which are clearly 'pure' *actiones iniuriarum* (see Alasdair McLean, *Autonomy, Consent and the Body in Delict*, in Joe Thomson (Ed.), *Delict*, (W. Green, 2007-2022), para.11.79) the historic and institutional meaning of 'injury' has been obscured (see the comments of Lord Eassie in *CG v Glasgow City Council* 2011 SC 1, at para.30). It is notable, further, that the All-Scotland Sheriff Personal Injury Court, instituted in 2015 following the enactment of the Courts Reform (Scotland) Act 2014, does not in fact have jurisdictions to hear cases of 'injury' in the classical Scots sense of that term.

[17] MacKenzie, *Matters Criminal*, p.303. This understanding is mirrored in later Institutional writers, including (e.g.) Erskine, who held that 'injury', in its particular sense, consisted of 'the reproaching or affronting our neighbour' (*Institutions*, IV, 4, 80). Though reference is made in these works to 'injury' as a crime, it must be noted that 'the rules of the substantive law [of crime and delict], with the possible exception of the law of negligence, are one and the same in the formative period of the sixteenth and seventeenth centuries and remained substantially so until the early years of the nineteenth century': John Blackie, *The Interaction of Crime and Delict in Scotland*, in Matthew Dyson, *Unravelling Tort and Crime*, (Cambridge University Press, 2014), at 358

[18] *Ibid*. This bipartite division of *iniuria* can be traced to Labeo, who maintained that a 'real' injury was perpetrated by the occurrence of some physical act and a 'verbal' injury where words, rather than the wrongdoer's hands, are used to effect contumely: D.47.10.1.1 (Ulpianus).

[19] Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law*, (W. Green, 2010), para.2.01

[20] Jonathan Brown, *The Defamation and Malicious Publications (Scotland) Bill: An Undignified Approach to Law Reform?* [2020] SLT (News) 131

[21] Alasdair Maclean, *Autonomy, Consent and the Body in Delict*, in Joe Thomson (Ed.), *Delict*, (W. Green, 2007), at para.11.79

[22] See, Robin Evans-Jones and Helen Scott, *Lord Atkin, Donoghue v Stevenson and the Lex Aquilia: Civilian Roots of the 'Neighbour' Principle*, in Paul J. du Plessis, *Wrongful Damage to Property in Roman Law: British Perspectives*, (Edinburgh University Press, 2018), at 272

treatise on *Delict* noted that 'liability in delict, with few exceptions, is referable to the concepts of *injuria* [in the sense of the nominate Roman delict][23] or *damnum injuria datum* [denoting here *Aquilian* liability predicated on *culpa*]'.[24] It is this former sense of the term 'injury' which influenced the historic development of nominate Scots actions and remedies for *solatium sine damno*, though of course – the categories of liability in delict being ever-open[25] – the law retains the flexibility to afford reparation for wrongdoing of this kind in wholly novel circumstances.

'Injuries' of the sort mentioned by MacKenzie, or such as those inflicted by assault (*inter alia*), are not properly speaking concerned with damage done to the human body, or illness or physical facility arising out of harm inflicted thereto, but are rather concerned with the impairment of the victim's *existimatio* ['dignity', in the broadest sense of that term].[26] Although cases singularly alleging this infringement are now rare, if not unheard of,[27] the *actio iniuriarum* – to give the action its Roman, and Roman-Dutch, appellation – is of ongoing relevance to the law of Scotland,[28] particularly as it can conceivably be used to secure remedy where no nominate delictual action is available.[29] Given that the *actio iniuriarum* in Scots law,[30] as in Roman law, serves (or logically ought to serve) to afford protection to individual interests in *corpus* [the body], *fama* [reputation] and *dignitas* ['honour', or 'dignity' in a more specific sense than is meant by *existimatio*],[31] any satisfactory definition of 'bodily injury' must

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[23] Of which, see J.4.1.2

[24] David M. Walker, *The Law of Delict in Scotland*, (W. Green, 1981), at 31.

[25] See T. B Smith, *A Short Commentary on the Law of Scotland*, (W. Green, 1962), at 653-654.

[26] See the discussion in *O Tempora! O Mores! The Place of Boni Mores in Dignity Discourse*, [2020] Cambridge Quarterly of Healthcare Ethics 144, *passim*.

[27] The emphasis placed on 'affront' in cases of assault, for instance, 'is apparent in nineteenth century cases but recedes in the twentieth': Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law*, (W. Green, 2010), para.2.01

[28] It is clear, for instance, that 'the *actio iniuriarum* root of Scots law infuses the delict of assault as much as any development of the *lex Aquilia*': Brian Pillans, *Delict: Law and Policy*, (W. Green, 2014), para.6.13; further, 'in the absence [of a modern and comprehensive system of 'personality rights'] the Scottish courts have had to rely on the historic *actio iniuriarum*' to afford remedy in cases of unwarranted wrongdoing, as in *Hardey v Russel and Aitken* 9 January 2003, Unreported (OH): See Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee University Press, 2009), para.1.4.2

[29] Recall *Stevens v Yorkhill NHS Trust* 2006 SLT 889 and see further, for example, Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194, *passim*; Jonathan Brown, *Revenge Porn and the Actio Iniuriarum: Using 'Old Law' to Solve 'New Problems'*, [2018] Legal Studies 396; Jonathan Brown, *O Tempora! O Mores! The Place of Boni Mores in Dignity Discourse*, [2020] Cambridge Quarterly of Healthcare Ethics 144.

[30] Though generally unarticulated in modern case law, as the Appellate Committee of the House of Lords recognised in the case of *McKendrick v Sinclair* 1972 SC (HL) 25, common law actions do not fall into desuetude and so since the *actio iniuriarum* undoubtedly formed a core part of Scots law at one time, in the absence of statutory abolishment its continued existence in modern jurisprudence may be presumed. Indeed, as commentators such as Whitty have demonstrated, there exist historic cases – such as the three Scottish 'post-mortem cases', *Pollock v Workman* (1900) 2 F 354, *Conway v Dalziel* (1901) 3 F 918 and *Hughes v Robertson* 1913 SC 394 which were implicitly founded upon the action: see Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194, *passim*. It has been suggested, further, that cases such as *Henderson v Chief Constable of Fife* 1998 SLT 361 could be rationalised on the basis of a general *actio iniuriarum*, although that terminology was noted used by name in that case (see Craig Anderson, *Roman Law for Scots Law Students*, (Edinburgh University Press, 2021), at 415), a suggestion which correlates with the finding of the Court of Session in *Stevens* in respect of the three post-mortem cases.

[31] D.47.10.1.2 (Ulpian). Although the Roman conception of 'dignity' is fundamentally distinct from the modern (particularly post-1945) conception of the same, the concept of 'dignity' in respect of the *actio iniuriarum* was

account for the possibility of liability for 'affronting' the body, as well as of inflicting actual (physical) harm or wounds.[32]

An affront actionable as 'injury' (Latinised *iniuria*) occurs when the wrongdoer acts contumeliously (i.e., 'hubristically')[33] in disregarding the recognised personality interest(s) of the victim. 'Personality interests' – or more broadly 'non-patrimonial interests' – are those interests which cannot be readily comprehended in monetary terms;[34] they represent 'who a person is, rather than what a person has'.[35] 'Life, members [i.e., limbs] and health' are manifestly examples of 'personality interests' historically recognised by the law of Scotland[36] and so any action which is designed to, or reckless to the possibility that it might, affront these may be deemed an 'injury' in the nominate sense of that term.[37] With that said – as Stair recognised – though the value of one's 'life, members and health' is 'inestimable and can have no price',[38] it has since the turn of the nineteenth century been recognised that such interests may also be damnified[39] – that is, recognised as objects of 'loss' within the context of an Aquilian action for the recovery of *damnum injuria datum*.[40] In effect, then, modern Scots law allows for the recovery of *solatium* for hurt feelings where harm is effected to one's bodily integrity, as well as a claim for damages arising from the same instance of wrongdoing.[41] That

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evidently 'levelled-up' (in the sense described by Whitman, see James Whitman, *Human Dignity in Europe and the United States*, in G. Nolte (Ed.), *Europe and U.S. Constitutionalism* (Strasbourg: Council of Europe Publishing, 2005), p.97) to denote an interest shared, in equal measure, by all human beings by *ius commune* scholars such as the French Humanist Donellus: See, generally, Jacob Giltaij, *Existimatio as "Human Dignity" in Late-Classical Roman Law*, [2016] Fundamina 232, *passim.*

[32] It should be noted, here, in line with the observations of MacAulay QC, that 'in principle *solatium* for "hurt feelings" caused by affront based upon the *actio injuriarium* is a different animal to the *solatium* that can be awarded to a claimant for physical or psychiatric injury. *Prima facie* the threshold for recovery for hurt feelings is lower than that for psychiatric injury.': *Stevens v Yorkhill NHS Trust* [2006] CSOH 143, at para.63

[33] See the discussion in David Ibbetson, '*Iniuria*: Roman and English' in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2013), at 40.

[34] Of course, in modern Scots law, to quote Lord Neaves, 'money is the universal solvent' (see *Auld v Shairp* (1874) 2 R. 191, p.199), meaning that monetary recompense can (and generally is) sought as reparation for any legal wrong, no matter the interest harmed (for the difficulties that this presents, see generally William J. Stewart, *How Much for a Leg? Assessing the Process of Assessment of Non-Pecuniary Personal Injury Damages in Scotland,* (Dundee University Press, 2010)), but historically this was not so and 'affronts' to non-patrimonial interests of the kind discussed here could be repaired by non-monetary means such as the palinode (i.e., court-ordered apology): see John Blackie, 'Defamation' in Kenneth G. C. Reid and Reinhard Zimmermann, *A History of Private Law in Scotland,* Vol. II (Obligations) (Oxford University Press, 2000), at 668.

[35] Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee University Press, 2009), para.1.2.1

[36] Even in works which are not directly concerned with crime/delict and those matters which were the concern of the consistorial courts, such as Stair's *Institutions*, can be found 'a scheme of protected interests wide enough to cover the whole field of personality rights': John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law*¸ in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee University Press, 2009), para.2.2.8 (c)

[37] In other words, any contumelious wrong which effects an affront is, or may be classified as, an *iniuria*, even if such terminology is not used by the court(s) who decide any case connected with such conduct: See Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194, at 197.

[38] Stair, *Institutions*, I, 9, 4

[39] Stair, *Institutions*, I, 9, 4

[40] Of which, see Brian Pillans, *Delictual Liability at Common Law*, in Joe Thomson, *Delict*, (W. Green, 2007), para.5.02

[41] See, e.g., *Reid v Mitchell* (1885) 12 R. 1129 and more recently *Wilson v Exel UK Ltd.* 2010 SLT 671

these logically several actions (the claim for *solatium* and the claim for damages) have come to be conflated in practice has obscured the logic of the structure of the law,[42] with (as Professor Blackie observed) the net effect that 'the Scots common law of delict is not today structured clearly under two broad heads, Aquilian liability and *iniuria*'.[43]

The operative word in Blackie's observation is 'clearly': the 'basic grammar' of Aquilian liability and liability based on *iniuria* remains latent in our law,[44] although since the Court of Session assumed jurisdiction over what were previously consistorial cases the visibility and adjectival – though not theoretical – importance of this division receded. In principle, it remains the case that 'loss' is immaterial in an action predicated on 'injury', in the specific sense of *iniuria*,[45] with mere hurt feelings, without any attendant 'loss' (i.e., *damnum*), sufficient to justify a claim for *solatium*.[46] Hence, an instance of assault which did not cause 'damage' to the body of the victim, nor ultimately inflict any kind of diagnosable psychological impairment upon them, would nonetheless be actionable as a delict as well as (potentially) criminal.[47] This example illustrates the ongoing demarcation between *iniuria* in its nominate sense and the so-called general action for reparation, predicated on the concept of *culpa* (fault) and the occurrence of *damnum iniuria datum*,[48] which has commanded the overwhelming majority of lawyers' attention in Scotland since the nineteenth century.[49] To succeed in any claim for damages for an incident where, it is alleged, the defender was at 'fault', the pursuer

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[42] The present state of affairs in respect of nominate delicts such as assault might be likened to the position in respect of the nominate delict of defamation in the nineteenth century, wherein the delict morphed from a wrong predicated on the occurrence of *iniuria* in its specific sense to a 'Janus-headed delict' which 'treats the two types of loss [patrimonial loss, or *damnum*, and non-patrimonial loss, or affront] as little more than an issue of quantification of damages: two losses from a single wrong'. This 'not surprisingly, but with disastrous effects on the coherence of the law, led to a coalescence of the very basis of liability itself' in respect of defamation – see Kenneth McK. Norrie, *The Scots Law of Defamation: Is There a Need for Reform?* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee University Press, 2009), para.9.2.4. It is submitted, here, that Scots lawyers must be careful to avoid repeating the error in respect of our remaining *iniuria*-based delicts.

[43] John Blackie, *The Protection of Corpus in Modern and Early Modern Scots Law*, in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2011), p.155.

[44] The continuing relevance of the divide is perhaps further obscured by the modern tendency to differentiate so-called 'intentional' delicts from 'unintentional' delicts (i.e., negligence): see, e.g., Joe Thomson, *Damages for Nuisance*, [1997] SLT (News) 177

[45] David M. Walker, *The Law of Delict in Scotland*, (2nd Ed.) (Edinburgh: W. Green, 1981), p.40

[46] *Cruickshanks v Forsyth* (1747) Mor.4034. See also *Stevens v Yorkhill NHS Trust* [2006] CSOH 143, at para.63 and Elspeth C. Reid 'Personality rights: a study in difference' in Vernon Palmer and Elspeth C. Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press, 2009) at 395–396, wherein it is noted that the case of *Ward v Scotrail Railways Ltd.* 1999 SC 255, which ostensibly held that 'emotional distress is not enough to found an action' (at 259-260, *per* Lord Reed), found this to be the case only because in *Ward* there were no specific pleadings of intention of malice (i.e., of *contumelia*) which would be necessary to sustain an *actio iniuriarum*. Hence, *Ward* confirms merely that *damnum* is an essential element of any action based on *culpa*, but does not serve to suggest that such is regarded, in modern Scots law, as a necessary element in a case of 'injury'.

[47] See *Stedman v Henderson* (1923) 40 Sh. Ct. Rep. 8; see further Douglas Brodie (ed.), *Stewart on Reparation: Liability for Delict*, (W. Green, 2021), para.A5-00. Specific forms of sexual harassment, such as so-called 'upskirting', further provide an illustrative (if hypothetical) example of the sort of conduct envisaged here, although no case turning on such facts has yet been argued before the civil courts of Scotland: see generally Jonathan Brown, *Revenge Porn and the Actio Iniuriarum: Using 'Old Law' to Solve 'New Problems'*, [2018] Legal Studies 396.

[48] Brian Pillans, *Delictual Liability at Common Law*, in Joe Thomson, *Delict*, (W. Green, 2007), para.5.02.

[49] Brian Pillans, *Delictual Liability at Common Law*, in Joe Thomson, *Delict*, (W. Green, 2007), *passim*.

must prove that a 'loss' was caused by the defender's wrongful conduct[50] (in practice, this 'wrongful conduct' most often being the defender's breach of the duty of care owed towards the pursuer).[51]

In view of the ongoing relevance of *iniuria* to the Scots law of delict, it follows that any satisfactory definition of 'bodily injury' encompass maltreatment leading to an 'affront', in addition to bodily wounds, damage or illness (including mental illness)[52] which are more obvious instances of 'personal injury' in the usual sense. This is significant, since the treatment and use of body parts, tissue and derivatives is a particularly complex and emotive subject, where concerns about matters such as 'human dignity' are particularly pronounced.[53] At first sight, then, it may be thought that far from 'offending morality', treating separated body parts and tissue as an extension of the person whence it was removed, rather than a mere 'thing' or object of property, would in fact be the more morally proper approach.[54] Recognising that separated human tissue may be 'injured' would allow for dignitary wrongs effected to said tissue to be remedied more readily than would be the case if such were categorised merely as objects.[55] Such would allow not only for reparation in straightforward cases of 'assault' effected against separated body parts,[56] but also in those myriad and hitherto unimagined cases of wrongdoing contumeliously directed towards human tissue.[57] With this in mind, the question of whether or not holding that separated human tissue might be the subject of 'bodily injury' would 'do violence to the law' seems pertinent.

Body Parts and Separated Human Tissue in Scots Law: 'Mere Things'?

While there exists a Scottish statutory regime which purports to regulate matters concerning the use of human biomaterials, the relevant legislation, as it stands, is silent as to

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[50] Brian Pillans, *Causation*, in Joe Thomson, *Delict*, (W. Green, 2007), para.7.01

[51] As Professor Thomson noted in 1996, though 'the duty of care is only needed to impose delictual liability in respect of a defender's negligent conduct', so paradigmatic is the concept in the modern Scots law of delict that in some cases (e.g., *Saeed v Waheed* 1996 SLT (Sh Ct) 39, which Professor Thomson commented upon) 'resort [has been] made to the concept of duty of care when the defender's conduct was clearly deliberate wrongdoing against the pursuer'. Since 'to discuss duty of care in this context is seriously to misunderstand the nature of delictual liability in Scots law', it is readily apparent that this area of Scots private law has long been misunderstood by practitioners and theoreticians alike: See Joe Thomson, *A Careworn Case? Saeed v Waheed 1996 SLT (Sh Ct.) 39*, [1996] SLT (News) 392-393.

[52] To employ the definition of 'personal injury' given in the All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015, Art.1 (2)

[53] Charles Foster, *Dignity and the Ownership and Use of Body Parts*, [2014] Cambridge Quarterly of Healthcare Ethics 417, p.418

[54] Consider, e.g., Charles Foster, *Dignity and the Ownership and Use of Body Parts*, [2014] Cambridge Quarterly of Healthcare Ethics 417, *passim*.

[55] See the discussion in Jonathan Brown, *Dignity, Body Parts and the Actio Iniuriarum: A Novel Solution to a Common (Law) Problem?* [2019] Cambridge Quarterly of Healthcare Ethics 522

[56] Though it should be noted in any case that the Scots concept of assault 'assault owes much to the *actio injuriarum* and that proof of physical injury or loss is not required' (Douglas Brodie (ed.), *Stewart on Reparation: Liability for Delict*), (W. Green, 2021), para.A5-003) and 'in the Scots delict of assault it is possible to discern, even today,46 the Civil Law legacy of the actio iniuriarum as a general organising principle' (Elspeth C. Reid 'Personality rights: a study in difference' in Vernon Palmer and Elspeth C. Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh University Press, 2009) at 394).

[57] As Stair noted in his *Institutes*, there is no limit to the perversions which the malice and cruelty of men can invent: 4, 40, 26

the institutional (i.e., 'traditional' legal) status of the regulated material.[58] While a proprietary model would appear to be presupposed by the relevant legislation, which speaks at times of 'possession' of bodies and parts thereof,[59] it was noted in *Holdich* that the fact that 'possessory remedies, interdict and delivery, are available for corpses and bio-matter separated from the body… does not [of itself] make the objects of the remedies property; nor does the fact that for certain statutory purposes bio-matter is to be treated as a "product"'.[60] This curious proposition is readily explicable if one understands that property law in Scotland is fundamentally Civilian in character;[61] it is not (or ought not to be) possible for lawyers in this jurisdiction to – even merely for the sake of convenience – 'elide the concepts of legal ownership and possessory title into the word "ownership"',[62] as was done in *Yearworth*.[63] While subsequent academic works have discussed *Holdich* from a purely Common law analytical standpoint,[64] it remains the case that the differences between the institutional notion of 'property' in Common and Civil law are such that 'it is not just that the individual concepts are different, but that the whole conceptual landscape [is] significantly different [to the extent that] problem[s] does not arise conceptually in the same way'.[65]

It must be noted here the Civilian tradition has long recognised that 'ownership and possession have nothing in common with one another'.[66] Hence, following this tradition, in Scots law a possessor of a thing who is unlawfully dispossessed by the owner of said thing has an action to recover possession,[67] notwithstanding the fact that the owner by definition has 'better' title to the thing, objectively speaking, than the mere possessor.[68] It follows from this that the existence of a possessory remedy, and the vesting of such in a particular person, does

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[58] This gives rise to the question, as Lord Stewart noted in *Holdich*, 'if stored gametes have to be labelled in terms of traditional categories, where should the line — effectively the line of separation from the body — be drawn between persons and property?': *Holdich v Lothian Health Board* [2013] CSOH 197, para.49

[59] See, e.g., s.4B of the Human Tissue (Scotland) Act 2006 and s.2 of the Anatomy Act 1984.

[60] *Holdich v Lothian Health Board* [2013] CSOH 197, para.49

[61] David L. Carey Miller, Malcolm Combe, Andrew Steven. and Scott Wortley, *National report on the transfer of movables in Scotland* in W. Faber and B. Lurger (eds.), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus*, (Sellier, 2009), p.311

[62] *Yearworth v North Bristol NHS Trust* [2010] QB 1, para.25. In Scots law, possession is a '*distinct* lesser right than property', *per* Stair (*Institutes*, 2, 1, 8) and this distinct concept 'is given interim protection without determining who has the right to possess', and indeed without reference to 'ownership': Craig Anderson, *Possession of Corporeal Moveables*, (Edinburgh Legal Education Trust, 2015), para.1-03.

[63] *Yearworth v North Bristol NHS Trust* [2010] QB 1, para.25

[64] See, e.g., James Edelman, *Property Rights to our Bodies and their Products*, [2015] UWA L. R. 47, at 60-62; Neil Maddox, *Property, Control and Separated Human Biomaterials*, [2017] European Journal of Health Law 24, at 35-36.

[65] See John Bell, *English Law and French Law — Not So Different?*, [1995] Current Legal Problems 63

[66] D 41.2.12.1 (Ulpianus): '*nihil commune habet proprietas cum possessione*'. Ulpian perhaps overstates matters when he says that the concepts have *nothing* in common with one another – certainly, both relate to the *ius quod ad res pertinet* [law pertaining to things] and so have more in common with one another than with other institutional concepts found in, e.g., the law of persons – nonetheless it is clear that in the Civilian tradition 'possession is protected without regard to who has the right to possess the property': Craig Anderson, *Possession of Corporeal Moveables*, (Edinburgh Legal Education Trust, 2015), para.1-03.

[67] The action for spuilzie (or 'ejection' and/or 'intrusion' in the case of immoveable property): Craig Anderson, *Property: A Guide to Scots Law*, (W. Green, 2016), para.3.27

[68] 'In a dispute between the owner of the property and someone possessing that property without a right to do so, the owner will always ultimately be successful': Craig Anderson, *Property: A Guide to Scots Law*, (W. Green, 2016), para.3.26

not imply that the person in question is in any sense 'owner' of the thing.[69] In this sense, Lord Stewart's observation that the existence of possessory remedies does not in and of itself imply 'property' is accurate, though only if here the term 'property' is interpreted as synonymous with 'ownership': that is to say, the availability of possessory remedies in a given case in no way suggests that the individual with entitlement to possessory remedy is 'owner' of the thing in question.[70] The term 'property', though, has (at least)[71] a dual meaning in this jurisdiction;[72] in addition to denoting a (indeed, the supreme) proprietary relationship, the word 'property' if of course commonly used to describe the object of ownership itself: that is, the 'thing' over which 'property' is asserted.[73]

In Scotland, then, 'property law' has been described as 'the law of things and rights in things',[74] which is consistent with the jurisdiction's connection to the institutional scheme of Roman law.[75] Though the English language term 'thing' has been described as 'too undignified' a term to refer to such an important concept in such an important area of law, as Professor Reid notes other jurisdictions such as Germany and South Africa have not, historically, shied away from speaking of 'thing-law'.[76] The Romans themselves did not speak of 'property law', but rather conceptualised a broad *ius quod ad res pertinet* [law pertaining to things] of which the law of corporeal and incorporeal 'property', obligations and inheritance formed but a part.[77] To the 'surprise' of eminent judges from Common law jurisdictions,[78] Scotland – though a 'highly developed economy'[79] – maintains a system of (moveable and immoveable, or moveable and 'heritable' in usual parlance)[80] property law which is fundamentally Roman in character.[81] Indeed, Scotland, along with its sister-jurisdiction South Africa, has been described as having a system of 'living Roman law'.[82]

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[69] *Per* Stair, 'in spuilzies, the pursuer needs no other title than possession: Stair, *Institutes*, 1, 9, 17

[70] See *Gemmell v Bank of Scotland* 1998 SCLR 144, at 146 *per* Sheriff Gordon.

[71] In addition to denoting the right of ownership and the thing owned in Scotland, 'property' is sometimes used also as a broad term to encompass the sum total of a person's assets, though more commonly the term 'estate' is used in this context and in a technical sense the term 'patrimony' is to be preferred where the sum total of a person's assets and liabilities is concerned: See Craig Anderson, *Property: A Guide to Scots Law*, (W. Green, 2016), para.1.01

[72] Peter Robson and Andrew McCown, *Property Law*, (2nd Edition, W. Green/Sweet and Maxwell, 1998) para.1.02

[73] Craig Anderson, *Property: A Guide to Scots Law*, (W. Green, 2016), para.1.01

[74] Kenneth Reid *The Law of Property in Scotland*, (Butterworths, 1996), para.11

[75] 'Property law is the area of modern Scots law in which the influence of Roman law is perhaps the most obvious': Craig Anderson, *Roman Law for Scots Law Students*, (Edinburgh University Press, 2021), at 161

[76] Kenneth Reid *The Law of Property in Scotland*, (Butterworths, 1996), para.3

[77] David L. Carey Miller, *Property*, in Ernest Metzger (Ed.), *A Companion to Justinian's Institutes*, (Duckworth, 1998), at 42

[78] See the comments of Lord Hobhouse of Woodborough in *Burnett's Trustee v Grainger* [2004] UKHL 8, at para.52

[79] *Burnett's Trustee v Grainger* 2004 S.C. (H.L.) 19, at para.52

[80] Craig Anderson, *Property: A Guide to Scots Law*, (W. Green, 2016), para.1.35

[81] A comparative lawyer would not be as surprised as Lord Hobhouse to find that the Scots law of property is fundamentally Roman in character: 'the law of property in mixed legal systems is always Civilian': See Kenneth G. C. Reid, *Patrimony not Equity: The Trust in Scotlan*d, in Remus Valsan, *Trust and Patrimonies*, (Edinburgh University Press, 2015), at 111

[82] Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2011), at 2

It is of course possible to overstate the differences between Common and Civilian jurisprudence insofar as the concept of 'property' is concerned,[83] however that is not to say that those differences can be minimised or simply glossed over.[84] According to the most orthodox view of 'property' in the Common law tradition, while one might colloquially speak of 'ownership' of a thing such is necessarily and conceptually inadequate. If 'ownership' of an object is discussed, the discussion does not in fact concern a singular right, nor does it describe the content of any relationship between a given person and the thing in question. Instead, 'ownership' in this tradition is understood as denoting a 'bundle' of disparate rights (or, metaphorically, 'sticks') which might severally pass between, and be split between, a range of discrete persons.[85] If the sticks are spread across a sufficiently large range of persons, it can be challenging, if not plainly impossible, to answer the question 'who is owner' in any meaningful sense. Thus, while one might claim 'ownership' of particular rights in the Common law tradition (one may, for instance, claim to own a mortgage, lease, or an easement, amongst other incorporeal (or juristic) things)[86] it is not possible in strictly legal terms to own a physical object itself. At most, one can claim to 'own' a maximal range of rights to that physical object and so style oneself 'owner' based on the aggregate of rights owned over said object.[87]

Scots lawyers, like those from purely Civilian jurisdictions, are not accustomed to speaking of 'bundles' of rights, or conceptualising 'ownership' in such terms[88] In the Civil tradition, in contrast to the Common law,[89] 'ownership' (i.e., *dominium*) is a defined and institutionalised legal concept, understood to be the 'sovereign or primary real right'[90] which binds a singular title-holder, or group of title-holders,[91] to the 'thing' (*res*) owned.[92] One cannot claim 'ownership' merely by demonstrating that one enjoys a 'better' right or entitlement to the thing than some other, as one may do in the Common law.[93] While one may cut and distribute branches from the 'tree' that is ownership, to adapt Professor Gretton's memorable

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[83] See Gretton's observations in George L. Gretton, *Ownership and Insolvency: Burnett's Trustee v Grainger*, [2004] Edin. L. R. 389, at 390

[84] George L. Gretton, *Ownership and Insolvency: Burnett's Trustee v Grainger*, [2004] Edin. L. R. 389, at 390

[85] *Yearworth v North Bristol NHS Trust* [2010] QB 1 at paras.41-44

[86] George L. Gretton, *Ownership and insolvency: Burnett's Trustee v Grainger*, [2004] Edin. L. R. 389, at 390

[87] In the words of the *per curiam* judgment of *Yearworth*: 'The concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things' – *Yearworth v North Bristol NHS Trust* [2010] QB 1, para.28

[88] See Malcolm M. Combe, *Exclusion Erosion – Scots Property Law and the Right to Exclude*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 104.

[89] See Barbara Pierre, *Classification of Property and Conceptions of Ownership in Civil and Common Law*, [1997] RGD 235, p.237

[90] Erskine, *Institute*, 2, 1, 1

[91] Ownership, in Scots law, may be shared (as in the case of two or more co-owners with *pro indivisio* rights over a single item) but not 'split'; in all cases of 'ownership' there is only ever a single title connecting the individual or group to the thing in question: See Craig Anderson, *Property: A Guide to Scots Law*, (W. Green, 2016), para.9.01-9.02

[92] George L. Gretton, *Ownership and insolvency: Burnett's Trustee v Grainger*, [2004] Edin. L. R. 389, at 390

[93] Consider, e.g., *Hecht v Superior Court (Kane)* Wests Calif. Report 1996 Nov 13; 59: 222-9, where the court held that 'to the extent that this sperm is 'property' it is only 'property' for [the girlfriend]. As such it is not an 'asset' of the estate subject to allocation, in whole or in part, to any other person whether through agreement or otherwise'.

metaphor,[94] with the net effect that as in the Common law tradition the 'rights associated with ownership' (e.g., the right to use and to fruits) might be split and shared out amongst disparate persons, so long as the owner has not given away the stump of the tree itself, 'what is left is still ownership'.[95] In other words, even if the 'owner' of a thing is sequestrated from all of the usual incidents of property, they are, and can still be called, the 'owner' of the thing in question, albeit that the 'ownership' they may lay claim to is practically devoid of content.[96]

The nature of the enquiry conducted in *Yearworth* thus ought to have been fundamentally different from the enquiry which would have to be conducted to determine whether or not human tissue could be juristically classified as 'property' in Scotland.[97] Consistent with the concept of 'ownership' in English law, the Court of Appeal '[had] no doubt that, in deciding whether sperm is capable of being owned for the purpose which we have identified, part of our enquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case [here, the 'right of use']… and the nature of the damage consequent upon the breach of the duty of care [that being the inability to now use the sperm]'.[98] One cannot, however, determine the presence of 'ownership', still less identify the 'owner' of a thing, by conducting such an enquiry in Scots law;[99] identifying that a particular person enjoys certain rights, or demonstrates any given incident, in respect of a thing does not and cannot conclusively establish that said person is the 'owner' of the thing in question.[100] Indeed, as Lord Stewart noted in *Holdich* itself, identifying a particular right – such as the 'right to use' – 'does not actually tell us whether the "right" is a property right or a personality right'.[101] Against this background, Lord Stewart suggested that while the pursuer's 'property case', as it had been argued (i.e., in like vein to *Yearworth*) was not 'bound to fail', but nonetheless that it faced difficulties.[102] In light of this, his Lordship suggested that the pursuer's case 'could have been put on a simpler footing, namely that any "thing", not being a living person, in relation to which the possessory remedies of delivery and interdict are available, is capable of being the subject matter of a contract for safekeeping. Sperm in a container is such a "thing"'.[103]

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[94] George L. Gretton, *Ownership and insolvency: Burnett's Trustee v Grainger*, [2004] Edin. L. R. 389, at 389

[95] George L. Gretton, *Ownership and insolvency: Burnett's Trustee v Grainger*, [2004] Edin. L. R. 389, at 389

[96] Indeed, it was 'to prevent ownership being rendered useless by permanent usufructs' that specific rules as to the termination of such things were instituted in Roman law: J.2.4.1

[97] As Reid noted in a chapter commenting on *Holdich*, 'in the Civil law world to which Scotland belongs, ownership is an idea which is quite distinct from its contents. There were no sticks for the parties in Holdich to count: Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 245.

[98] *Yearworth v North Bristol NHS Trust* [2010] QB 1, para.28

[99] See Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194 at fn.93: as Professor Reid noted in personal correspondence with Professor Whitty, 'a Civil Law system needs to be able to locate ownership, otherwise the whole scheme of rules fails'.

[100] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 245.

[101] *Holdich v Lothian Health Board* [2013] CSOH 197, at para.47

[102] *Holdich v Lothian Health Board* [2013] CSOH 197, at para.75

[103] *Holdich v Lothian Health Board* [2013] CSOH 197, at para.75

While for practical and rhetorical purposes, such an argument could be presented convincingly by a skilled advocate, and the thorny question of 'ownership' of the sperm could have been avoided (for the purposes of the court action itself, if no other) were this approach to have been taken by pursuer's counsel, it conceptually makes little sense to maintain that an entity might be institutionally categorised as a 'thing', but not recognised as 'property', in Scots law.[104] If, as is the case, 'property law is the law of things', then it would appear to follow that, unless there is some express rule barring the recognition of the object as 'property' in a more technical sense, an object which is recognised as a 'thing' and subject to rights of possession is 'property', even if the owner of the thing cannot be readily identified. In the Roman institutional schema, as traditionally in Scottish jurisprudence,[105] it was recognised that certain objects were in all cases *nullius in bonis* [in the property of no one] as they were consigned to the provenance of divine law,[106] but bodies and parts thereof – unless reverentially interred – did not fall into this category.[107] Human tissue – understood broadly as encompassing regenerative and non-regenerative parts and derivatives of the human body – does not obviously fall into any of the classical categories of 'public' or 'divine' objects which are removed from the ambit of ordinary 'thing law' in the Roman and later Continental European legal tradition.[108]

In the Common law tradition, there ostensibly exists a particular rule which precludes the recognition of human tissue as 'property': the historical rule 'there is no property in a corpse'[109] has, by analogy, developed into a wider prohibition on the recognition of proprietary rights in body parts and derivative products of the human body.[110] Though some Scots sources have suggested that this rule has been received north of the border,[111] there is good reason to doubt the veracity of this apparent reception,[112] not least because a major consequence of the English 'no property' rule has been to preclude trying the misappropriation of cadavers as the crime of 'theft',[113] while in Scots law it seems settled that a cadaver (at least before it has been

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[104] Recall Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194 at fn.93.

[105] Viscount Dunedin (Ed.), *Encyclopaedia of the Laws of Scotland*, Volume XII (W. Green, 1931), para.437

[106] J.2.2.8

[107] Of which, see Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 357

[108] For these categories, see J.2.2.pr.-2.2.10 and Viscount Dunedin (Ed.), *Encyclopaedia of the Laws of Scotland*, Volume XII (W. Green, 1931), para.437

[109] Of which, see *Yearworth v North Bristol NHS Trust* [2010] QB 1 para.32

[110] Rohan Hardcastle, Law and the Human Body, (Hart Publishing, 2007) p.203; Jesse Wall, *Being and Owning*, (Oxford University Press, 2015), p.1; *R v Kelly* [1999] QB 630

[111] See, e.g., *Robson v Robson* 1897 SLT 351 at 353. A number of commentators – even some based in Scotland – have in fact taken the view that the English 'no property' rule is representative of a non-existent 'UK law': See, for example, Thomas L. Muinzer's review of Heather Conway's *The Law and the Dead*, [2017] Med. L.R 505, p.510, wherein Muinzer (then based at the University of Stirling, now based at the University of Aberdeen) states that '[I]n UK law, the human body has conventionally been placed outside of the realm of property'.

[112] For comprehensive discussion of this point, see Jonathan Brown, *Corpus Vile or Corpus Personae? The Status of the Human Body, its Parts and its Derivatives in Scots Law*, [2020] (University of Strathclyde PhD Thesis), paras.2.1-2.5

[113] Indeed, the rule itself seems to have stemmed from a rejection of the idea that the misappropriation of a cadaver could be tried as theft in England: Imogen Goold and Muireann Quigley, *Human Biomaterials: The Case for a Property Approach*, in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene, *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?*, (Hart Publishing, 2014), at 237

buried) may be 'stolen'.[114] While it is true to say that a dead body, once interred, can no longer be the object of theft in Scotland,[115] there are sound jurisprudential reasons for this in Scotland which do not connect to any general or generalised 'no property' rule.[116] Rather than enjoining a blanket ban on the ownership of bodies, body parts and human tissue, Scots law – drawing on its Roman heritage – has historically recognised that a body, once buried, becomes a constitutive part of a *res religiosa* – a 'religious' or 'superstitious' thing consigned to 'divine law' and sequestered from the ordinary rules of property.[117] Hence, the act of disturbing, or misappropriating, a cadaver after its interment is not merely theft, but rather amounts to the taxonomically distinct crime of violation of sepulchres.[118]

Further to this, though the Court of Appeal in *Yearworth* posited that there existed sound and rational reasons for the 'no property' rule within English law,[119] it in fact appears that the rule emerged only as the result of a peculiar historical accident.[120] The burial of cadavers (not, it should be stressed, cadavers themselves), were consigned to ecclesiastical jurisprudence by English jurists such as Coke,[121] Wood[122] and Blackstone[123] and so removed from the ambit of the Common law (and so the Common law concept of 'property').[124] While subsequent Common law jurists and courts appear to have formed the view that the sequestration of interred cadavers from the ordinary rules of 'property' meant that 'there could be no property in a corpse' more generally,[125] this conclusion appears to be based on misinterpretation of the earlier juristic works rather than sound reasoning.[126] As Mr Justice Edelman noted in a 2014 plenary lecture, 'the common law rule is almost inexplicable. Even if it might have been re-rationalised as based upon some policy about the sanctity of the human body, the policy would be self-defeating for the very reasons that David Hume gave in *A Treatise on Human Nature*: it allows the very acts that the policy is designed to prevent'.[127]

Since it may be doubted that Scots law has ever received or recognised the Anglo-American 'no property in a corpse' rule, and there exist no sound or rational reasons for

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[114] See *H.M Advocate v M'Kenzie* (1899) 3 Adam 57n, *Dewar v HM Advocate* 1945 J.C 5 and Fiona Leverick and James Chalmers, *Gordon's Criminal Law*, (W. Green, 2017), para.21.26

[115] Unless, it might be thought, it is lawfully disinterred, after which point it – no longer being as one with its burial-site – would revert to being an ordinary, rather than divine, thing.

[116] Jonathan Brown, *Res Religiosae and the Roman Roots of the Crime of Violation of Sepulchres*, [2018] Edin. L. R. 357

[117] *Ibid.*

[118] *Ibid.*

[119] *Yearworth v North Bristol NHS Trust* [2010] QB 1, para.28

[120] See the discussion in Jonathan Brown, *Corpus Vile or Corpus Personae? The Status of the Human Body, its Parts and its Derivatives in Scots Law*, [2020] (University of Strathclyde PhD Thesis), para.2.3.1

[121] Coke, *Institutes*, III, 203

[122] Wood, *Institute* I, 67

[123] Blackstone, *Commentaries*, II, 429

[124] Jonathan Brown, *Corpus Vile or Corpus Personae? The Status of the Human Body, its Parts and its Derivatives in Scots Law*, [2020] (University of Strathclyde PhD Thesis), para.2.2.2

[125] See, e.g., *Exelby v Handyside* (1749) 2 East PC 652; *R v Sharpe* [1857] Dearsly and Bell 160

[126] One might be reminded here of Hume's general observation: 'there is a principle of human nature, which we have frequently taken notice of, that men are mightily addicted to general rules and that we often carry our maxims beyond those reasons which first induced us to establish them': David Hume, *Treatise*, 3.2.9

[127] James Edelman, *Property Rights to our Bodies and to their Products*, Plenary presentation at the Australian Association of Bioethics and Health Law Conference, 3 October 2014, p.19

incorporating it into the Scottish legal framework,[128] it follows that it should also be doubted that Scots law denies that body parts and tissue separated from human bodies are incapable of being owned. Indeed, 'separated body parts… fall squarely within Bell's definition [of 'corporeal moveable property'].[129] If human tissue is indeed to be treated as a '"thing", not being a living person, in relation to which the possessory remedies of delivery and interdict are available' then it should follow that the tissue in question is an object of 'property' in the ordinary sense of that word – albeit that it may be a thing which, for moral reasons, is deemed *extra commercium*.[130] It follows then that jurists, if not judges, must make a determination of who, in law, the 'owner' of such material would logically be. Reid has suggested that only two possibilities exist; that the tissue is owned at the point of separation or ownerless at this point and so capable of being lawfully acquired by *occupatio*.[131] The court in *Holdich*, in his view, implicitly endorsed the former view with the owner in question being the 'originator' (i.e., the person whence the tissue was removed).[132]

Treating separated body parts and human tissue as 'property' owned by its 'originator' is, on the face of it, a satisfactory way of dealing with such material in law,[133] if for no reason other than the fact that 'property law is better than no law'.[134] Doing so also allows the originator to maintain a degree of control over their bodily tissue, while at the same time avoiding the creation of a 'vacuum which the rest of private law [would] struggle to fill'.[135] Indeed, in a jurisdiction such as Scotland, which recognises (or has the potential to recognise, particularly in cases involving contracts of deposit)[136] that an award of damages may be augmented with reference to the *pretium affectionis* (price of affection) attached by the owner

[128] For a more comprehensive refutation of the place of the 'no property' rule in Scots jurisprudence, see Jonathan Brown, *Corpus Vile or Corpus Personae? The Status of the Human Body, its Parts and its Derivatives in Scots Law*, [2020] (University of Strathclyde PhD Thesis), *passim*.

[129] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 238.

[130] Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194 at 223, noting that 'in the *ius commune* there was a long tradition of treating commerce in human organs or tissue as *contra bonos mores*' on the basis that such material is *extra commercium*, but nonetheless Whitty suggests that separation of bodily tissue from a person may be (in theory) effective to bring such material *intra commercium* (see p.227).

[131] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 252.

[132] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 252.

[133] As Whitty notes, while 'the issue of ownership of the human body and body parts is very [ethically and morally] controversial… there seems to be a good case for applying such principles to body parts': Niall R. Whitty, *Rights of Personality, Property Rights and the Human Body in Scots Law*, [2005] Edin. L. R. 194, at 221.

[134] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 243.

[135] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 243.

[136] See, e.g., *Lockhart v Cunninghame* (1870) SLR 8 151

to a particularly (sentimentally) important thing,[137] it might be thought that the remedies made available through the general Scots law of property and obligations are sufficiently flexible to deal adequately with any problem (actual or perceived) that might concern wrongdoing involving human tissue.[138] As Foster cautions, however, 'even if a remedy is adequate, we shouldn't assume that the law that leads to the availability of the remedy is necessarily adequate';[139] for instance, 'the parents [of a child such as Nicola Jane Stevens][140] would be outraged to hear it suggested that the wrong committed by the [physicians] was morally identical to shoplifting'.[141]

With that said, 'the case for property is [only] in part a case for efficiency of outcomes'.[142] As Reid reminds us, 'above all… it is a case for legal coherence'.[143] Yet while the Scots law of personality rights remains a 'thing of shreds and patches',[144] and the law of property is presently better understood than the Scots law pertaining to persons,[145] it is submitted that development of the law relating to 'personality rights' could effectively lead to a coherent legal framework which is capable of adequately describing the nature of wrongs effected to human tissue while at the same time avoiding the pitfalls of a 'piecemeal', or *sui generis*, approach.[146] Adopting a well-recognised and familiar framework, such as 'property law', might well be better than having nothing other than a legal void, or a hotchpotch of disparate bespoke rules,[147] but it does not follow from this that property law is the best or only way of providing a generalised framework to regulate disputes concerning human body parts or tissue. Indeed, the definition of 'things' proffered by MacCormick in the Stair Memorial Encyclopaedia, and approved by Reid in his commentary on *Holdich*, maintains that a thing

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[137] This point may be controverted in contemporary Scots law, but it has its provenance in Stair: *Institutions*, I, 9, 4. See also *Fraser and Ors v J. Morton Wilson Limited* 1965 S.L.T. (Notes) 81

[138] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 243.

[139] Charles Foster, *Dignity and the Ownership and Use of Body Parts*, [2014] Cambridge Quarterly of Healthcare Ethics 417, p.419

[140] Of which, see *Stevens v Yorkhill NHS Trust* 2006 SLT 889

[141] Charles Foster, *Dignity and the Ownership and Use of Body Parts*, [2014] Cambridge Quarterly of Healthcare Ethics 417, p.419; Foster, in his article, is discussing a hypothetical, rather than real, case study, but the facts of that hypothetical map on directly to the case of *Stevens*: See the discussion in Jonathan Brown, *Dignity, Body Parts and the Actio Iniuriarum: A Novel Solution to a Common (Law) Problem?* [2019] Cambridge Quarterly of Healthcare Ethics 522

[142] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 243.

[143] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 243.

[144] Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law*, (W. Green, 2011), para.1.02

[145] As Professor Paisley wryly noted in a 2013 seminar at Queen's University Belfast, the last person to say anything about the Scots law of persons that makes any real sense was Gaius: Roderick R. M. Paisley, *The Effect of Death in the Context of Succession*, (2013): https://www.youtube.com/watch?v=7EVDRsqxHcE

[146] Of which, see Lyria Bennett Moses, *The Problem with Alternatives: The Importance of Property Law in Regulating Excised Human Tissue and in vitro Human Embryos*, in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene, *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?*, (Hart Publishing, 2014), pp.197-214

[147] \\a

must exist 'separately from and independently of persons';[148] only on an overly literal interpretation of this definition does, say, Ms. Ritson's left tibia have an existence 'separate from' and 'independent of' her person. To remain 'Ms. Ritson's left tibia' in a practically meaningful sense, the tissue must be kept alive with the intention of being returned, and reattached, to her.

While, then, there are sound reasons for rejecting any general rule purporting to prohibit the ownership of human tissue in Scots law, there are also reasons for holding that such tissue, in certain circumstances, cannot be regarded as merely a 'thing', but rather must be seen as an enduring part of the person from whom it was removed. The case of Ms. Ritson's left tibia is starkly illustrative of a situation in which it makes more sense to treat the tissue in question as a part of her person than a mere object held in her patrimony (and the hospital's custody). Were a physician – or indeed, any other person – to interfere with (or attack)[149] the tibia without Ms. Ritson's consent, they would quite obviously effect some degree of harm to her person, notwithstanding the fact that bone itself might be spatially (and indeed geographically quite far) removed from her at the relevant time. Hence, to treat such an incident as one of assault, or some other delictual (and potentially criminal) attack on her person would appear more sensible than categorising the event as one involving interference with property. The same, it is thought, might be true of the sperm in the case of *Holdich* itself; as in the case of Ms. Ritson's tibia, Mr. Holdich's sperm was retained, and existed as a meaningful entity, only because of its prospective biological function (i.e., reproduction). Any unlawful destruction of such, then, would axiomatically interfere with his autonomy[150] which, as Lord Stewart noted in the case, 'seems to be a personality [as opposed to proprietary] right'.[151] The law, then, should provide a coherent framework to allow for the protection of such personality interests, and being concerned with 'things' rather than with 'persons', property law is inadequate to serve as the basis of the protection of such interests.

Body Parts and Separated Human Tissue in Scots Law: Parts of Persons?

Far from 'doing violence to the law', then, it would appear that to treat separated human tissue, in some circumstances, as an enduring part of the 'person' from whom it was taken is in fact more likely to lead to just outcomes than is categorising such material merely as 'property'. The 1993 BGHZ case discussed by Lord Stewart in *Holdich* is instructive in this regard.[152] Here, the German court described the view that 'a part of the body separated from it becomes a physical object, with the result that a person's right to his own body is transformed to a right of ownership in the separate part of his body' (which corresponds to Reid's suggestion discussed above) as 'too narrow', since 'it is not the physical matter as such that is protected

[148] SME, *General Legal Concepts*, (Reissue) (Butterworth, 2008), para.98

[149] This is no mere matter of idle fancy or speculation; consider, for instance, the case of Dr. Naum Ciomu, who, 'in a fit of madness', 'sliced off the [patient's] penis in front of shocked nursing staff, and then placed it on the operating table where he chopped it into small pieces before storming out of the operating theatre at Bucharest hospital: https://metro.co.uk/2007/01/16/row-over-angry-penis-removing-doctor-562355/

[150] As was argued in the case itself: *Holdich*, para.2; the ability to decide on the size of one's family (if able, biologically, to father or produce offspring) was also described as 'an important aspect of [one's] personal autonomy' by Lord Millett in *MacFarlane v Tayside Health Board* 2000 SC (HL) 1, at 44.

[151] *Holdich*, para.102

[152] See BGHZ 124, 52 VI. Civil Senate (VI ZR 62/93) (translation available at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=830)

[by law, from 'injury'],[153] but rather a person's entire area of existence and self-determination, which is materially manifested in the body'.[154] This being so, it followed that – where 'parts of a body are taken out in order later on to be re-implanted as a means of preserving or improving bodily functions', the 'extracted parts continue to form a functional unity with the remaining body even during their separation from it'.[155] Thus, it 'seem[ed] necessary to classify the damage to or destruction of such extracted body parts as a physical injury'.[156]

The case of frozen sperm, the court in that case noted, 'represent[ed] a special case' in that the sperm was permanently separated from the body of the plaintiff with no intention of it ever being reconnected with him in the future. That being said, the purpose of the separation was still to 'fulfil a bodily function', namely procreation (the prime biological purpose of sperm). Since 'the preservation of sperm was meant as a substitute to the lost capability of procreation', it was found that the plaintiff's 'sperm is no less valuable than a woman's egg cell or other bodily parts' and was clearly protected, as a part of the plaintiff's 'person', in terms of § 823 (1) BGB.[157] A case such as that of Ms. Ritson's left tibia gives rise to no such complications; it is manifestly one in which re-implantation is envisaged and in which unauthorised interference with that re-implantation would harm Ms. Ritson's bodily integrity. Accordingly, in German law Ms. Ritson's tibia would clearly benefit from the protection of § 823 (1) and so the relationship between her and the severed body part would be treated as inherently personal rather than as proprietary.

§ 823 (1) BGB itself 'secures that under certain conditions damage done to others must be compensated by the author of that damage'[158] and has been described as 'the central and most famous norm of German tort law'.[159] The section reads as follows: *Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet*. ['A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this'].

As in the Scottish system of delict, there is no exhaustive list of nominate wrongs in German law, but rather a general obligation to repair loss or damage where such has resulted from culpable wrongdoing.[160] Though the official translation of § 823 speaks of the obligation of reparation arising where there has been 'injury' [*verletzt*] to the life, body, health, freedom, property or 'another right' [*sonstiges Recht*] of any person, the term 'injury' here must be taken as synonymous with 'damage' (i.e., *damnum*, corresponding with the contemporary

[153] See Bürgerliches Gesetzbuch (BGB) § 823 (1)

[154] BGHZ 124, 52 VI. Civil Senate (VI ZR 62/93), para.2

[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.*

[158] Gerhard Dannemann and Reiner Schulze, *German Civil Code (Bürgerliches Gesetzbuch (BGB) Article-by-Article Commentary*, Vol. I (Books 1-3), at 1599

[159] See Gerhard Dannemann and Reiner Schulze, *German Civil Code (Bürgerliches Gesetzbuch (BGB) Article-by-Article Commentary*, Vol. I (Books 1-3), at 1599

[160] Brian Pillans, *Delictual Liability at Common Law*, in Joe Thomson, *Delict*, (W. Green, 2007), *passim*.

understanding of 'personal injury' based on the *lex Aquilia*) rather than *injuria*.[161] In other words, § 823 (1), on the face of it, corresponds with the Scots law of delict only insofar as instances of *damnum injuria datum* ('loss wrongfully caused') are concerned, not insofar as instances of 'injury' in the nominate sense are concerned. The latter are dealt with, in Scots law, under a separate heading of the law of delict, that being the law pertaining to the reparation of *iniuria* in the specific sense of 'affront', whereas in Germany the institutional connection to the Roman *actio iniuriarum* was broken by codification.[162] As discussed above,[163] for *solatium* to be recovered in cases of 'affront' in Scotland, it is essential that the wrongdoing be inflicted contumeliously (i.e., the wrongdoer must demonstrate a hubristic disregard for the personality interests of the pursuer), not merely culpably.[164] In Germany however, though the legislature clearly intended to preclude the possibility of damages claims in respect of dignitary wrongs,[165] the development of the *Allgemeines Persönlichkeitsrecht* under this title allows for the recovery of 'money damages for the immaterial damage' caused by culpable wrongdoing.[166]

There is, then, a notable difference between German law and Scots law, in spite of the initial impression of correlation. Due to the fact that the reparation of 'injuries', in the nominate sense, has been subsumed into § 823 BGB by developments pioneered in the BGH, German law now recognises in principle that a dignitary wrong may be inflicted either intentionally or negligently (provided that the infringement is suitably serious).[167] Pecuniary and non-pecuniary 'damages' alike can be claimed by virtue of the section which of course causes difficulties when one considers the general view that damages exist to effect *restitutio in integrum* (that is, to put the pursuer into the position which they would have been in had the damage never occurred),[168] but this problem is familiar to Scots lawyers also, due to the fact that the language of *solatium* has come to be used (inappropriately) in cases of Aquilian liability also.[169] However, in Scotland, unlike in Germany, the institutional connection to the *actio*

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[161] The obligation arising from § 823 (1) is one to repair *damage*, not to redress wrongdoing *simpliciter*: Gerhard Dannemann and Reiner Schulze, *German Civil Code (Bürgerliches Gesetzbuch (BGB) Article-by-Article Commentary*, Vol. I (Books 1-3), at 1599

[162] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Clarendon Press, 1990), at 1090-1092

[163] See p.3 *supra*.

[164] Though § 823 was initially conceived of only as a means of repairing 'damage' done, the general action to repair 'injury' in the nominate sense (of 'affront') managed to 'sneak in the back door', to use Zimmermann's memorable turn of phrase, through the courts' recognition of an Allgemeines Persönlichkeitsrecht ['general personality right']: See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Clarendon Press, 1990), at 1092

[165] Indeed, as Zimmermann notes 'it is hard to imagine a line of decisions more blatantly *contra legem*' than those which established the *Allgemeines Persönlichkeitsrecht*: Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Clarendon Press, 1990), at 1094

[166] See Gerhard Dannemann and Reiner Schulze, *German Civil Code (Bürgerliches Gesetzbuch (BGB) Article-by-Article Commentary*, Vol. I (Books 1-3), at 1606

[167] See the discussion in Tilman Ulrich Amelung, *Damage Awards for Infringement of Privacy—The German Approach*, [1999] Tulane European and Civil Law Forum 15, at 22

[168] Tilman Ulrich Amelung, *Damage Awards for Infringement of Privacy—The German Approach*, [1999] Tulane European and Civil Law Forum 15, at 22

[169] In Stewart's view, for instance, the conventional view that delictual damages are paid to effect *restitutio in integrum* 'cannot be right', for 'if I run over your leg I have nothing to restore… Even if money substitutes for your leg it cannot be said that your leg represented money to me unless the delict was intentional and I am a sadist who would have paid money for the pleasure [of breaking it] on the market': William J. Stewart, *Reparation*, (Edinburgh: W. Green, 2000), para.18-1

iniuriarum has not been severed and so (in principle) while dignitary wrongs effected to the body are reparable as 'injury' (in the nominate sense), mere culpability, in the absence of recognised 'loss', is not sufficient to generate liability on the part of the prospective delinquent.

This notwithstanding, it is clear that Scots law presently recognises the human body as an entity which might be damnified (i.e., that the law recognises that one can suffer 'loss' due to a 'personal injury' and so obtain reparation from a culpable wrongdoer) notwithstanding the historical view that the human body is 'of inestimable value'.[170] While in principle, then, recovery of damages for culpable wrongdoing is possible where there has been physical 'loss' caused to 'property' or 'person' alike, and so to some extent the question of regarding human tissue as 'functionally united' with the person whence it was removed might seem moot, in cases concerning subject-matter as intimate as human tissue it is thought that the law must recognise the non-patrimonial – and so 'personality' – value of the material in question. To discover that one's limb has been mistreated (say, by being subjected – without one's consent – to a battery of medical tests) prior to re-attachment could conceivably generate an actionable affront, even if re-attachment remains possible notwithstanding the mistreatment which occurred. In other words, even in cases in which there is no 'loss' suffered on the part of the defender, it should be recognised that *solatium* is an appropriate remedy, if 'injury' in the traditional sense of that term has been inflicted.

The utility of recognising separated human tissue – in instances where re-attachment or fulfilment of a biological purpose is envisaged – as an enduring part of the person whence it was taken is thus manifest. By affording such material protection under a regime of 'personality' – rather than proprietary – rights, the law would be well placed to coherently develop a means of safeguarding wider interests, such as those in individual autonomy, which are connected with human personality. Doing so not only allows for more appropriate language to be used in cases concerning maltreatment of human tissue, but it allows for the possibility of separate dignitary actions to be brought also, where such material is treated with contempt (that is, if the ongoing utility of such *actiones iniuriarum* is to continue to be recognised by Scots lawyers). There are, as has been demonstrated above, sufficient similarities between the Scots law of delict and the German law of *Unerlaubte Handlungen* [illegal acts] that no 'violence' would be perpetrated upon the law of Scotland were our courts to recognise that human tissue may be 'injured' (in both sense of that term). Rather, it appears quite the contrary; that adopting the German court's analysis from the 1993 case would be an eminently sensible means of developing Scots law.

Conclusion

The court in *Holdich* was faced with a complex case and a complex task. The storage of sperm is, as the German court recognised in 1993, a special case, since the human tissue in question is not removed and stored with a view to return and reattachment to the body which produced it, but rather with a view to implantation in another person. A case such as Ms. Ritson's, where a body part is separated only to be reunited with the host following medical treatment, is far simpler and demonstrates plainly the utility of a 'personality' analysis over one of 'property'. While in principle recognising an entity such as Ms. Ritson's tibia as

[170] See John Blackie, *Unity in Diversity: The History of Personality Rights in Scots Law,* in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: DUP, 2009), p.85

'property', for the duration of its separation from her, would allow for remedy in cases of wrongdoing involving it – and indeed, if the common law concept of *pretium affectionis* were to be developed this remedy might account for the importance of the 'thing' in question – it cannot be said that proprietary remedies are the most appropriate to use in circumstances such as this. Rather, it would seem that if the law is to recognise and protect the value of bodily integrity, then maltreatment of living human tissue can more appropriately be remedied by actions concerned with the preservation of personality interests, since individual interests in the body are manifestly non-patrimonial rather than proprietary.

That the Scots law of personality rights is presently under-developed is no argument against placing human tissue under this sphere; indeed, it might be thought that to arbitrarily exclude human tissue from the ambit of human personality would be to further stymie the development of a coherent, 'full-blooded' system of personality rights in this jurisdiction. While cases such as that of Ms. Ritson may presently be sparse – and it is hoped that cases involving wrongdoing in respect of human tissue will remain even sparser – lawyers and jurisprudents must ensure that the law is equipped with the means of justly dealing with novel situations. As Reid noted in his commentary on *Holdich*, 'no statute, however detailed and prescient, can provide for the unexpected and unanticipated as well as a set of general rules'.[171] Although this argument was used to buttress an argument in favour of a proprietary approach to human tissue, it is here thought that the 'general rules' pertaining to personality – though perhaps not well elucidated, or understood, in Scots law – can, at times, better provide for the unexpected and unanticipated in respect of human tissue. To recognise separated human tissue, if 'functionally united' with a particular person, as a body part which might be 'injured' would neither do violence to the law nor offend morality; in fact, it would appear to do the opposite: it would appropriately recognise the non-monetary and dignitary value of material connected with an intrinsic aspect of human personality.

[171] Kenneth G. C. Reid, *Body Parts and Property*, in Douglas Bain, Roderick R. M. Paisley, Andrew R. C. Simpson and Nikola J. M. Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*, (Aberdeen University Press, 2018), at 243.