

# Detention of Private Persons by Private Persons as a Delictual Wrong: Liability for Deprivation of Liberty in Scots Private Law

By Dr. Jonathan Brown

## | Preamble |

Jonathan Brown is a lecturer in Scots Private Law at the University of Strathclyde in Glasgow. Previously he was a lecturer in law at Aberdeen's Robert Gordon University. Jonathan considers himself to be a private law generalist and dabbling legal historian. His recent publications include work on medical jurisprudence, the law of defamation and the relation between the Roman law of slavery and modern Scottish human trafficking legislation. The present essay is intended to provide a modern account which places acts amounting to wrongful detention effected by private persons within the taxonomy of iniuria.

## **Introduction**

'False imprisonment' is, in English law, a strict liability tort.<sup>108</sup> It is thus actionable regardless of the mind-state of the perpetrator,<sup>109</sup> regardless of whether or not the victim suffers any demonstrable 'loss' or 'damage'<sup>110</sup> and indeed regardless of whether or not the 'victim' knew that they had in fact been falsely imprisoned.<sup>111</sup> To adopt the English lawyer's term of art, the tort is actionable '*per se*'.<sup>112</sup> In general terms, conduct amounts to 'false imprisonment' if the perpetrator has imposed some constraint on the freedom of movement from a particular place ordinarily enjoyed by another individual.<sup>113</sup> Conceptually, 'false imprisonment' falls, as a 'cause of action', under the umbrella of the 'form of action' known as 'trespass to the person',<sup>114</sup> albeit unhappily so in the view of some learned authority.<sup>115</sup> While it has been said that the 'categorisation of trespasses to the person is an ongoing source of

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<sup>108</sup> *Regina v. Governor of Her Majesty's Prison Brockhill Ex Parte Evans* [2001] 2 A.C. 19, at 26 per Lord Slynn

<sup>109</sup> Although this proposition is now complicated by the fact that the courts require the act amounting to physical imprisonment to have been 'intentional' – see *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245, per Lord Dyson JSC at para.65

<sup>110</sup> *Ibid.*, para.64

<sup>111</sup> *Murray v Ministry of Defence* [1988] 1 WLR 692, at 703a-c per Lord Griffiths

<sup>112</sup> *Lumba*, para.63

<sup>113</sup> *Collins v Wilcock* [1984] 1 WLR 1172, at 1177 per Goff LJ

<sup>114</sup> Mulheron, *Tort Law*, p.685

<sup>115</sup> *Wainwright v Home Office* [2001] EWCA Civ. 2081, per Buxton LJ at para.68

confusion’,<sup>116</sup> it remains the case that ‘the distinction [between actions of trespass and actions on the case] still continues to hold good’.<sup>117</sup> England may have buried her forms of action, but, to this day, those forms do continue to exercise an influence over Common law jurisprudence.

Scotland is not, in spite of its historical and ongoing political union with England, a Common law jurisdiction.<sup>118</sup> Indeed, Scots law knows of no ‘torticle’ by the name of ‘false imprisonment’.<sup>119</sup> In Scotland, ‘trespass’ refers only to ‘transient interference with another person’s land [or sufficiently large moveable, such as a ship]<sup>120</sup> without right to do so’.<sup>121</sup> The phrase ‘trespass to a chattel’ has been described as being ‘perfectly unmeaning’ by the Scottish courts<sup>122</sup> and the concept of ‘trespass to the person’ is likewise foreign to lawyers north of the Tweed.<sup>123</sup> This is not to say that Scots law does not afford protection to individual liberty in private law. Rather, it is simply the case that the juridical history of the protection of ‘personality rights’ in Scotland differs quite drastically from the schema which has developed in the Common law world.<sup>124</sup>

‘Affronts to liberty’ were termed by Stair ‘the most bitter and atrocious forms of injury’.<sup>125</sup> The word ‘injury’, here, appears as a term of art and does not simply denote (as it typically does today) bodily harm suffered by a legal subject. Rather, it refers to what MacKenzie termed, in his 17<sup>th</sup> century *opus* on *Matters Criminal*,<sup>126</sup> ‘contumely or reproach’.<sup>127</sup> This usage was common to Civilian jurisdictions in the Seventeenth century<sup>128</sup> and at this time (though not immune to influence from south of the border)<sup>129</sup> Scotland was unquestionably a part of the wider European legal family and subject only to

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<sup>116</sup> Mulheron, *Principles*, p.685

<sup>117</sup> *Ibid.*, p.686

<sup>118</sup> See the Hon. Lord Gill, *Quo Vadis Leges Romanorum?*, *passim*.

<sup>119</sup> Blackie, *Protection of Corpus*, p.160

<sup>120</sup> See Whitty, *Rights of Personality*, p.215

<sup>121</sup> Anderson, *Property*, para.10.18

<sup>122</sup> *Leitch & Co v Leydon* 1931 SC (HL) 1 at 8

<sup>123</sup> Whitty, *Rights of Personality*, p.215

<sup>124</sup> For the history of ‘personality rights’ in Scotland, see Blackie, *Unity in Diversity*, *passim*. For comment on the wider *ius commune*, see Blackie, *Doctrinal History*, *passim*.

<sup>125</sup> Stair, *Inst.*, 1, 2, 2

<sup>126</sup> On the significance of the equivalence of crime and delict during this period of Scots law, see Blackie and Chalmers, *Mixing and Matching in Scottish Delict and Crime*, p.286

<sup>127</sup> MacKenzie, *Matters Criminal*, (1678), p.303

<sup>128</sup> Blackie, *Doctrinal History*, p.14

<sup>129</sup> Blackie, *Unity in Diversity*, p.104

limited Common law influence.<sup>130</sup> Thus, it is apparent that the term ‘injury’ here corresponds with the Roman idea of *iniuria* within the context of the *actio iniuriarum*.<sup>131</sup> This is significant: Due to the significance of the Scottish ‘institutional writers’,<sup>132</sup> it remains the case today that ‘interference with the personal liberty of an individual which is not warranted by law will justify an *actio iniuriarum for solatium*’.<sup>133</sup>

The ‘legal ancestor’ of the Scottish action(s) for deprivation of liberty, in the context of private law and outwith the context of actions involving public authorities,<sup>134</sup> is therefore markedly distinct from that of the English concept of ‘false imprisonment’.<sup>135</sup> This has a number of practical, as well as conceptual, implications. The purpose of this essay is to explore those implications through reference to the Covid-19 (coronavirus) pandemic and the associated lock-down(s) implemented to mitigate its effects. The facts arising from the localised lock-down imposed at Manchester Metropolitan University provide a useful case study; here, approximately fifteen-hundred students were sent an email by the University asking them to self-isolate for fourteen days to inhibit the spread of the Covid-19 virus. Many students later reported that they only became aware of the situation after security guards actively prevented them from leaving their halls of residence. In the immediate aftermath of this event, there have been reports that some students are considering legal action and seeking to raise claims of ‘false imprisonment’ against the institution.<sup>136</sup>

This essay consequently explores the possibility of factually analogous claims succeeding in Scotland (not a mere matter of fancy, given reports of comparable situations in this jurisdiction),<sup>137</sup> with specific reference to the doctrinal differences between the English law of ‘false imprisonment’ and the Scots law of delict pertaining to deprivation of liberty effected by private

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<sup>130</sup> At least insofar as the substantive law is concerned: Sellar, *A Tale of Two Receptions*, *passim*.

<sup>131</sup> MacKenzie divides the classification of ‘injuries’ into those which are ‘real’ and those which are ‘verbal’, consistent with D.47.10.1.1 (Ulpian, citing Labeo) and later Civilian jurisprudence: See MacKenzie, *Matters Criminal*, Tit. XXX, I (p.304)

<sup>132</sup> Of which, see Paton, *Evaluation of the Institutions*, p.201

<sup>133</sup> Walker, *Delict*, p.681

<sup>134</sup> See Reid, *Personality*, paras.5.02-5.03

<sup>135</sup> English common law knows of no analogue to the *actio iniuriarum*: Descheemaeker and Scott, *Iniuria*, p.2

<sup>136</sup> Speare-Cole, *Manchester Students Under Lockdown*, *passim*.

<sup>137</sup> Brooks and Adams, *Banned from Socialising*, *passim*.

persons (as opposed to state officials).<sup>138</sup> In so doing, the essay seeks to fit the Scots action(s) for the redress of affronts to ‘personal liberty’ within the wider schema of the law of delictual liability. This, it is submitted, is necessary not only to ensure the coherence of the legal system as a whole, but also to ensure that actions to recover compensation for deprivation of liberty are understood by the legal profession and wider public alike. In the absence of such understanding, injustice may arise from the success of unmeritorious claims, from the failure of logically meritorious claims, or indeed from the failure to raise potentially successful claims in the first place.

### **‘Liberty’ as an aspect of *Corpus* and the *Actio Iniuriarum***

‘*Actio iniuriarum* afforded a strong and efficient protection against injuries to immaterial interests ... [it] was adopted from the Romans in order to provide protection against interference with man’s (non-material interest) in his dignity and honour’.<sup>139</sup> *Iniuria* in the sense of the *actio iniuriarum* did not simply mean ‘wrongdoing’ in the broadest sense of that term,<sup>140</sup> rather it denoted hubristic conduct<sup>141</sup> which infringed another person’s recognised non-patrimonial (*i.e.*, ‘dignitary’)<sup>142</sup> interest(s).<sup>143</sup> It was – and is – thus conceptually distinct from actions to repair ‘loss’ [*damnum*] that have as their ancestor the *lex Aquila*.<sup>144</sup> There, *iniuria* could be demonstrated by pointing to the defender’s *culpa*,<sup>145</sup> but to succeed in an *actio iniuriarum* a pursuer would need to demonstrate that the defender had behaved contumeliously.<sup>146</sup> Should

<sup>138</sup> Interactions between state officials (such as police officers) and private individuals have been described as ‘paradigm case[s]’ of wrongful invasion of ‘liberty’ as a protected interest and there is a considerable body of Scots authority (based on the Act Anent Wrongous Imprisonment 1701) on this topic – of which, see Blackie, *Protection of Corpus*, p.160; Reid, *Malice and Police Privilege*, *passim*. This essay, however, is focused on less paradigm cases; those which arise where a private individual, with no express state authority (in the form of public legislation permitting the conduct), acts to infringe the liberty interests of another private individual.

<sup>139</sup> Zimmermann, *Law of Obligations*, p.1062

<sup>140</sup> Although that was the word’s original meaning: Birks, *The Early History of Iniuria*, , p.163

<sup>141</sup> Ibbetson, *Iniuria: Roman and English*, p.40

<sup>142</sup> Whitty and Zimmermann, *Issues and Options*, p.3

<sup>143</sup> ‘At a high level of generality, it would probably not be controversial to say that all *iniuriae* were offences against dignity in the broad sense of status or honour (*dignitas*)’: Descheemaeker and Scott, *Iniuria*, p.13. Although Descheemaeker and Scott here identify *dignitas* with ‘status or honour’, there is a case to be made that *existimatio* would be the more fitting (in legal, not merely semantic) term to describe the highest-level dignitary interest protected by the *actio iniuriarum*, with *dignitas* operating functionally as a lower-level catch-all sub-category for personality interests which have not been singled out for specific protection.

<sup>144</sup> Descheemaeker and Scott, *Iniuria*, p.2

<sup>145</sup> Ibbetson, *Buckland on the Lex Aquilia*, p.53; G.3.202; D.9.2.44pr. (Ulpian)

<sup>146</sup> Though certain texts, *e.g.*, D.47.10.33 (Paul) appear to suggest that Roman law required conduct to be effected *adversus bonus mores* **and** for there have to been *contumelia* on the part of the defender, it is

this be proven alongside affront to a recognised ‘personality interest’, however, the defender would be obliged to make reparation, even if the pursuer did not suffer any pecuniary ‘loss’.<sup>147</sup>

Within Roman law, all *iniuriae*, in the sense of the nominate delict, were said to pertain to a person’s *corpus* [body], *fama* [reputation] or *dignitas* [dignity].<sup>148</sup> This triad was co-opted and popularised throughout the *ius commune* by Johannes Voet,<sup>149</sup> to the extent that Blackie termed *corpus*, *fama* and *dignitas* ‘higher level categories... that are central in the general analysis of the more systematic jurists’.<sup>150</sup> Although affronts to each of these three interests are each actionable as *iniuria*, ‘the protection in the Scots law of delict of a person’s interest in his or her bodily integrity and physical freedom [taken together under the higher-level heading of *corpus*]<sup>151</sup> from the early modern period on has been in different ways separated from the protection of other specific interests relating to the person’.<sup>152</sup> This has had the net effect of obscuring the place of *iniuria* within the framework of Scots law.<sup>153</sup> Unlike in South Africa, where *iniuria* clearly stands alongside the *lex Aquilia* and the ‘action for pain and suffering’ as one of the ‘three pillars’ of that jurisdiction’s law of delict,<sup>154</sup> in Scotland the traditional view has long been that the law of delictual liability ‘is founded upon a [unitary] concept of [broad] *culpa*’.<sup>155</sup> This concept of *culpa* is typically said to be derived from the *lex Aquilia*, although in contradistinction to the position in Roman law ‘the word *culpa* in this [*i.e.*,

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‘more likely... that for Ulpian the impropriety of the [defender’s] conduct was bundled up in his notion of *contumelia*, whereas for Paul the two requirements were treated as independent of one another, *contumelia* focusing on the subjective aspect of the [defender’s] conduct and *adversus bonus mores* focusing on its social interpretation’: Ibbetson, *Iniuria: Roman and English*, p.43

<sup>147</sup> See, e.g., D.47.10.9.1 (Ulpian); the irrelevance of pecuniary ‘loss’ remains a feature of the modern Scots *actio iniuriarum*: Walker, *Delict*, p.40

<sup>148</sup> Dig.47.10.1.2 (Ulpian)

<sup>149</sup> Johannes Voet (1647-1713) was a Dutch jurist and the son of Paul Voet (1619-1677), who was also a jurist. Johannes Voet was the author of, *inter alia*, an authoritative *Commentary on the Pandects*: see Voet, *Commentarius*, 47.10.1

<sup>150</sup> Blackie, *Doctrinal History*, p.2

<sup>151</sup> See Blackie, *Protection of Corpus*, p.156

<sup>152</sup> *Ibid.*, p.155

<sup>153</sup> This state of affairs was not unique to Scotland: ‘*corpus* was, in many ways, a victim of its own strength as a legally protected interest’ throughout the jurisdictions of the *ius commune*. ‘Its violation is so intuitively wrongful that it hardly needs to be channelled through the – a highly artificial – construct of *iniuria* for a remedy to be granted’ – see Descheemaeker and Scott, *Iniuria and the Common Law*, p.15

<sup>154</sup> Brown, *Revenge Porn and the Actio Iniuriarum*, p.403

<sup>155</sup> MacCormick, *Culpa*, p.13

the Scots] context had a wide sense and expresses a liability for *dolus* and *culpa* in a narrow sense'.<sup>156</sup>

This view of the Scots law of delict as predicated entirely on *culpa* has fallen out of fashion. It emerged in the Nineteenth century and has since been invoked 'in cases where there has been a doubt as to the basis of liability'.<sup>157</sup> Nonetheless, it has been said by two of leading lights of Scots law<sup>158</sup> that 'it [is] no longer possible to argue that the law was based on one general underlying principle such as reparation for *culpa* or fault... different interests [are] protected in different ways often far removed from personal injuries cases which have hitherto been considered paradigmatic'.<sup>159</sup> This sage statement has the benefit of appearing as a statement of the obvious, if only in hindsight.<sup>160</sup> Rather than basing the sum of liability on one singular principle, Scots law has historically recognised a basic grammar of Aquilian liability and liability based on *iniuria*,<sup>161</sup> with some native nominate delicts (such as assythment) serving to redress harm effected to the health, limbs and life of oneself and one's family.<sup>162</sup>

In recognition of the fact that it cannot now be said that Scots law is predicated on a single principle, it is submitted that there is an impetus for Scots lawyers to return to the recognition of the place of the *actio iniuriarum* within the law of delict. The *actio iniuriarum* is acknowledged as an important 'legal ancestor' in many modern European jurisdictions,<sup>163</sup> although the process of codification has, in most European jurisdictions, severed the direct influence of Roman law as a 'living' source.<sup>164</sup> Scotland, like South Africa, is however (in a sense) a 'living system of Roman law', untouched by codification.<sup>165</sup> Hence, *iniuria* subsists in this jurisdiction not only as a 'legal ancestor', but as the prime source of liability in contemporary delictual actions

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<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*, p.28

<sup>158</sup> The late Lord Rodger of Earlsferry and the late Professor Joe Thomson.

<sup>159</sup> Thomson, *Delict*, preface.

<sup>160</sup> It is a gift few possess, to state the obvious in such a way that the obvious only seems obvious after it has been stated.

<sup>161</sup> Blackie, *Protection of Corpus*, p.156

<sup>162</sup> See Black, *Delictual Liability in Scotland for Personal Injuries and Death*, p.53

<sup>163</sup> Reid, *Personality*, para.17.18

<sup>164</sup> Zimmermann and Visser, *South Africa as a Mixed Legal System*, p.3

<sup>165</sup> Descheemaeker and Scott, *Iniuria and the Common Law*, p.2

for assault<sup>166</sup> (including sexual assault and rape),<sup>167</sup> and (presently) defamation.<sup>168</sup> Indeed, in any action which seeks recovery of *solatium* in the absence of proof of *damnum*, the claim is logically predicated on an *actio iniuriarum*.<sup>169</sup>

While the ongoing relevance of the *actio iniuriarum* to modern Scots law has been questioned,<sup>170</sup> it is here submitted that development of the concept is preferable to the available alternatives. In the absence of native authority on any given subject, modern Scots practitioners tend to look to English (or other Common law) precedents,<sup>171</sup> which are typically deemed ‘persuasive’ authority by the judiciary. There are, however, manifest differences between the Scots law of delict and the English law of torts. Most significantly, ‘there is no such thing as an exhaustive list of named delicts in the law of Scotland. If the conduct complained of appears to be wrongful, the law of Scotland will afford a remedy even if there has not been any previous instance of a remedy being given in similar circumstances’.<sup>172</sup> In contrast, within the Common law system, wherein ‘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’.<sup>173</sup>

There is thus ‘little historical basis in Scots law for the kind of structural difficulties that have restricted English law’.<sup>174</sup> Scots lawyers should therefore be wary of importing Common law authorities into their jurisprudence, lest the character of the Scots law of delict be wholly and irretrievably changed. This sense of wariness should be further heightened in respect of areas of law where there is conceptual incoherence within the Common law tradition itself. As noted in the introduction to this essay, the nature of the tort of ‘false imprisonment’ is such that certain learned judges and commentators are of the

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<sup>166</sup> Pillans, *Delict*, para.6.13

<sup>167</sup> MacLean, *Autonomy, the Body and Consent in Delict*, para.11.79

<sup>168</sup> Brown, *Defamation*, p.131

<sup>169</sup> Particularly given that the action and remedy of assythment was abolished in 1976 by the Damages (Scotland) Act: see s.8 of that Act (since repealed by s.16 of the Damages (Scotland) Act 2011, although no case has been made that this repeal has revived the action).

<sup>170</sup> Reid, *Personality*, para.17.12

<sup>171</sup> See Brown, *The Scottish Legal System*, *passim*.

<sup>172</sup> *Micosta SA v Shetland Islands Council* 1986 SLT 193, at 198 *per* Lord Ross

<sup>173</sup> Lord Hope of Craighead, *The Strange Habits of the English*, (Stair Society, 2009), p.317

<sup>174</sup> Reid, *Personality*, para.17.17; Reid here refers to the position in respect of informational privacy, but her point can be generalised.

view that it should not be categorised as a ‘trespass to the person’. Rather, it appears that it would be better conceptualised as an ‘action on the case’. In a jurisdiction such as Scotland, where these terms are meaningless, there is a risk that if case law concerning ‘false imprisonment’ is deemed ‘persuasive’ and thus received as law, then the structure of the law itself will break down. Instead of a principled and rational system, there would be only a pigeonhole arrangement of nominate actions. To abandon reason and make it the slave of alien precedent would be a retrograde step.

There is, however, a dearth of native Scots authority on the subject of deprivation of liberty effected by private persons. While it is not the case that ‘wrongful detention by private persons now occurs only rarely’,<sup>175</sup> as figures from the National Crime Agency in respect of human trafficking bear out,<sup>176</sup> it is nevertheless the case that private law actions concerning wrongful detention are rare.<sup>177</sup> It is consequently natural for Scots lawyers to seek guidance from the law of other jurisdictions when faced with problems arising from such matters. To argue that Scots lawyers should resist the importation of alien precedents into their system is not, however, to argue that they should resist the use of foreign precedents. Merely, it is to claim that for a foreign precedent to be deemed ‘persuasive’ by the Scottish courts it ought to be decided on the basis of principles which are consistent with the norms of Scots law. The English tort of false imprisonment, with its different history and jurisprudential background, is not analogous to the Scots action for the wrongful deprivation of liberty and consequently reliance on authorities concerning such could potentially introduce conceptual confusion, rather than clarity, to Scots law.

Though geographically distant from one another, South Africa has been described as Scotland’s closest legal neighbour. This is due to the fact that Scotland and South Africa share a common uncodified Roman-Dutch heritage and have each (at various times, to various degrees) been influenced by the Anglo-American Common law.<sup>178</sup> South Africa has thus been able to build up

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<sup>175</sup> As suggested by Reid: *ibid.*, para.5.48

<sup>176</sup> See National Crime Agency, *National Referral Mechanism Statistics – End of Year Summary 2018* (published 20/03/2019)

<sup>177</sup> See Brown, *Servitude, Slavery and Scots Law*, p.371

<sup>178</sup> Brown, *The Scottish Legal System*, p.59



a ‘copious and vigorous case law’ concerning the *actio iniuriarum*<sup>179</sup> and, given the conceptual and historical similarities between Scots and South African jurisprudence, this body of authorities could serve as a fruitful source of borrowing for Scottish lawyers.<sup>180</sup> There is little question, as there were in bygone days,<sup>181</sup> of the practical accessibility of such authorities: a great many are freely available via the South African Legal Information Institute (SAFLII) database.

In Scotland, ‘since the earliest accounts of the law of reparation, infringement of liberty has been regarded as a "delinquency" which requires to be compensated’.<sup>182</sup> Comparably, in South Africa, ‘it has long been settled law that the arrest and detention of a person are a drastic infringement of his basic rights, in particular the rights to freedom and human dignity, and that, in the absence of due and proper legal authorisation, such arrest and detention are unlawful.’<sup>183</sup> The South African actions for recovery of *solatium* in the face of wrongful arrest, detention (by private persons) and imprisonment (by state officials) is grounded in the *actio iniuriarum*.<sup>184</sup> Though the institutional connection to the *actio iniuriarum* is less clearly articulated in Scotland than in South Africa, in both jurisdictions the deprivation of a person’s liberty is not actionable as a tort *per se*, but rather actionable on the basis of the delictual liability arising from interference with the detained person’s dignitary interest in their *corpus*. ‘Borrowing’ principles and authorities from South African jurisprudence is, thus, less likely to do structural damage to the Scots law of delict than is borrowing from Common law authorities.

### **Deprivation of Liberty as *Iniuria***

As an action based on *iniuria*, in any claim for redress following deprivation of liberty, the pursuer must be able to prove that they have subjectively suffered ‘affront’<sup>185</sup> (and so deprivation of liberty is not, logically,

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<sup>179</sup> Reid, *Personality*, para.17.12

<sup>180</sup> See Burchell, *Personality Rights in South Africa*, pp.352-353

<sup>181</sup> See Blackie and Whitty, *Scots Law and the New Ius Commune*, p.80

<sup>182</sup> Reid, *Malice and Police Privilege*, p.175

<sup>183</sup> *Theobald v Minister of Safety and Security and Others* 2011 (1) SACR 379 (GSJ), at 389F

<sup>184</sup> Nkosi, *Balancing Deprivation of Liberty and Quantum of Damages*, p.66

<sup>185</sup> *Le Roux v Dey* [2011] 3 SA 274 (CC), para.143

actionable where the pursuer did not realise that they were detained)<sup>186</sup> in addition to establishing the objective wrongfulness of the defender's conduct.<sup>187</sup> Whether or not conduct is to be understood as 'objectively wrongful' turns on the question of whether or not said conduct is deemed juridically *contra bonos mores* [contrary to good morals].<sup>188</sup> This standard – though presented here in the 'decent obscurity of a learned language'<sup>189</sup> – is simply analogous to the familiar benchmark of 'public policy',<sup>190</sup> which is recognised as presently permeating the law of delict.<sup>191</sup> Although the courts in Scotland have not, in recent times, analysed acts amounting to the deprivation of liberty effected by private persons within the schema of liability for *iniuria*, it is here submitted that the extant Scots authorities on the subject (such as they exist) can be fit neatly within this framework.

It is said that to succeed in an *actio iniuriarum* there must be *animus iniuriandi* [intention to injure] on the part of the delinquent.<sup>192</sup> To say such has been described by Zimmermann, however, as an 'ahistorical generalisation'.<sup>193</sup> While it is the case that a delinquent must possess *animus* in order to be capable of effecting the delict of *iniuria*, *animus* here does not mean simply 'intention' but rather to the broader ability of a person to form an 'intention' as a matter of law.<sup>194</sup> In other words, *iniuria* cannot be inflicted by one who is insane or of nonage.<sup>195</sup> It can only be inflicted by one who is capable of understanding the wrongfulness of their actions, even if as a matter of subjective fact the individual in question does not in fact appreciate the wrongfulness of said action.<sup>196</sup> Consequently, in spite of what the terminology of *animus iniuriandi* implies, there need be no design to actively cause affront. *Iniuria* may be inflicted by one who affronts the personality interests of

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<sup>186</sup> Cf. D.47.10.3.2; see also Ibbetson, *Iniuria: Roman and English*, fn.41

<sup>187</sup> *Ibid.*, para.70

<sup>188</sup> Strauss, *Bodily Injury*, p.182

<sup>189</sup> Johnston, *Res Merae Facultatis*, p.141

<sup>190</sup> Strauss, *Bodily Injury*, p.182

<sup>191</sup> See Pillans, *Delict*, preface

<sup>192</sup> Erskine *Institute*, 4.4.80

<sup>193</sup> Zimmermann, *Obligations*, pp.1059-1061

<sup>194</sup> Ibbetson, *Iniuria: Roman and English*, p.40

<sup>195</sup> D.47.10.3.1 (Ulpian)

<sup>196</sup> D.47.10.3.2 (Ulpian); although Ulpian here suggests that one need not be aware of the wrongdoing for it to be actionable, in D.47.10.11.1 it is stressed that an *actio iniuriarum* will not lie where there is dissimulation on the part of the 'victim'.

another through misplaced zeal as much as where one has acted with an express design to injure.<sup>197</sup>

It is for this reason that in *Stevens v Yorkhill NHS Trust*,<sup>198</sup> the pursuer's case was permitted to proceed to probation notwithstanding the absence of any claim of malice, intention or '*animus iniuriandi*' on the part of the defenders. This ostensible oddity can be rationalised on the grounds that the core of the *actio iniuriarum* is the *contumelia* displayed by the wrongdoer. *Contumelia* – hubristic disregard of a recognised personality interest – cannot be effected through simple negligence, but it is quite apparent that one might recklessly disregard another's rights.<sup>199</sup> Hence, conduct might be actionable as *iniuria* where it is unthinking (as where one acts without thinking about the interests of others),<sup>200</sup> but not where the alleged perpetrator is incapable of thinking.

An *actio iniuriarum* thus occurs where a delinquent, who is *compos mentis*, hubristically acts to the subjective and objective affront of another person's recognised personality interest(s). Liberty, as an interest which falls under the 'higher-level' category of *corpus*, is manifestly a recognised and protected personality interest. Consequently, affronts to liberty are, in Scots law as in South Africa, 'injurious' in the technical sense of that term. As such, in Scots law the act of hubristically depriving another of their liberty is actionable *sine damno* – that is, without proof of loss. *Solatium*, rather than 'damages',<sup>201</sup> is payable as recognition that a wrong has been committed by the delinquent.<sup>202</sup> That *solatium* is payable *sine damno* ostensibly marks a point of similarity with 'false imprisonment', but this point of analogy should not be stretched too far. An *actio iniuriarum* does not give rise to liability '*per se*' in the Anglo-American sense. Rather, that *solatium* is payable *sine damno* is a

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<sup>197</sup> The paradigm exemplar of such would be where a physician provides medical treatment without the consent of, or against the wishes of, their patient. Here, the benevolent intention of the doctor is irrelevant; in disregarding the patient's personality interests, even in the perceived best interests of the patient, the physician commits iniuria in the form of assault: see Brown, *When the Exception is the Rule*, p.37

<sup>198</sup> [2006] CSOH 143

<sup>199</sup> See the discussion in Smith, *Damn, Injuria, Damn*, p.126

<sup>200</sup> David Ibbetson, *Iniuria, Roman and English*, p.40

<sup>201</sup> 'Though typically conflated or taken together, [damages and *solatium*] are conceptually separate: damages repair instances of *damnum* (loss), while an award of *solatium* affords reparation for non-patrimonial injury or affront: see Brown, *Defamation*, p.131

<sup>202</sup> 'It should be noted that 'in principle solatium for "hurt feelings" caused by affront based upon the actio iniuriarum is a different animal to the solatium that can be awarded to a claimant for physical or psychiatric injury': *Stevens*, para.63

relic of the history of the *actio iniuriarum* as a penal delict.<sup>203</sup> In recognition of the aversion of modern Scots law to private penal remedies, however, *solatium* was ‘effortlessly reinterpreted as being purely compensatory when the time came for legal writers to fit the *actio iniuriarum* into the modern theory of Scots delict law’.<sup>204</sup>

‘Unlike officials operating under statutory authority, private persons do not enjoy any form of privilege and thus malice need not be proved in order to establish liability’ for depriving another of their liberty.<sup>205</sup> It is sufficient for the pursuer to show that the detention was ‘wrongful’.<sup>206</sup> This, it is submitted, corresponds with the framework of liability based on *iniuria*; the threshold for what amounts to contumelious conduct is lower where one acts without grant of legal authority. A police officer or other such state official who infringes the liberty interest of a private person does not axiomatically commit a legal wrong, for they enjoy a privilege which ordinary persons do not.<sup>207</sup> Hence, the courts require more than proof of the mere act of detention where the alleged wrongdoer is a state official.<sup>208</sup> Where the defender is a private person, however, the ‘wrongfulness’ of the act will be presumed in the absence of vitiating factors.<sup>209</sup> In other words, where the alleged delinquent is a state official, the onus is on the pursuer to prove that the defender’s conduct was positively *contra bonos mores*. Where the alleged delinquent is a private person, it is for the defender to demonstrate that their conduct was not *contra bonos mores*.

The formal need to demonstrate the objective ‘wrongfulness’ of the act complained of marks the modern Scots action for wrongful detention as a child of *iniuria* rather than of strict liability. While in practice the ease with which

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<sup>203</sup> ‘In Scots law, the *solatium* awarded by courts to the successful claimant under *iniuria*... was originally regarded as being entirely penal’: Descheemaeker, *Solatium and Injury to Feelings*, p.73

<sup>204</sup> *Ibid.*

<sup>205</sup> Reid, *Personality*, para.5.50

<sup>206</sup> *Smith v Green* (1853) 15 D. 549; *MacKenzie v Young* (1902) 10 SLT 231

<sup>207</sup> This is not to say that a private person who detains another *necessarily* commit a wrong: one may legitimately act to protect one’s proprietary interest (Bell, *Principles*, §2032) or where there is ‘moral certainty’ that a crime has been committed: SME, *Criminal Procedure*, (2002 Reissue), para.101. Such considerations are, it is submitted however, a mere vitiation of the general rule that deprivation of liberty is *contra bonos mores*; the wrongfulness of deprivation of liberty, in other words, has to be weighed against other public policy considerations, such as those stemming from the law of property or from the general proposition that people in society should not commit crimes.

<sup>208</sup> See *Whitehouse v Gormley* [2018] CSOH 93, para.164. See also Lindsay *Relegated No Longer?*, *passim*.

<sup>209</sup> See, e.g., Reid, *Personality*, para.5.54

‘wrongfulness’ might be established in cases against private persons, in the face of the presumption thereof, is such that one might describe liability for such as ‘strict’ *de facto* if not *de jure*,<sup>210</sup> the temptation to categorise wrongful detention in this manner should be resisted. To do so would, as occurred in respect of the delict of defamation, have a deleterious effect on the coherence and rationality of Scots law.<sup>211</sup> When faced with novel problems arising out of conduct amounting to deprivation of liberty, Scots lawyers should consequently avoid looking to Anglo-American precedent. Instead, comparative consideration of South African authorities would allow for the development of a more coherent and principled framework which is in keeping with the spirit of Scots law.

### **Conclusion**

The above discussion, as indicated in the introduction, is not mooted as a matter of idleness. It is of considerable practical importance given the reports of the alleged ‘detention’ of students in their halls of residence in universities throughout the United Kingdom. While there exists the possibility that actions based on ‘false imprisonment’ might succeed throughout in the UK’s Common law jurisdictions, the legal position is conceptually different in Scotland. Indeed, as discussed in this essay, that position is so different due to fundamental dissimilarities between Common law jurisprudence and the Mixed jurisprudence of Scotland that Scots lawyers must be wary of taking any ‘lessons’ from court judgments concerning the tort of false imprisonment. Liability for deprivation of liberty in Scotland is not ‘strict’ and so facts which give rise to a right of reparation in the Common law may not necessarily do so in Scots law.

Universities, though (autonomous) public bodies, are private ‘persons’ in terms of the law of delict; hence they can sue (and be sued) in their own name. Within the context of the subject-matter of this essay, they have no special status in private law and nor do their security staff. Hence, university employees do not enjoy any privilege to detain private persons; *prima facie*

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<sup>210</sup> This position would thus mirror the development of the Scots common law pertaining to defamation: See Blackie, *Defamation*, p.634

<sup>211</sup> See the discussion in Brown, *Defamation, passim*.

detention effected by university security staff is consequently unlawful. This presumption of wrongdoing is rebuttable, however. Provided that the detainer can show that their conduct was not contumelious – in other words, that what they did was not *contra bonos mores*, *i.e.*, contrary to public policy – then they might escape liability for their actions. In practice, this would be a very difficult thing for the detainer to prove, since, any argument to the effect that the ends justify the means will not defeat a claim of *iniuria*. One who hubristically infringes the personality interest(s) of another commits a wrong, regardless of their subjective benevolent intent. At best, it may be argued that the *de facto* confinement of students who are expected to self-isolate due to their exhibiting Covid-19 symptoms is not *contra bonos mores*, since it is in keeping with public policy to prevent the spread of infectious disease.

The key practical difference between the law of Scotland and that of the rest of the UK lies thus in the fact that for an instance of wrongful detention to be actionable in Scotland the pursuer must logically have suffered a demonstrable subjective affront. Consequently, evidence that the pursuer was not aware of or bothered by the detention, or that they passively and pleasantly acquiesced in it, will not give rise to a right of reparation. This is in contrast with the position under the nominate tort of false imprisonment, where a right of reparation does arise even if the purported ‘victim’ was unaware of their predicament.<sup>212</sup> The implications of this distinction in cases of mass detention are manifest. While in the Common law, proof that one student has been in fact ‘falsely imprisoned’ in their halls of residence would logically mean that every other student confined to those same halls would have a right of action, in Scotland the onus is on each individual pursuer to demonstrate that they knew of and were affronted by the fact of detention.

Like the Roman jurists, the English judiciary have in the past demonstrated a studied ‘ability not to extend conclusions to the point of absurdity.’<sup>213</sup> Faced with a preponderance of claims for damages from those who have suffered no meaningful harm, in circumstances in which the deprivation of liberty may be deemed in the ‘public interest’, the English courts

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<sup>212</sup> *Murray v Ministry of Defence* [1988] 1 WLR 692; *Meering v. Grahame-White Aviation Co. Ltd.* (1920) 122 LT 44, pp.54-55, *per* Atkin LJ.

<sup>213</sup> Watson, *Roman Slave Law*, p.25

may rule against recoverability on grounds of public policy, notwithstanding the internal logic of the rules pertaining to strict liability. The position in Scotland has the potential to be more principled: While the courts may act so as to achieve the same practical outcome, by predicating the law pertaining to deprivation of liberty upon *iniuria* as opposed to some strict liability nominate action, particular claims may be allowed or denied depending on their own merits, without abandoning the internal logic of the law. Here, one is reminded of the title of the *festschrift* for Professor George Gretton: There is *Nothing so Practical as a Good Theory*.