

RESEARCH ARTICLE

# ‘Revenge porn’ and the *actio iniuriarum*: using ‘old law’ to solve ‘new problems’

Jonathan Brown\*

Robert Gordon University, Aberdeen, Scotland, UK

\*Author email: [J.Brown23@rgu.ac.uk](mailto:J.Brown23@rgu.ac.uk)

(Accepted 12 January 2018)

## Abstract

‘Revenge porn’ is conceptualised as a modern phenomenon which the law is not equipped to deal with. The advent of smartphone technology has allowed sexually explicit material to be created easily and disseminated quickly. An increasing number of individuals have fallen victim to this phenomenon in recent years. This paper submits that victims of revenge porn ought to be held due monetary redress in the civil law, while acknowledging that the damage done by revenge porn need not necessarily involve a loss. Victims of revenge porn are likely to suffer from severe emotional distress and upset, but these injuries are non-patrimonial. This can consequently make it difficult to frame an action for damages. This paper asks if the delict *iniuria* might offer appropriate remedy in instances of revenge porn. The *actio iniuriarum* was, in Roman law, a delict which served to protect the non-patrimonial aspects of a person’s existence – ‘who a person is rather than what a person has’. As the propagation of sexually explicit images of an individual without their consent is clearly an affront to the esteem of that individual, it is argued that instances of revenge porn ought to be considered actionable as *iniuria* in modern Scottish law.

**Keywords:** revenge porn; *iniuria*; delict

## Introduction

‘Revenge porn’, as the non-consensual distribution of private sexual images and videos has been termed,<sup>1</sup> is conceptualised as an inextricably modern phenomenon which the law is not appropriately equipped to deal with.<sup>2</sup> The advent of smartphone technology has ensured that sexually explicit material can be created easily (with or without the knowledge of all parties)<sup>3</sup> and disseminated quickly. An increasing number of individuals (generally, though not necessarily, women)<sup>4</sup> have fallen victim to this phenomenon in recent years. This has led to calls for legislative intervention.<sup>5</sup> Many academics and campaigners have taken the view that the publication of such material deserves to incur punishment by the criminal law.<sup>6</sup>

<sup>1</sup>KB Darrell *Issues in Internet Law: Society, Technology, and the Law* (Amber Book Co, 9<sup>th</sup> edn, 2014).

<sup>2</sup>S Jeong ‘Revenge porn is bad. Criminalizing it is worse’, *Wired*, 28 October 2013.

<sup>3</sup>Creating sexually explicit material has been described as a ‘new and popular way of expressing sexuality’ by Ndeunyema: see N Ndeunyema ‘Addressing “revenge porn” in Namibia’ (OxHRH Blog, 5 June 2015), available at <http://ohrh.law.ox.ac.uk/addressing-revenge-porn-in-namibia/> (last accessed 10 June 2018).

<sup>4</sup>Indeed, the first person charged with distributing revenge porn in England was a woman: see ‘Josie Cunningham charged for allegedly posting revenge porn on Twitter’ (*Independent*, 14 May 2015). See also J Valenti ‘It’s still revenge porn when the victim is a man and the picture is of his penis’ (*The Guardian*, 26 June 2014).

<sup>5</sup>D Keats Citron and MA Franks ‘Criminalizing revenge porn’ [2014] *Wake Forest L Rev* 345.

<sup>6</sup>*Ibid.*

In England and Wales, legislative intervention of this kind has occurred in the form of the Criminal Justice and Courts Act 2015.<sup>7</sup> This Act criminalises individuals who ‘disclose private sexual photographs and films with intent to cause distress’.<sup>8</sup> In 2016, similar legislation was passed by the Scottish Parliament,<sup>9</sup> with regulations giving effect to the provisions pertaining to revenge porn entering into force as of 24 April 2017.<sup>10</sup> Those convicted of the crime of ‘disclosing, or threatening to disclose, an intimate photograph or film’<sup>11</sup> now face up to 12 months in prison on summary conviction<sup>12</sup> or five years in prison if convicted on indictment.<sup>13</sup>

It is submitted that the potential for recourse to the criminal courts does not provide sufficient remedy for those affected by this conduct, however. Victims ought also to be considered to be due monetary redress in respect of the infringement of their privacy and their rights of personality via compensation by way of a civil law remedy. With that said, the damage done by revenge porn need not necessarily be economic. Victims of revenge porn are likely to suffer from severe emotional distress and upset (resultant psychological issues aside),<sup>14</sup> but these injuries are non-patrimonial and the victim need not have suffered any noticeable or quantifiable loss. This can consequently make it difficult to frame an action for damages according to the common law.

This paper asks if the specific Romanistic delict *iniuria* might offer appropriate remedy in instances of revenge porn. The *actio iniuriarum* was, in the Roman law, a delict which served to protect the non-patrimonial aspects of a person’s existence – ‘who a person is rather than what a person has’<sup>15</sup> – their physical body, their reputation and their esteem.<sup>16</sup> As the propagation of sexually explicit images of an individual without their consent is clearly an affront to the esteem of that individual,<sup>17</sup> and is likely to significantly damage their reputation,<sup>18</sup> it is submitted that victims of revenge porn ought to be entitled to *solatium*. Furthermore, as it is submitted that an *actio iniuriarum* may be brought against anyone who shares and continues to propagate revenge porn, not merely the first person who uploads it, this paper also argues that the *actio iniuriarum* is a means by which victims of revenge porn may discourage the continued spread of the offending material, even on the internet.

The *actio iniuriarum* was unequivocally received into Scots law in the Institutional period,<sup>19</sup> although Scotland’s connection with the action has since been neglected.<sup>20</sup> There is currently conflicting academic opinion which holds that the doctrine is dead, on the one hand,<sup>21</sup> and that the doctrine still has a part to play in the development of Scots law, on the other.<sup>22</sup> In light of the fact that the Outer House explicitly found it necessary to make use of the *actio iniuriarum* in deciding the 2006 case of

<sup>7</sup>Criminal Justice and Courts Act 2015, ss 32–35.

<sup>8</sup>Ibid, s 33.

<sup>9</sup>The Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

<sup>10</sup>The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (Commencement No 1 and Transitional Provision) Regulations 2017.

<sup>11</sup>Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2.

<sup>12</sup>Ibid, s 2(7)(a).

<sup>13</sup>Ibid, s 2(7)(b).

<sup>14</sup>Ndeunyema, above n 3.

<sup>15</sup>NR Whitty and R Zimmerman *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: Dundee University Press, 2009) para 1.2.1.

<sup>16</sup>The term ‘esteem’ is preferred here due to the fact that, as noted by Professor Norrie, the concept of ‘honour’ ought to be treated, by the law, with a degree of suspicion: see K McKenzie Norrie ‘The *actio iniuriarum* in Scots law: romantic romanticism, or tool for today?’ in E Descheemaeker and H Scott *Iniuria and the Common Law* (Oxford: Hart, 2013).

<sup>17</sup>In the words of Sheriff Andrew Mackie, the posting of revenge porn is ‘a gross invasion of [the] victim’: see BBC News ‘Stanley Gibbs jailed for filming naked images of female friend’ (9 June 2015).

<sup>18</sup>‘US woman pursues ex-boyfriend in landmark UK revenge-porn action’ (*The Guardian*, 3 June 2015).

<sup>19</sup>Case Comment ‘*Actio iniuriarum* and human organ retention’ [2007] Edin LR 5.

<sup>20</sup>McKenzie Norrie, above n 16.

<sup>21</sup>EC Reid ‘Protection of personality rights in the modern Scots law of delict’ in Whitty and Zimmerman, above n 15.

<sup>22</sup>McKenzie Norrie, above n 16; see also T Wallinga ‘Review of *iniuria* and the common law’ [2014] Roman Legal Tradition 46 at 47.

*Stevens v Yorkhill NHS Trust*,<sup>23</sup> this paper takes the latter view and argues that the *actio iniuriarum* still offers scope for a robust doctrine of ‘rights of personality’<sup>24</sup> to develop in Scots law. There is no reason to eschew the use of old law in the face of new problems. Since revenge porn is a contemporaneous challenge which the law now faces, unimagined in bygone days, this paper submits that it is entirely appropriate that the Scottish *actio iniuriarum* should develop to protect the privacy and dignity of individuals in contemporary Scots law, given Scotland’s Romano-Dutch heritage.

It is submitted that the provision of *solatium* is absolutely appropriate in instances of revenge porn and that the law of Scotland ought to move to recognise this, given that the present remedies which the court can offer are lacking. This paper shall establish that such actions clearly fall within the scope of *iniuria* as it is understood in historic and contemporary Scots law, and argues that the particular and peculiar problems associated with actions arising out of revenge porn cases can be addressed under this heading.

The *actio iniuriarum* is a product of the Civilian legal tradition. There is no equivalent in the common law system.<sup>25</sup> With that said, the Protection from Harassment Act 1997 introduces a protection akin to that offered by the *actio iniuriarum* to those living under English law;<sup>26</sup> consequently, this paper also considers whether or not a civil claim may be brought in England, Wales or Northern Ireland under this statutory heading. The 1997 Act applies in Scotland, although the applicable provisions are slightly different in this jurisdiction. Nevertheless, as ‘most conduct which falls foul of the Act in Scotland is likely to fall foul of the Act in England, and vice versa’,<sup>27</sup> this paper also considers the likelihood of a claim for redress in relation to revenge porn succeeding under this statutory heading in Scotland.

Ultimately, it is submitted that victims of revenge porn ought to be entitled to civil remedy, whether this ought to be paid under the statutory heading of harassment or according to the traditional *actio iniuriarum*. Although it is clear that a number of practical problems will remain, given the complex nature of this new phenomenon and the reality of the internet, it is hoped that the requirement to provide civil compensation may serve to deter potential perpetrators of revenge porn.

## Defining revenge porn

For the purposes of this paper, revenge porn is understood as the non-consensual publication of sexually explicit material, such as photographs or videos, in order to cause distress or harm to the subject. The motive for the publication of the material need not be ‘revenge’, in spite of this title; the phrase revenge porn here is to be understood as referring to any non-consensual publication of sexual material.<sup>28</sup> This definition has found usage in official<sup>29</sup> and unofficial dictionaries<sup>30</sup> and has been adopted by academics for the purposes of setting out a precise meaning of revenge porn.<sup>31</sup> In addition to this

<sup>23</sup>[2006] CSOH 143.

<sup>24</sup>Used here to describe rights of protection against threats to physical integrity, personal liberty, reputation, privacy and confidentiality: see EC Reid *Personality, Confidentiality and Privacy in Scots Law* (W Green, 2010) para 1.02.

<sup>25</sup>Descheemaeker and Scott, above n 16, introduction, *passim*.

<sup>26</sup>F du Bois ‘Harassment: a wrong without a right’ in Descheemaeker and Scott, above n 16.

<sup>27</sup>Per Sheriff Braid, *Dickie v Flexicon Glenrothes Ltd* (6 August 2007, unreported), Kirkcaldy Sheriff Court, noted at 2009 GWD 35-602.

<sup>28</sup>Although it may be suggested that the term ‘non-consensual pornography’ is to be preferred to the term revenge porn, since the latter makes no assumption with regard to the motive of the perpetrator, the term revenge porn has nevertheless found use, albeit as a colloquialism, in academic (and multimedia) discourse which is not solely concerned with instances where the perpetrator’s motive was purely revenge: see R Hill ‘Cyber-misogyny: should “revenge porn” be regulated in Scotland, and if so, how?’ [2015] 12:2 SCRIPTed 117: <<https://script-ed.org/?p=2113>>. The term revenge porn is thus used in this paper, as in others, in the understanding that it is a colloquialism which serves as shorthand for a complex phenomenon.

<sup>29</sup>Such as the *Oxford English Dictionary*: [https://en.oxforddictionaries.com/definition/revenge\\_porn](https://en.oxforddictionaries.com/definition/revenge_porn).

<sup>30</sup>Such as the *Urban Dictionary*: <http://www.urbandictionary.com/define.php?term=revenge%20porn>.

<sup>31</sup>See JK Stokes ‘The indecent internet: resisting unwarranted internet exceptionalism in combating revenge porn’ [2014] Berkeley Tech LJ 929, wherein the author makes use of the *Webster’s* dictionary definition. See also T Linkous ‘It’s time for

definition, however, it is submitted that sexually explicit material shared without the consent of the subject depicted in the material, for the sole purpose of offering gratification to others or, indeed, for any other purpose, should also fall within the definition of revenge porn.<sup>32</sup> As it is the fact of publication without consent that truly reflects the harm of revenge porn – the ‘gross invasion of the victim’ spoken of by Sheriff Mackie – it is thought that any sexually explicit content uploaded to the internet or otherwise published without the subject’s consent is to be properly regarded as revenge porn. The stated or purported purpose of the publisher, if at all relevant, is ancillary to any claim (at most); the fact that the victim subsequently felt hurt or upset is more significant to any claim for *solatium*.

This expanded definition would allow instances such as the publication of nude photographs of Jennifer Lawrence to be rightly regarded as actionable<sup>33</sup> – leaving aside the complications of international private law, which are beyond the scope of this paper – and would more properly align with the understanding of the scope and purpose of the delict *iniuria* presented in this paper. As shall be demonstrated throughout this paper, all forms of the *actio iniuriarum* – in Roman, South African and Scots law – would permit a claim for *solatium* in any instance of the above, albeit that each system might utilise differing taxonomy in classifying the harm caused. A celebrity who has suffered a form of online ‘hacking’ has as much of a claim against the perpetrators and publishers of revenge porn as an ex-lover who created or consensually received the revenge porn material, given the breadth and flexibility of the law of delict and the *actio iniuriarum* therein.

### The *actio iniuriarum* and the essence of ‘*iniuria*’

The *actio iniuriarum* has consistently received far less academic attention than actions brought under the *lex Aquilia*, both in the Roman writings and in contemporary scholarship.<sup>34</sup> The *lex Aquilia* served to offer remedy to those who suffered proprietary damage and to compensate those who suffered *damnum*. The concept of the *actio legis Aquiliae* recrudesced during the second life of Roman law and even exhibited influence on the common law tradition during the foundational period of that legal family.<sup>35</sup> The *actio iniuriarum*, on the other hand, was concerned with protecting individuals from injury to their person and enjoyed a ‘less than triumphant fate’ during the second life.<sup>36</sup>

The term ‘*iniuria*’ is etymologically complex. Justinian ascribed several meanings to it, stating that it may denote any act done without legal justification,<sup>37</sup> the specific wrong done by a judge who imposes an unjust sentence,<sup>38</sup> an act implying *dolus* or *culpa* under the *lex Aquilia*<sup>39</sup> – commonly recognised in the *damnum iniuria datum* – or an act which causes compensable affront to another.<sup>40</sup> The last of these represents the specific delict ‘*iniuria*’; a contumelious attack on the dignity of a free-man, which may give rise to a compensable claim.<sup>41</sup>

---

revenge porn to get a taste of its own medicine: an argument for the federal criminalization of revenge porn’ [2014] Rich JL & Tech, wherein the author draws on the Urban Dictionary in defining ‘revenge porn’ for the purposes of her article.

<sup>32</sup>Indeed, this broader definition finds favour in the *Collins English Dictionary*: see <https://www.collinsdictionary.com/dictionary/english/revenge-porn>.

<sup>33</sup>Ms Lawrence’s Instagram account was ‘hacked’, allowing the ‘hackers’ to gain access to private material which she had shared with her then boyfriend: <http://www.independent.co.uk/news/people/jennifer-lawrence-on-4chan-nude-hacking-scandal-the-internet-has-scorned-me-9856364.html>; <https://www.theguardian.com/film/2017/jan/24/jennifer-lawrence-nude-photo-hacker-edward-majerczyk-prison>.

<sup>34</sup>Descheemaeker and Scott, above n 16.

<sup>35</sup>Descheemaeker and Scott, above n 16.

<sup>36</sup>Descheemaeker and Scott, above n 16.

<sup>37</sup>*Iniuria dicitur omne quod non iure fit*: Justinian *Institutes*, 4.4.

<sup>38</sup>Justinian *Institutes*, 4.4.

<sup>39</sup>R Zimmermann ‘*Actio iniuriarum*’ in *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996).

<sup>40</sup>See Justinian *Institutes* 4.4; Dig. 47.10; C. 9.35. See also M Kaster *Das Römische Privatrecht*, I (Munich: Beck, 1955) pp 21–22; 139–140; 520–522.

<sup>41</sup>AM Prichard *Leages’ Roman Law* (London: MacMillan and Co, 3rd edn, 1961) p 417; Dig. 47.10.2.

*Contumelia*,<sup>42</sup> which has been variously defined as ‘insult’,<sup>43</sup> ‘contempt’,<sup>44</sup> and ‘disrespect’,<sup>45</sup> lay at the heart of the Roman delict of *iniuria*<sup>46</sup> and, thus, their conception of the *actio iniuriarum*.<sup>47</sup> The use of the term ‘insult’, in understanding *contumelia*, has been favoured by some English writers, as this allows those writers to draw a ready parallel between verbal attacks in the Roman law and the English law of tort.<sup>48</sup> This approach is ill-advised;<sup>49</sup> the Romans understood the concept of *iniuria* as the Greeks understood their concept of *hubris*,<sup>50</sup> to which the closest English language analogue is ‘contempt’, indicating a lack of respect for the personality of another.<sup>51</sup> The Romanist Professor Ibbetson therefore suggests that the best translation of *contumelia* may be ‘disrespect’,<sup>52</sup> though current Scottish jurisprudence appears to suggest that the Scots judiciary prefers to interpret the word as ‘affront’.<sup>53</sup>

In the post-classical period of Roman law, contumelious intent to effect affront could cause otherwise lawful conduct to be considered *iniuria* both in the sense of ‘unlawful conduct’ and in the sense of the specific delict.<sup>54</sup> In the words of Professors Descheemaeker and Scott, ‘as long as the wrongdoer’s purpose was to bring his victim into disrepute, his conduct – whatever it was – was potentially actionable’.<sup>55</sup>

By the classical period of Roman law, one could inflict *iniuria* and exhibit *contumelia* by words or by a physical act<sup>56</sup> and the affront caused to one’s *corpus, fama* and *dignitas*, was the essence of actions in respect of verbal injury just as for *iniuria realis* – injuries which would contemporaneously be understood as ‘assault’.<sup>57</sup> The classical Romans and their successors therefore recognised that reparation could be owed in respect of both physical and verbal attacks under the *actio iniuriarum*.<sup>58</sup>

### Verbal injury (*iniuria verbalis*)

Just as the Roman law recognised *iniuria verbalis* in the context of the *actio iniuriarum*, so too does English law recognise the concept of verbal injury in the torts of slander and libel.<sup>59</sup> There is no unified tort of defamation,<sup>60</sup> but the two separate torts offer some protection to those defamed and ‘in general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another’.<sup>61</sup> The malicious publication of sexual images and videos is clearly not actionable

<sup>42</sup>Dig. 47.10: The wrong stems from ‘*quod non iure fiat: omne enim, quod non iure fit, iniuria fieri dicitur. hoc generaliter. specialiter autem iniuria dicitur contumelia*’.

<sup>43</sup>JP Sampley and P Lampe (eds) *Paul and Rhetoric* (New York: T&T Clark, 2010).

<sup>44</sup>P Birks ‘Harassment and hubris: the right to an equality of respect’ [1997] *Irish Jurist* 1.

<sup>45</sup>D Ibbetson ‘*Iniuria*, Roman and English’ in Descheemaeker and Scott, above n 16.

<sup>46</sup>Dig. 47.10.15.46.

<sup>47</sup>Ibbetson, above n 45, p 40.

<sup>48</sup>Ibbetson, above n 45, p 40.

<sup>49</sup>Not least because the South African courts expressly rejected this interpretation of *contumelia* and *iniuria* in *Foulds v Smith* 1950 1 SA 1 (A), 11; see also J Neethling, JM Potgieter and PJ Visser *Neethling’s Law of Personality* (Durban: Butterworths, 1996) p 240.

<sup>50</sup>Justinian *Institutes* Book III, Tit IV.

<sup>51</sup>Birks, above n 44, at 8.

<sup>52</sup>Ibbetson, above n 45, p 40.

<sup>53</sup>*Stevens v Yorkhill NHS Trust* [2006] CSOH 143.

<sup>54</sup>E Descheemaeker ‘“A man of bad character has not so much to lose”: truth as a defence in the South African law of defamation’ [2011] *South African Law Journal* 452; Birks, above n 44, at 8.

<sup>55</sup>Descheemaeker and Scott, above n 16, p 13.

<sup>56</sup>Dig. 47.10.1.

<sup>57</sup>J Blackie ‘Unity in diversity’ in Whitty and Zimmerman, above n 15, ch 2.

<sup>58</sup>Dig. 47.10.2.

<sup>59</sup>DO Dykes *Cooper on Defamation and Verbal Injury* (Edinburgh: W Green and Sons, 1906).

<sup>60</sup>A Mullis ‘The law of defamation’ in A Grubb (ed) *The Law of Tort* (London: Butterworths, 2000) para 24.24; in Scotland, there is no distinction between slander and defamation in delict: K McKenzie Norrie *Defamation and Related Actions in Scots Law* (Edinburgh: Butterworths, 1995).

<sup>61</sup>*Toogood v Spryng* (1834) 1 CM & R 181 at 193.

as slander<sup>62</sup> and it is not generally actionable as libel, unless the propagation of the offending images is accompanied by a false statement or a malicious innuendo.<sup>63</sup> With that said, the term ‘words’, in statute, has been interpreted in such a way so as to include both ‘pictures and visual images’.<sup>64</sup> Thus, it is submitted that any wrong involving the unauthorised publication of a picture or video ought to be understood as a verbal, as opposed to ‘real’, injury, particularly as ‘real’ injuries are typically only those which involve *physical* acts.<sup>65</sup>

While the essential elements of defamation in the form of libel may ostensibly apply to instances of revenge porn, and one can construct at least a *prima facie* case in every instance,<sup>66</sup> one cannot construct a definite case in every instance. Any libellous statement must necessarily be false<sup>67</sup> and so while one may be able to establish libel if the images were posted with an implication that the subject of the attack was a ‘slut’, or a ‘whore’ or suchlike,<sup>68</sup> however this implication may be imputed,<sup>69</sup> in the absence of this innuendo the simply publication of private images will not be actionable under this heading, however great the actual damage to the victim’s reputation.<sup>70</sup> According to English law, *veritas non est defamatio*;<sup>71</sup> if an individual publishes an intimate image without the consent of the subject of that image in an instance of revenge porn, but does not add a defamatory statement (be it a statement or an innuendo) when doing so, the subject of the illicitly published material will have no recourse under the law of libel.<sup>72</sup>

With that said, any publication which implies that a woman is not chaste was specifically actionable as a result of statutory intervention<sup>73</sup> until the Slander of Women Act was repealed by the Defamation Act 2013<sup>74</sup> (a comparable publication concerning a man would not have been actionable under the legislation).<sup>75</sup> As revenge porn is clearly injurious to the character of the victim, and as it obviously implies a lack of chastity,<sup>76</sup> there would have been scope for one to argue that revenge porn ought to be actionable according to the tort of libel using this Act, though this would hardly have been a satisfactory means of prohibiting the propagation of revenge porn, as forcing a woman to accept that she is ‘unchaste’ in the pursuit of a legitimate grievance appears to be a blatant instance of ‘victim

<sup>62</sup>Simply because slander is defined as a ‘defamatory communication conveyed in some non-permanent form’; the publication of revenge porn online is clearly a permanent fixture, given the nature of the internet: see P Druschel et al ‘The right to be forgotten – between expectations and practice’ [2011] ENISA Report pp 8–9.

<sup>63</sup>*Monson v Tussauds Ltd* [1894] 1 QB 671 at 692; *Du Bost v Beresford* (1810) 2 Camp 511; McKenzie Norrie, above n 60, p 13.

<sup>64</sup>Theatres Act 1968, s 4(3).

<sup>65</sup>See J Blackie ‘The protection of corpus in Scots law’ in Descheemaeker and Scott, above n 16, p 157.

<sup>66</sup>The essential elements of a cause of action being: (a) that the statement/implication was defamatory; (b) that the statement/implication was published to at least a third person; and (c) that the statement/implication referred to the claimant: Mullis, above n 60, para 24.8.

<sup>67</sup>*Sutherland v Stopes* [1925] AC 47 at 62; Defamation Act 2013, s 2(1).

<sup>68</sup>As often (though not always) occurs in instances of revenge porn: see O Rachmilovitz ‘Bringing down the bedroom walls: emphasising substance over form in personalized abuse’ [2008] William and Mary Journal of Women and the Law 495 at 500. The law looks to the substance of words and actions when considering defamation; one cannot escape liability by ‘artfully’ disguising libel: Dykes, above n 59, p 29.

<sup>69</sup>McKenzie Norrie, above n 60, p 13.

<sup>70</sup>*Sutherland v Stopes* [1925] AC 47.

<sup>71</sup>2 Selden Society 82 (1294).

<sup>72</sup>Defamation Act 2013, s 2; McKenzie Norrie, above n 60.

<sup>73</sup>Slander of Women Act 1891, s 1; *Kerr v Kennedy* [1942] 1 KB 411.

<sup>74</sup>Section 14(1).

<sup>75</sup>Mullis has argued that this incongruity may not be compatible with Arts 6 and 8 of the European Convention on Human Rights: Mullis, above n 60, para 24.37, but this has not yet been tested.

<sup>76</sup>Per *Kerr v Kennedy* [1942] 1 KB 409. The test for establishing a lack of chastity is the question: ‘What imputations on a woman, qua woman, in the sphere of sexual morality, are grave enough to be actionable without proof of pecuniary loss, or so likely to cause pecuniary loss as not to call for such proof?; at 412; S Meyer ‘Still blaming the victim of intimate partner violence? Women’s narratives of victim desistance and redemption when seeking support’ [2015] Theoretical Criminology 1.

blaming'. Victims of revenge porn can never be regarded as 'ideal victims'<sup>77</sup> and so those who upload such material routinely regard their conduct as justifiable on grounds that the victim 'had it coming' as a form of 'shame punishment'.<sup>78</sup> To suggest that a statute such as the Slander of Women Act ought to be used to curtail revenge porn plays into the victim-blaming narrative by implicitly suggesting that no woman should ever be involved in the creation of private sexually explicit material.

Accordingly, libel is not a wholly satisfactory foundation on which to rest all actions against revenge porn. The tort of 'breach of confidence' may, however, offer better recourse in English law. Though the English courts have hitherto avoided creating a specific or defined tort to protect privacy,<sup>79</sup> they have nevertheless recognised that there are occasions on which the publication of private images or information may be actionable;<sup>80</sup> if one is under a 'duty of confidence', then one is bound not to publish or otherwise disseminate information which is held in confidence.<sup>81</sup> As such, given the private nature of sexual relations, the assumed level of mutual trust and respect in sexual relationships and the intimate nature of homemade sexual images or videos, one may legitimately claim that a sexual partner is legally bound under a duty of confidence to refrain from sharing sexually intimate material, whether such content is sent to them by their partner or created by them personally.

The problem with using breach of confidentiality as an action for remedy in instances of revenge porn is readily apparent. It may be used against the sexual partner who initially shares the intimate material, but once the material is published on the internet it may be readily and lawfully shared by others who are not bound by the duty of confidentiality. Breach of confidentiality offers remedy when there has been '[a]n intrusion – an unbecoming and unseemly intrusion ... offensive to that inbred sense of propriety natural to every man',<sup>82</sup> but one cannot claim for any intrusion beyond the initial breach of confidence. This action cannot, therefore, be used to prevent the spread of intimate images which have already been uploaded into the public domain.

Roman law offers more comprehensive, and more appropriate, protection from verbal injury than the English common law by dint of the *actio iniuriarum*. The *actio iniuriarum* allows for one to found an action based on insult alone; this cannot be done under English law.<sup>83</sup> A successful claim under the *actio iniuriarum* requires no more than that the real or verbal injury inflicted on an individual's personality interests be caused contumeliously.<sup>84</sup> There is no requirement for falsity in a verbal attack and so the problems which are inherent in raising an action for libel are not encountered. The complexities of breach of confidentiality need not be contended with; there is no need to establish that a perpetrator was bound by any specific duty to refrain from disclosing anything, thus anyone who subsequently and contumeliously shares intimate material may be pursued by a claimant. The *actio iniuriarum*, in Roman, Scots and South African law, consequently can be said to offer greater protection to the victim of revenge porn than one pursuing an action founded in breach of confidence.

It is not difficult to extend the protection from verbal injury offered in respect of the contumelious publication of harsh words to verbal injury caused by the contumelious publication and propagation of intimate images, as the English experience demonstrates. English law expressly recognises that one

<sup>77</sup>N Christie 'The ideal victim' in E Fattah (ed) *From Crime Policy to Victim Policy* (Basingstoke: MacMillan, 1986) p 17 at p 19.

<sup>78</sup>MC Nussbaum 'Objectification and internet misogyny' in *The Offensive Internet: Speech, Privacy and Reputation* (Harvard University Press, 2012) p 68.

<sup>79</sup>*Kaye v Robertson* [1991] FSR 62.

<sup>80</sup>*Prince Albert v Strange* (1849) 2 De G & Sm 652.

<sup>81</sup>*Coco v An Clark (Engineers) Ltd* (1968) FSR 415 at 419.

<sup>82</sup>*Prince Albert v Strange*, above n 80, at 698.

<sup>83</sup>McKenzie Norrie, above n 60, p 2.

<sup>84</sup>The *Actio Iniuriarum* offered a strong and efficient protection against injuries to immaterial interests, and in particular against insulting behaviour of any kind': R Zimmerman *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996) p 1062; see also the case of *Le Roux v Dey* (CCT 45/10) [2011] ZACC 4, para 113 wherein the South African Constitutional Court, citing *Kimpton v Rhodesian Newspapers Ltd* 1924 AD 755, interpreted *contumelia* to mean something which can be considered 'insulting, offensive or degrading to another'.

may be defamed by the publication of libellous pictures as well as by false statements.<sup>85</sup> South African law similarly recognise that one may suffer *iniuria verbalis* as a result of the malicious publication of photographs.<sup>86</sup> It is therefore quite clear that, even if one takes the strict view that *contumelia* is a separable element of *iniuria* which must be proven along with *animus iniuriandi* and the fact that the conduct committed was *contra bonos mores*, all revenge porn cases could be actionable according to the Roman *actio iniuriarum*. Revenge porn is almost a textbook example of improper shaming and, as the victims are generally rendered *infamis*, as the Romans would have understood that term, it is accordingly evident that any claim made by them would be, *prima facie*, competent. *Animus iniuriandi* could easily be established in most, if not all, such cases: the intention behind maliciously uploading and sharing intimate images and videos is obviously to affront or degrade the subject of the material, to say nothing of any breach of confidence or expectation of privacy. *Contumelia* is clearly present wherever consent is blatantly disregarded. Violating the sexual autonomy or integrity of an individual goes against the basic moral fabric of contemporary society and can undoubtedly be considered *adversus bonos mores*.<sup>87</sup>

The Roman understanding of the *actio iniuriarum* does not provide an accurate account of the modern law in either Scotland or South Africa, however. As both of these jurisdictions were greatly influenced by both the *ius commune* jurists and the Anglo-American tradition, and both received something closer to Romano-Dutch law rather than 'pure' Roman law, their concept of the *actio iniuriarum* is rather different from the conceptual framework of the delict discussed above. In addition, in spite of their shared heritage, both jurisdictions have treated the action in very different ways. Scotland has neglected her connection to the *ius commune*; South Africa has embraced it. Accordingly, this paper shall presently consider the place of the *actio iniuriarum* in South African law, before comparatively analysing the same within the context of Scots law.

### Rights of personality and the *actio iniuriarum*

Although the *actio iniuriarum* (appearing in its modern form as the *actio injuriarum*) was received into those jurisdictions which have been influenced by the Romanistic tradition, its presence is now merely residual in some Civilian legal systems.<sup>88</sup> In the mixed jurisdiction of South Africa, however, the *actio iniuriarum* has thrived and, while the delict made rather 'staccato progress in the nineteenth and twentieth centuries',<sup>89</sup> it now stands alongside *Aquilian* liability and the action for pain and suffering as one of the pillars of the South African law of obligations.<sup>90</sup>

As the *lex Aquilia* did somewhat influence English law in its developmental period, the word *iniuria* is also familiar to most English lawyers. With that said, however, the *actio iniuriarum* has no ready counterpart in the history of common law jurisdictions.<sup>91</sup> The closest equivalent would be found in the early law of trespass,<sup>92</sup> but this is a weak comparator. The Anglo-American tradition has come to favour a 'pigeonhole system of nominate torts' in preference to the broad blanket of

<sup>85</sup>*Monson v Tussauds Ltd* [1894] 1 QB 671 at 678.

<sup>86</sup>*O'Keefe v Argus Printing and Publishing Co* 1954 (3) SA 244 C; malice is not, of course, a requirement, although it is submitted that any instance in which malice can be shown would certainly be actionable.

<sup>87</sup>Professor Blackie has suggested that the law ought to recognise a right to sexual integrity in civil cases and that the delict of *iniuria* offers an opportunity to do this. Although, here, his discussion is limited to matters which affect the physical body, it is apparent that this analysis may be extended beyond *corpus* (a term used in a more inclusive sense than Ulpian's, in Blackie's essay) to *fama* and *dignitas* as well: Blackie, above n 65, pp 166–167.

<sup>88</sup>Such as in France, where the action has been 'squeezed of its substance': see Descheemaeker and Scott, above n 16, p 26.

<sup>89</sup>JM Burchell 'The protection of personality rights' in R Zimmerman and D Visser *Southern Cross: Civil Law and Common Law in South Africa* (Oxford: Clarendon Press, 1996).

<sup>90</sup>J Neethling, JM Potgieter and PJ Visser *Law of Delict* (Durban: Butterworths, 4<sup>th</sup> edn, 2001) p 8.

<sup>91</sup>Descheemaeker and Scott, above n 16.

<sup>92</sup>D Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) pp 13–17, 39–43, 63–70.

delictual liability preferred in the Civilian tradition<sup>93</sup> and accordingly, as there is nothing akin to the Romanistic *iniuria* in the common law tradition, any attempt to understand the modern, South African notion of *iniuria* through the lens of a single, nominate action is impossible.<sup>94</sup> In addition, trespass does not and has never protected personality rights as the *actio iniuriarum* has done.

The phrase ‘the English law of tort’ is itself something of a misnomer.<sup>95</sup> England does not really have a law of tort, per se, but rather a law of torts. This slight semantic difference is no mere matter of pedantry; English law recognises only a finite, distinct and nominate number of ‘wrongs’ which are actionable.<sup>96</sup> Actions which infringe dignity do not fit within any of these ‘torticles’.<sup>97</sup> The South African law of delict, conversely, is very much that: an unbroken system which recognises a potentially infinite number of wrongs, as it regards as actionable anything which does injury to an individual’s *corpus, fama* or *dignitas* and it will order reparation in respect of *damnum iniuria datum*. Between its connection to the common law and the *ius commune*, South Africa has developed a unique system of civil law to protect personality rights.<sup>98</sup> It has done so using the same sources available to Scottish jurists, albeit to far greater effect. Thus, though South Africa has not yet passed any legislation to exclusively proscribe or prevent the publication of revenge porn, victims of it are afforded some effective legal recourse. In addition to the potential for a civil claim in respect of the infringement of one’s privacy or personality rights,<sup>99</sup> since the propagation of revenge porn is an example of an occurrence which unlawfully and seriously impairs the dignity of the victim, the conduct is also criminalised by way of the *crimen injuria*.<sup>100</sup>

The South African law of defamation has been greatly influenced by the Anglo-American tradition.<sup>101</sup> It does not, however, strictly divide the delict of defamation into the torts of slander and libel and so its law remains profoundly Civilian in this respect. Nor is their legal practice akin to that of England; in South Africa, the maxim *veritas convicii non excusat* has become entrenched, although there is a ‘dissenting strand’,<sup>102</sup> which is English in substance if not in root,<sup>103</sup> which maintains that truth is a defence for any claim of *convicium* or defamation. With that said, in spite of its connection to the common law, the method by which privacy is protected by non-defamatory actions in South Africa would be unrecognisable to an English lawyer.

Though publication is regarded as an element for the purposes of this aspect of the infringement of privacy, it does not follow that the wrong is founded on the same base as defamation. Defamation consists of an attack on reputation resulting from publication while infringement of privacy is grounded in an impairment of *dignitas*.<sup>104</sup>

Scotland, although heavily influenced by the common law tradition in its law of ‘personality rights’, has a well-established, foundational connection to the *actio iniuriarum*. Bankton called on it by name<sup>105</sup> and Stair had earlier alluded to a general obligation of reparation which appears to have been influenced by the concept.<sup>106</sup> Yet with that said, the law pertaining to the protection of

<sup>93</sup>FF Stone ‘Touchstones of tort liability’ [1950] Stan LR 259 at 283.

<sup>94</sup>Descheemaeker and Scott, above n 16.

<sup>95</sup>Discussion in TB Smith *A Short Commentary on the Law of Scotland* (Edinburgh: W Green & Son, 1962) p 658.

<sup>96</sup>Stone, above n 93.

<sup>97</sup>B Rudden ‘Torticles’ [1991] 6/7 Tul Civ LF 105.

<sup>98</sup>Burchell, above n 89.

<sup>99</sup>B Fischer ‘Revenge porn: scorned exes and dirty pictures’ Perdeby, 19 August 2013.

<sup>100</sup>JRL Milton *South African Criminal Law and Procedure* (Volume II) Common Law Crimes (Kenwyn: Juta, 3<sup>rd</sup> edn, 1996) p 492.

<sup>101</sup>Burchell, above n 89.

<sup>102</sup>To use the words of Professor Descheemaeker in his study on the subject: see Descheemaeker, above n 54, *passim*.

<sup>103</sup>Descheemaeker, above n 54.

<sup>104</sup>CF Amerasinghe *Aspects of the Actio Iniuriarum in Romano-Dutch Law* (Ceylon: Lake House, 1966) p 190.

<sup>105</sup>Bankton *Institute* 1.10.21.

<sup>106</sup>Stair *Institutions* 1.9.4.

personality rights in Scotland ‘remains a thing of shreds and patches’;<sup>107</sup> that particular jurisdiction has not built up robust doctrines designed to protect privacy as comparable Civilian jurisdictions have done.<sup>108</sup> Unlike South Africa, which used its connection to the *ius commune* to great effect, Scotland grossly mistreated the *actio iniuriarum* throughout the course of the nineteenth and twentieth centuries,<sup>109</sup> during which time her lawyers began to eschew its Civilian roots in favour of the English Common law.<sup>110</sup>

The Civilian tradition had come, in the nineteenth century, to be associated with dictatorship, while the Common law tradition was viewed by Scots as progressive, liberal and preferable to the repressive Romanist regime.<sup>111</sup> This reflected a trend whereby it was thought, quite simply, that it was ‘time to close the old books’.<sup>112</sup> As a result of this, although Scots law had the potential to develop a full-blooded, hearty system of personality and privacy rights, no such structure was realised. The Scots law of ‘personality rights’ developed, and has continued to develop, in a manner akin to English law.<sup>113</sup>

As noted, English law does not naturally recognise any ‘high-level principle’ protecting privacy or personality rights;<sup>114</sup> its practical focus and endemic distrust of legal academia precluded the development of any doctrine in this direction<sup>115</sup> until the European Convention on Human Rights was adopted into domestic law.<sup>116</sup> The importance of the Scottish *actio iniuriarum* has, accordingly, been very much diluted over the years,<sup>117</sup> however it must be noted that unlike English law, which has struggled to cope with the reception of the Article 8 right to privacy into domestic law, Scots law at least has the potential to draw on the South African innovation of treating one’s privacy as an aspect of one’s *dignitas* and protecting it by dint of the *actio iniuriarum*.<sup>118</sup>

*Iniuria* initially had a role to play in both the civil law of delict and the criminal law, but as the nominate delict and crime of assault emerged, its importance in the criminal sphere deteriorated into desuetude.<sup>119</sup> It does, however, remain within the framework of the Scottish civil law.<sup>120</sup> Just as delict in South Africa remains an unbroken system which acts to compensate those who suffer as a result of *culpa*, so too can the Scottish law of delict act to compensate those who suffer loss or injury as a result of an indefinite number of intentional or unintentional wrongs.<sup>121</sup>

*Iniuria*, within the context of the *actio iniuriarum*, is generally understood as ‘injury’ caused by ‘affront’ in the Scots literature on the subject and in Scottish jurisprudence.<sup>122</sup> This allowed Professor Whitty to persuasively argue that the three Scottish post-mortem cases<sup>123</sup> were clearly decided according to the logic of the *actio iniuriarum* on grounds of the judicial reference to ‘affront’ made in them, in spite of the fact that the delict of *iniuria* was not expressly mentioned in any of these

<sup>107</sup>Reid, above n 24, para 1.02.

<sup>108</sup>Reid, above n 24, para 1.02.

<sup>109</sup>McKenzie Norrie, above n 16.

<sup>110</sup>R Evans-Jones ‘Receptions of law, mixed legal systems and the myth of the genius of Scots private law’ [1998] LQR 228; Lord Alan Rodger ‘Thinking about Scots law’ [1996] Edin LR 3, passim.

<sup>111</sup>Rodger, above n 110, at 15.

<sup>112</sup>Ibid.

<sup>113</sup>Reid, above n 24, para 1.18.

<sup>114</sup>*Kaye v Robertson*, above n 79; *R v Khan (Sultan)* [1997] AC 558; *Wainwright v Home Office* [2004] 2 AC 406 at 419.

<sup>115</sup>H Gutteridge ‘The comparative law of the right to privacy’ [1931] LQR 203 at 219.

<sup>116</sup>By the Human Rights Act 1998.

<sup>117</sup>U Smartt *Media and Entertainment Law* (Abingdon: Taylor & Francis, 2011) p 15.

<sup>118</sup>Neethling, Potgieter and Visser, above n 49, p 240.

<sup>119</sup>Blackie, above n 57; Blackie, above n 65.

<sup>120</sup>Even during the nineteenth and twentieth centuries, when the Scottish doctrine of the *actio iniuriarum* was perhaps most neglected, a number of cases called which either explicitly or implicitly relied upon it: *Eisten v North British Railway Co* (1870) 8 M 980; *Bern’s Executor v The Royal Lunatic Asylum of Montrose* (1893) 20 R 859; *Pollock v Workman* (1900) 2 F 354; *Conway v Dalziel* (1901) F 918; *Hughes v Robertson* (1913) SC 394.

<sup>121</sup>J Thomson *Delictual Liability* (Haywards Heath: Bloomsbury Professional, 5<sup>th</sup> edn, 2014) p 1.

<sup>122</sup>See NR Whitty ‘Overview of rights of personality in Scots law’ in Whitty and Zimmerman, above n 15, para 3.2.10.

<sup>123</sup>*Pollock v Workman* (1900) 2 F 354; *Conway v Dalziel* (1901) F 918; *Hughes v Robertson* (1913) SC 394.

cases.<sup>124</sup> One year later, a Scottish Outer House case expressly vindicated his argument<sup>125</sup> and ultimately held that the law of Scotland continues to recognise actions for affront and hurt feelings under the *actio iniuriarum*.<sup>126</sup> In such cases, a court may order that *solatium* must be paid, although this *solatium* is ‘a different animal’ to that awarded for physical or psychiatric injury.<sup>127</sup>

Scots law therefore has an intrinsic advantage over English law as a result of its connection to the *actio iniuriarum*. In 2003, Lord Bonomy recognised that a right to privacy could be fashioned from existing principles of the Scots law and that, in the course of the case of *Martin v McGuiness*, counsel did not direct him to any authority which suggested that Scots law was as inimical to the concept of privacy rights as English law.<sup>128</sup> In the case of *Murray v Beaverbrook Newspapers Ltd*, however, Lord Thomson maintained that he knew ‘of no authority to the effect that mere invasion of privacy, however hurtful and whatever its purpose and however repugnant to good taste, is itself actionable’.<sup>129</sup>

In spite of Lord Thomson’s comments, the possibility of action where *animus iniuriandi* can be established remains open.<sup>130</sup> According to Professor Smith, if the pursuer who alleged a breach of privacy in *Murray* had been ‘subjected to contumely beyond the ambit of comment on his public activities’, then ‘a remedy might well have been competent. Mere lack of precedent should be no obstacle and in most civilised countries some protection is afforded by the law in respect of a citizen’s private life’.<sup>131</sup>

The promulgation of revenge porn is not simply a mere invasion of privacy. It seriously infringes the *dignitas* of the victim and accordingly any affront to the victim’s privacy is necessarily connected to this infringement of *dignitas*.<sup>132</sup> Revenge porn is, if nothing else, a contumelious verbal attack which effects affront. In the words of the institutional writer Erskine:

A verbal injury, when it is pointed against a private person, consists in the uttering of contumelious words, which tend to vilify his character, or render it little or contemptible... The *animus iniuriandi* which is of the essence of this crime, being an act of the mind, must be inferred from presumptions; and, in general, it is presumed from the injurious words themselves, especially when they are made use of to hurt one in his moral character, or to fix some particular guilt upon him; as if one should give his neighbour the name of thief, cheat, liar etc ...<sup>133</sup>

It must be noted that, like the Romans, Erskine considers that the perpetrator’s display of *animus iniuriandi* is intrinsically bound to the execution of the contumelious act itself.

Consequently, as it is not difficult to substitute the phrase ‘injurious words’ for ‘injurious material’ contemporaneously, as the English and South African experiences indicate,<sup>134</sup> it is evident that one can consider the uploading of sexually explicit material to the internet, in the absence of consent from the subject of the material, as a verbal attack on the basis of the *actio iniuriarum* according to Scots law. Revenge porn is already judicially recognised as ‘an invasion... A gross invasion of the victim’.<sup>135</sup> Accordingly, the publication of such material is clearly an affront to the *dignitas* of the victim, as

<sup>124</sup>N Whitty ‘Rights of personality, property rights and the human body in Scots law’ [2005] Edin LR 194.

<sup>125</sup>*Stevens v Yorkhill NHS Trust* 2006 SLT 889 (OH) at para 34.

<sup>126</sup>*Ibid*, para 62.

<sup>127</sup>*Ibid*, para 63.

<sup>128</sup>*Martin v McGuiness* 2003 SLT 1424 at para 28.

<sup>129</sup>18 June 1957, unreported.

<sup>130</sup>Smith, above n 95, p 655.

<sup>131</sup>*Ibid*.

<sup>132</sup>Indeed, it might be suggested that if privacy is not a discretely recognised personality right in Scots law, then the Romanistic conception of *dignitas* is so broad as to effectively encapsulate it: see Neethling, Potgieter and Visser, above n 49, p 240; *Joubert* 1960 THRHR 39; HL MacQueen ‘A hitchhiker’s guide to personality rights in Scots law, mainly with regard to privacy’ in Whitty and Zimmerman, above n 15.

<sup>133</sup>Erskine *Institute* IV 4, 80; DM Walker *The Law of Delict in Scotland* (Edinburgh: W Green, 2nd edn, 1981) p 731.

<sup>134</sup>*Monson v Tussauds Ltd* [1894] 1 QB 671; *O’Keefe v Argus Printing and Publishing Co* 1954(3) SA 244 C.

<sup>135</sup>BBC News, above n 17.

well as being an invasion of their privacy and an attack on their *fama*. As the *actio iniuriarum* exists to confer *solatium* on those who suffer such affront, it is submitted that the victims of revenge porn ought to be able to avail themselves of this legal mechanism.

In addition to the harm effected by the plain publication of revenge porn, in the modern context, it would not be a stretch to place the word ‘slut’ before Erskine’s use of ‘etc ...’, or, indeed, to understand that indefinite nature of ‘etc ...’ implicitly includes it within the list’s ambit. Thus, it is suggested that in addition to there being an action arising out of the affront caused by the plain publication of revenge porn, there is additional scope available to the law to categorise the publication of revenge porn on websites which are explicitly designed to denigrate the subjects of such publications as a specific form of verbal injury in such a manner that the purported ‘truth’ or otherwise of the alleged verbal attack is immaterial to the claim.

Verbal injury, as a form of *iniuriae*, justifies a claim for *solatium*, here understood as the payment of compensation in recognition of the fact that a wrong has been committed. Loss, or lack thereof, is immaterial to such a claim. Although the dicta of Lord President Robertson appear to suggest that a verbal injury could be conceptualised as patrimonial loss caused by a malicious statement,<sup>136</sup> this view swims against the tide of over two thousand years of scholarship.<sup>137</sup> Almost all Civilian commentators, and all of the Scottish Institutional writers, base their understanding of *iniuria verbalis* on the Digest;<sup>138</sup> accordingly there is no reason to suggest that verbal injury, in Scotland, means anything more than a compensable form of injury resulting from a verbal attack.

In light of Lord Bonyon’s dicta, Professor Smith’s comments and Erskine’s understanding of *iniuria verbalis*, and in considering the recrudescence of the *actio iniuriarum* in *Stevens v Yorkhill NHS Trust*, it remains distinctly possible that the *actio iniuriarum* may be – indeed, ought to be, according to Smith’s view – properly revived. In Scotland,

[T]he proper scope of the *actio iniuriarum* has always been to deal with those many situations where there has been deliberate affront to the pursuer (or negligence so gross as to be the equivalent of intent) and the pursuer’s feelings have consequently been hurt. Damages are for non-patrimonial loss (*solatium*) and the malicious purpose of the defender is always relevant.<sup>139</sup>

If this action is wholly forgotten, then a gap will form in Scots law, and individuals who ought to be entitled to compensation may be denied remedy.

This is evidenced by the case of *Ward v Scotrail Railways Ltd*.<sup>140</sup> Therein, Lord Reed appeared to suggest (on the basis of English authority<sup>141</sup> and a Scottish negligence case<sup>142</sup>) that mere emotional distress cannot be considered compensable by Scots law.<sup>143</sup> The decision, therefore, ostensibly appears to entirely overlook the Romano-Dutch origins of Scots law and seems to merge two separate strands of the law of delict together by mistakenly equating the *iniuria* of the *damnum iniuria datum* in the law of negligence with *iniuria* in the context of the *actio iniuriarum*.

This state of affairs arose as a result of the fact that counsel made no pleadings of deliberate intention or malice; had they done so, the claim for emotional distress would have been regarded as actionable (as the court appeared to concede).<sup>144</sup> While it is evident that no action for fright or mere distress

<sup>136</sup>*Paterson v Welch* (1893) 20 R 744.

<sup>137</sup>Smith, above n 95, p 726.

<sup>138</sup>Specifically Dig. 47.10.

<sup>139</sup>TB Smith ‘Damn, injuria, damn’ 1972 SLT (News) 125 at 126.

<sup>140</sup>(1999) SC 255.

<sup>141</sup>*R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58.

<sup>142</sup>*Moffat v Secretary of State for Scotland* 1995 SLT 729.

<sup>143</sup>Above n 140 at 259.

<sup>144</sup>EC Reid ‘Personality rights: a study in difference’ in V Palmer and EC Reid *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh: Edinburgh University Press, 2009) pp 395–396.

may be brought under an *actio legis Aquiliae*, or an action for negligence,<sup>145</sup> as ‘affront’ is the salient feature of the *actio iniuriarum*, it is evident that intentionally inflicted *iniuria* ought to give rise to a claim for *solatium* where the conduct of the defender displays *culpa*, regardless of any loss suffered by the pursuer. Loss is a salient feature of the *lex Aquilia*, but not the *actio iniuriarum*. *Solatium* is payable to those who have been wronged by injurious conduct under the *actio iniuriarum*, even if the pursuer has suffered no loss or personal injury;<sup>146</sup> thus, it is equally clear that one who suffers pure emotional distress ought to be considered compensable according to the *actio iniuriarum*.<sup>147</sup>

As actual loss or damage is not essential for a claim to be raised under the *actio iniuriarum*, a pursuer need only aver and prove three things: conduct which violates a legally protected interest in personality, dignity, honour or reputation (ie a wrong); affront to, or aggression on, personality causing hurt to feelings; and *dolus* – called, in this context, *animus iniuriandi*.<sup>148</sup> In all instances of revenge porn, all three of these elements may be easily established; it is therefore evident that the malicious dissemination of private, intimate images is a textbook example of an instance in which an *actio iniuriarum* ought to be available to a pursuer. Sharing such material in the absence of consent is an affront to the victim. Whether the perpetrator intends to cause affront or not is irrelevant; recklessly sharing private, sexually explicit material is so obviously wrong that *animus iniuriandi* can be inferred. It is almost self-evident that a victim of revenge porn will suffer emotional hurt and thus be entitled to *solatium*.<sup>149</sup> The malicious purpose of the propagator of revenge porn may be presumed, particularly in instances in which the images in question are uploaded to sites specifically designed to shame the subjects in the pictures, but also where the perpetrator places the images on public *fora* such as social media sites.

In concluding that the *actio iniuriarum* was no mere ‘romantic Romanism’, Professor Norrie maintained that the Scottish courts could, if they deemed it desirable, build upon the concept of *iniuria* once more, in order to provide *solatium* in ‘appropriate contexts’.<sup>150</sup> It is evident that instances of revenge porn represent such an ‘appropriate context’. Although contemporary society no longer considers verbal injury and name-calling to have any ‘socially destructive potency’,<sup>151</sup> the hurt caused by the propagation of revenge porn is socially destructive. It represents a violation of the sexual freedom of the victim, as well as a callous disregard for their privacy. The publication and propagation of revenge porn is undoubtedly a deliberate affront; to reiterate the words of Sheriff Mackie, it is ‘a gross invasion of [the] victim’.<sup>152</sup>

Consequently, it is clear that, in spite of the fact that the *actio iniuriarum* has been neglected by Scots law, the Scottish *actio iniuriarum* may theoretically be used to provide remedy for victims of revenge porn. The ‘pure’ Roman law would have regarded revenge porn as a compensable *iniuria*, had the publication and promulgation of sexual photographs and videos been possible in antiquity, and South African law does evidently offer *solatium* to victims of contumelious publication of such material. There is, therefore, no reason for Scotland to eschew use of its familial connection to Rome and South Africa in addressing contemporaneous societal problems such as revenge porn; indeed, as the European Convention on Human Rights remains within the framework of Scottish domestic law,<sup>153</sup> at least for the moment, there is a case to be made for the suggestion that the Scottish courts are obliged to resume the development of the *actio iniuriarum*, given that the right

<sup>145</sup>*Simpson v Imperial Chemical Industries Ltd* 1983 SLT 601.

<sup>146</sup>DM Walker *Delict* (2nd edn) p 40.

<sup>147</sup>See eg *Cock v Neville* (1797) Hume 602; *Hyslop v Staig* (1816) 1 Mur 15 at 22; *Hyslop v Miller* (1816) 1 Mur 43; *Armstrong v Vair* (1823) 3 Mur 315 at 319 (same); *Tullis v Glenday* (1834) 13 S 698; 6 Sc Jur 503; *Ewing v Earl of Mar* (1851) 14 D 314 at 330.

<sup>148</sup>Walker, above n 146, p 40.

<sup>149</sup>E Descheemaeker ‘Solatium and injury to feelings’ in Descheemaeker and Scott, above n 16.

<sup>150</sup>McKenzie Norrie, above n 16.

<sup>151</sup>In the words of Professor McKenzie Norrie, above n 60, p 1.

<sup>152</sup>BBC News, above n 17.

<sup>153</sup>By virtue of the Human Rights Act 1998 and the Scotland Act 1998.

to privacy is explicitly protected by the Convention and its enacting UK statute.<sup>154</sup> Whether privacy is regarded as a separable head under which an *actio iniuriarum* may be raised, or if it is regarded as no more than a manifestation of *dignitas*, it is plain that Scots law, by virtue of its connection to this *actio*, is in a better position to live up to its obligations under Article 8 than the Common law jurisdictions of the UK.

The desirability of a mechanism akin to the *actio iniuriarum*, and the need for such a mechanism in law, is demonstrated by virtue of the Harassment Act 1997. Though *iniuria* in the context of the *actio iniuriarum* is alien to the common law tradition, English lawyers may nevertheless find some guidance as to what constitutes ‘harassment’ within the context of the 1997 Act with reference to that delict.<sup>155</sup> Like *iniuria*, ‘harassment’ has ‘emerged as a wrong of astonishing versatility’;<sup>156</sup> according to Birks, the word is ‘the best generic description of the act involved in any example of *iniuria*’.<sup>157</sup> Thus, it is submitted, as the need for the *actio iniuriarum* is thought to be so pressing that a statutory equivalent was required in those jurisdictions which have no connection to it, the Scottish legal system – which may claim such a connection and offer remedy on the basis of this action – ought to make full use of the tools which are available to it.

### Harassment and *iniuria*

Whether or not enough remains of the *actio iniuriarum* for the Scottish common law to adequately address the problem of revenge porn, it is likely that Parliament’s statutory intervention in the form of the Protection from Harassment Act 1997,<sup>158</sup> which also applies to England and Wales, can be used to offer remedy to victims of this conduct. The word ‘harassment’ remains curiously undefined in the 1997 Act; as such, ‘a great deal is left to the wisdom of the courts to draw the line between the ordinary banter and badinage of everyday life and genuinely offensive and unacceptable behaviour’.<sup>159</sup>

It is quite clear that, even without reference to *iniuria*, no court in the UK would regard the malicious publication of revenge porn as anything other than genuinely offensive and utterly unacceptable. Accordingly, the 1997 Act appears, *prima facie*, to offer some protection to victims of revenge porn. In England and Wales, the High Court may offer civil remedies to those affected by such conduct according to the 1997 Act<sup>160</sup> and, even in the absence of the explicit criminalisation of revenge porn effected by the Criminal Justice and Courts Act 2015, it is plain that the 1997 Act could also be used to secure a criminal conviction, in England and Wales, per s 2 of that Act.

While the 1997 Act may appear to be a sufficiently robust means of legally pursuing remedy, the problem with using this statute to pursue remedy for instances of revenge porn is readily apparent. The sections of the Act which apply to England and Wales proscribe ‘pursuing a course of conduct which amounts to harassment’,<sup>161</sup> but define a ‘course of conduct’ as ‘conduct on at least two occasions’.<sup>162</sup> The equivalent Scottish provisions reflect this definition.<sup>163</sup> As such, though a case might be made that one who uploads (or, indeed, subsequently shares) more than one piece of sexually explicit material has pursued a course of conduct which amounts to harassment on more than one occasion, no remedy will be available for a victim of a single instance of revenge porn under this heading. In addition, unless multiple images of one victim are posted and hosted on the same website, then there can be no action for harassment brought against the webmaster or controller of the website

<sup>154</sup>See ECHR, Art 8.

<sup>155</sup>du Bois, above n 26.

<sup>156</sup>Ibid, p 216.

<sup>157</sup>Birks, above n 44, p 7.

<sup>158</sup>Henceforth, the 1997 Act.

<sup>159</sup>Per Baroness Hale in *Majrowski v Guy and St Thomas’ NHS Trust* [2007] 1 AC 224 at para 66.

<sup>160</sup>1997 Act, s 3.

<sup>161</sup>1997 Act, s 1(1).

<sup>162</sup>1997 Act, s 7(3).

<sup>163</sup>1997 Act, s 8(3).

in question, absent the common law innovation of some civil equivalent of the Moorov doctrine.<sup>164</sup> Accordingly, it is evident that the 1997 Act offers less civil protection to victims of revenge porn than the *actio iniuriarum* can theoretically provide.

## Conclusion

From the above, it is plain that the *actio iniuriarum* was, in Roman law, an astonishingly versatile delict. The term *iniuria* itself could be used in respect of a wide number of legal wrongs, but even when used in the specific context of an *actio iniuriarum*, almost any legal wrong causing affront to the extra-patrimonial interests of a legal person could be captured within the term's purview. As long as an act was carried out in order to display or effect disrespect towards the victim, it could be categorised as an actionable *iniuria*. On this basis, it is plain that if the Roman law of Justinian were to be directly transposed into a twenty-first century society, any victim of any instance of revenge porn would be entitled to raise an *actio iniuriarum* against the perpetrator and to seek the remedy of *solatium* in respect of the wrong.

That the *actio iniuriarum* was received into Scots law is not controversial; nor is the fact that it has consistently found use in Scots law even during its worst times of neglect. Since the law of Scotland has grossly neglected its connection to the *actio iniuriarum* since its reception, however, it is difficult to judge whether the action, as it exists in this jurisdiction, should be regarded as closer to the classical action as it existed in Roman law or the modern action as it exists in South Africa. Whatever the case in respect of this, it is plain that any instance of revenge porn ought to be considered actionable under the *actio iniuriarum* in Scots law; the 'gross invasion of the victim', which necessarily occurs in all revenge porn cases, is such that a legal wrong, a lack of respect for the victim and the victim's emotional distress might all be reasonably inferred. Thus, under any iteration or interpretation of the *actio iniuriarum*, it is plain that revenge porn cases are actionable in Scotland as a result of the harm which the publication and dissemination of such material inflicts on the victim's *dignitas*.

The desirability of an action akin to the *actio iniuriarum* may be imputed by the fact that the Protection from Harassment Act 1997 introduced both a civil and a criminal concept which is comparable to the *actio iniuriarum* in England and Wales, where there was no equivalent action at common law. The Act similarly introduced the concept of 'harassment' into Scots law, but it is here concluded that the concept of 'harassment' is, in many respects, a (less versatile) statutory duplication in Scots law of the concept of *iniuria*. It is submitted, here, that, as a result of the 1997 Act, instances of revenge porn may be actionable as 'harassment' throughout Great Britain, but it is also concluded that the Scottish common law *actio iniuriarum* is preferable to the statutory concept of harassment, since the former action may be brought even in the absence of a 'course of conduct'.

Ultimately, it is plain that the law should act to offer civil redress to victims of revenge porn, just as it ought to criminally sanction those who disseminate such material. It is also clear that, though the 'wrong' of revenge porn is ostensibly a twenty-first century phenomenon, the common law of Scotland is appropriately equipped to tackle it. This paper has provided a consideration of 'old law' and how it can be utilised in order to solve contemporary problems; in order for this 'old law' to make a positive contribution to the modern Scots legal system, it must be utilised and pleaded by practitioners. Scotland's connection to this aspect of the civil law tradition has lain forgotten for generations. In light of the fact that it can now evidently be used to tackle an emergent societal problem, it is clear that it ought to lie forgotten no longer.

<sup>164</sup>See *Moorov v HM Advocate* 1930 SLT 596.