Edinburgh Legal Education Trust

Possible subjects for LLM and PhD study in private law

Research Project (1)
Good Faith in Scots Contract Law: The Way Forward?

Question
To what extent does Scots law recognise contractual good faith? Lord Clyde in *Smith v Bank of Scotland*[1] provided a basis for the development of a modern concept. His conception failed to develop beyond the factual context within which the case was decided. Seven years later, the House of Lords considered the issue once again. At that time, according to Lord Hope, good faith was "…generally an underlying principle of an explanatory and legitimating rather than an active or creative nature".[2]

More recently, in *Van Oord UK Ltd v Dragados UK Ltd*[3] the Inner House asserted the existence of contractual good faith in Scots law. In addition, express clauses imposing obligations of good faith are routinely interpreted and applied by the Scottish courts.[4] But they have not yet fully articulated the nature of the concept, its content or its field of application.

Comparative Context
English law, once "swimming against the tide" of contractual good faith within Europe, has mellowed its approach. In *Yam Seng Pte Ltd v International Trade Development*[5] and later cases, an implied term of good faith was born. Although few claimants have succeeded in persuading a court to imply such a term, with each new case the parameters of the concept emerge.

A similar mellowing of a once strict opposition to contractual good faith can be observed in other common law countries. Canadian developments in *Bhasin v Hrynew*[6] have provided a yardstick for use in comparative exercises involving both Australian law[7] and Scots law.[8]

The Way Forward?
The direction of travel across the common law world is clearly towards the development of contractual good faith. If Scots law is to develop its native idea, that process should be fully informed by comparative law. Inspiration can be drawn from

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[1] 1997 SC (HL) 111.
[2] *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1, [60].
[3] [2020] CSOH 87, [2021] CSIH 50.
[4] *ATE Farms Ltd v AW Estates Scotland Ltd (in administration)* [2023] CSOH 73.
[5] [2013] EWHC 111, [2013] All ER (Comm) 1321.
[6] 2014 SCC 71, [2014] 3 SCR 494.
[7] J Viven-Wilksh**,** "Good Faith in Contracts: Australia at the Crossroads" (2019) 1 Journal of Commonwealth Law 273.
[8] H MacQueen and S O'Byrne, "The Principle of Good Faith in Contractual Performance: A Scottish Canadian Comparison" (2009) 23 EdinLR 301.

the common law systems mentioned above, and also the approaches of Continental European systems.

A Small or a Large Project?
The precontractual phase has often been identified as a more limited and circumscribed context within which good faith can operate. Obligations to negotiate in good faith can be time-limited, and expressed with sufficient detail to ensure ease of enforcement. The pre-contractual phase might provide a suitable focus for a one-year LLM(R) project. A wider project, more suitable for PhD study, might include within its ambit the nature and content of good faith more broadly, and its field of operation.

Further Reading
P S Davies, "Excluding Good Faith and Restricting Discretion" in PS Davies and M Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (2020) 89

H MacQueen and S O'Byrne, "The Principle of Good Faith in Contractual Performance: A Scottish Canadian Comparison" (2009) 23 EdinLR 301

M Raczynska, "Good Faiths and Contract Terms" in PS Davies and M Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (2020) 65

Lorna Richardson, "Good Faith and the Duty to Co-operate in Long Term Contracts" in A Hutchison and F Myburgh (eds) *Research Handbook on International Commercial Contracts* (2020) 35

J Viven-Wilksh**,** "Good Faith in Contracts: Australia at the Crossroads" (2019) 1 Journal of Commonwealth Law 273

Informal inquiries
Professor Laura Macgregor (l.macgegor@ed.ac.uk) would be glad to answer queries in relation to this research project.

Research Project (2)
Assault in Private Law

Four related aspects of the treatment of assault in Scots law call for further examination: (i) the historical process by which assault came to replace real injury and some of its sub-categories; (ii) the relationship between crime and civil liability in this area; (iii) the "gist" of the wrong; and (iv) the nature and role of consent in this area.

The emergence of assault as a nominate wrong in private law
John Blackie has shown how Scots law deployed the *ius commune* concept of *iniuria* and its sub-categories to address interference with bodily integrity through the early-

modern period and into the nineteenth century.[9] His discussion places less emphasis on the process by which assault came to prominence in the nineteenth century and to the implications that this process has for Scots law's understanding of the rule and on the continuing relevance or otherwise of real injury (although his discussion at 2.3.2 in "Unity in Diversity: the History of Personality Rights in Scots Law" provides an excellent starting point).

The relationship between crime and delict

Both the *iniuria* phase and the period in which assault emerges demonstrate the close relationship between crime and delict in this area. While this was a general feature of the Scots law of delict through the early-modern period (and probably earlier), the general tendency has been towards decoupling civil and criminal liability.[10] Sexual assault is an important exception to this tendency: conditions of criminal liability laid out in a recent statute have been invoked in decisions on civil liability.[11]

This raises two questions: why should criminal law have continued (and dynamic) relevance here when its influence has declined elsewhere and how broad is the scope of this influence? In relation to the second, the question is whether this is a feature of sexual assault in particular or of the law of assault more generally. That in turn raises questions about whether sexual assault is merely a particular application of the general law of assault or whether it is a distinct wrong with a its own framework.

The "gist" of the wrong

Accounts of the law premised on *iniuria* tend to present its gist as addressing certain harms rather than as the relief of an absolute (i.e. *erga omnes*) right that others do not interfere with our body. In particular, *iniuria*-based accounts focus on affront but also on pain and suffering and undermining sexual morals in cases like *stuprum*. Blackie shows this very clearly in his historical work but there have also been attempts to apply the approach in a modern context.[12] It seems plausible that this background is at least part of the reason for existence and extent of the harm requirement in the modern law of assault.[13]

In other places, particularly in the case law surrounding consent to medical treatment[14] and sexual contact, the presupposition seems to be of a right to bodily integrity which (while qualified by certain limitations allowing trivial touching and justified use of force in cases like self-defence) grounds wrongfulness in the case of interference without the need to establish harm beyond the touching.

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[9] J Blackie, "Unity in Diversity: the History of Personality Rights in Scots Law" in N R Whitty and R Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 31; J Blackie, "The Protection of *corpus* in Modern and Early Modern Scots Law" in E Descheemaeker and H Scott (eds) Iniuria *and the Common Law* (2013) 155–168.

[10] J W G Blackie, "The Interaction of Crime and Delict in Scotland" in M Dyson (ed), *Unravelling Tort and Crime* (2014) 356.

[11] E C Reid, *The Law of Delict in Scotland* (2022) para 16.22; *DC v DG and DR* [2017] CSIH 72, 2018 SC 171; *AR v Coxen* [2018] SC EDIN 53, 2018 SLT (Sh Ct) 335.

[12] E.g. J Brown, "When the Exception is the Rule: Rationalising the Medical Exception in Scots Law" (2020) 26 *Fundaminia* 1 and, somewhat more sceptically K McKenzie Norrie, "The *actio iniuriarum* in Scots Law: Romantic Romanism or Tool for Today" in E Descheemaeker and H Scott (eds) Iniuria *and the Common Law* (2013) 49.

[13] E C Reid, *The Law of Delict in Scotland* (2022) paras 16.11–16.23.

[14] E.g. *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, 2015 SC (UKSC) 63 at paras 81–87.

The approach taken to this question has consequences for the range of justificatory defences which are necessary as well as for the appropriateness of "non-contact" assaults such as threatening behaviour.

The nature and role of consent

The approach taken to the gist of the wrong also has implications for the role of consent in reasoning about assault. Conversely, one might say that provision of support for the optimal view of the role and nature of consent is an important factor in deciding which model of consent should be favoured.

If the gist is infringement an absolute right that others refrain from interference with bodily integrity, the giving of consent can plausibly be understood as a juridical act which confers a Hohfeldian privilege.[15] That privilege suspends the duty which is correlative to the right of non-interference. This model tends towards application across the board, and thus to point away from a strict division between sexual assault and the broader law of assault.

Such an approach seems to tend in a direction which contrasts with the Scottish Law Commission's approach to consent in its *Report on Rape and Other Sexual Offences*[16]. The Commission took the view that contractual consent was a poor model for consent to sexual contract and that something approaching a bespoke regime was required.

This also suggests a sharp division between consent and other justificatory defences. In contrast to the other justificatory defences to assault, consent can be understood as the exercise of a right to bodily integrity rather than as a limitation on it.

On a harm-based model, consent is less central and distinctive. It is one factor among many which, in appropriate circumstances, can prevent contact from being regarded as harmful. Rules surrounding consent might be varied according to the harm which is in view. On such a model, the parallels with juridical acts in the rest of private law seem less important.

Scope of the project

The four aspects could, taken together, make a good PhD topic. The first and the second or the third and fourth might be combined for an LLM.

Further reading

In addition to the material cited in the footnotes, the following might be considered:
E Reid, *The Law of Delict in Scotland* (2022) paras 16.01–16.58
G Barclay, *The structure of assault in Scots law: a historical and comparative perspective* (LLM(R) thesis, University of Glasgow, 2017) available here: https://theses.gla.ac.uk/8569/
J W G Blackie and J Chalmers, "Mixing and Matching in Scottish Delict and Crime" in M Dyson (ed), *Comparing Tort and Crime* (2015) 271

[15] W N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919) 35–63.
[16] SLC No 209, 2007, Part 2.

D W McKenzie Skene and R Evans-Jones, "The Development of Remedies for Personal Injury and Death" in R Evans-Jones (ed) *The Civil Law Tradition in Scotland* (Stair Society Supplementary Series, vol 2, 1995) 277

Informal inquiries

Dr John MacLeod (John.Macleod@ed.ac.uk) would be glad to answer queries in relation to this research project.