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Author(s): Johann Neethling

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Personality rights: a comparative overview

Johann Neethling*

Professor: School of Law, University of South Africa

Abstract

This contribution entails a comparative review or synopsis of the present state of the protection of personality rights. Realistically, this can only be a snapshot of the *status quo* in various legal systems and is not intended to give a detailed exposition. The aim is to summarise, systemise and to an extent critically reflect on the available literature, as well as to identify particular dogmatic and practical problems. The research results may also stimulate in-depth examination of particular aspects of personality protection. The topics dealt with are the recognition and basis of protection of personality rights, the scope of their protection, the relationship between the general right to personality and specific personality rights, the nature of personality rights and personality harm, the classification of specific personality rights, the distinction between personality rights and certain patrimonial rights, personality rights as human rights, post-mortem personality protection, and the personality rights of juristic persons.

HISTORICAL BACKGROUND

Personality rights, which recognise a person as a physical and spiritual-moral being¹ and guarantee his enjoyment of his own sense of existence,² are today protected in various countries to a greater or lesser degree. But the concept of personality rights is not new. In particular classical natural law, with its notion of innate, inalienable human rights which included various rights relating to personality, forms the background to the modern concept.³ In 1877 Gareis, and after him Gierke and Kohler, postulated the idea of a general

*BA LLB (UOFS); LLM (McGill); LLD (Unisa).

¹WA Joubert *Grondslae van die persoonlikheidsreg* (1953) at 130–1; J Neethling, JM Potgieter & PJ Visser *Neethling's law of personality* (2005) at 24.

²C von Bar *The common European law of torts vol 2* (2000) at 61.

³Joubert n 1 above at 13ff; D Leuze *Die Entwicklung des Persönlichkeitsrechts im 19. Jahrhundert: zugleich ein Beitrag zum Verhältnis allgemeine Persönlichkeitsrecht: Rechtsfähigkeit* (1962) at 11ff, 27ff; H Hubmann *Das Persönlichkeitsrecht* (1967) at 85ff; M Herrmann *Der Schutz der Persönlichkeit in der Rechtslehre des 16. bis 18. Jahrhunderts* (1968) at 19ff, 29ff; M-T Frick *Persönlichkeitsrechte. Rechtsvergleichende Studie über den Stand des Persönlichkeitsschutzes in Österreich, Deutschland, der Schweiz und Liechtenstein* (1991) at 44; Neethling, Potgieter & Visser n 1 above at 6.

right to personality⁴ from which particular rights or interests of personality may develop, such as (the rights to) physical integrity, freedom, and dignity.⁵ Gierke even enumerated the characteristics which distinguish personality rights from other rights: they are private rights, of a non-patrimonial nature and highly personal in the sense that they are connected to the personality of their holder and terminate with his death (in other words, they are non-transferable and unhereditary).⁶ However, whereas Gareis and Gierke considered the products of the human mind as part of the general right of personality, Kohler distinguished between such intellectual property and personality rights,⁷ demonstrating that a person's intellectual creations exist independently of his personality, and form a separate category of legal objects, namely immaterial or intellectual property. Today the idea of personality rights as a separate group of private rights is firmly established on the European continent, and has also made its appearance elsewhere (for example, in South Africa and the USA). The different legal systems nevertheless do not share the same views on the recognition and scope of protection of these rights.⁸

RECOGNITION AND BASIS OF PROTECTION OF PERSONALITY RIGHTS

Since as a rule individuals attach considerable significance to facets of their personality — so much so that most personality rights have also been entrenched as human rights⁹ — and are accordingly sensitive to infringements thereof,¹⁰ it can as premise be accepted that all legal systems strive towards, and indeed have an obligation, because of their human rights connotation,¹¹ to provide for comprehensive personality protection. In this regard a differentiated approach has been followed.

First of all, there are those systems, of which German law is the best example, that recognise a general right to personality as a basis for comprehensive personality protection. Although such a basis existed in the common law of that country under the *actio iniuriarum*, it was not included in the BGB, mainly because the protection by criminal sanctions of dignity alone was considered sufficient. Specific personality rights were nevertheless statutorily recognised, namely the rights to a name, image, dignity, reputation, body, life,

⁴Leuze n 3 above at 93ff; Joubert n 1 above at 18ff; S Strömholm *Right of privacy and rights of the personality: a comparative survey* (1967) at 29; R Nehmelman *Het algemeen persoonlijkheidsrecht. Een rechtsvergelijkende studie naar het algemeen persoonlijkheidsrecht in Duitsland en Nederland* (2002) at 7ff; Neethling, Potgieter & Visser n 1 above at 6–7; BS Markesinis & H Unberath *The German law of torts: a comparative treatise* (2002) at 74.

⁵Leuze n 3 above at 114–5; Joubert n 1 above at 20; Neethling, Potgieter & Visser n 1 above at 8–9.

⁶Neethling, Potgieter & Visser n 1 above at 8.

⁷Joubert n 1 above at 21ff; Leuze n 3 above at 103ff; Nehmelman n 4 above at 7–8.

⁸Von Bar n 2 above at 61.

⁹See below under *Personality rights as human rights*.

¹⁰Neethling, Potgieter & Visser n 1 above at 12.

¹¹Von Bar n 2 above at 61.

freedom and health.¹² However, the paramount significance attached to human dignity and the free development of personality in the Constitution brought about a radical change in 1954 when the BGH recognised a general right to personality — a development confirmed by the BverfG¹³ and considered by Larenz and Canaris¹⁴ to be the most important change in German tort law since the enactment of the BGB.¹⁵ The basis of the protection of personality is thus the general right to personality which comprises all aspects of personality and can be regarded as the fountain (*Mutterrecht*) from which all concrete or specific rights of personality flow.¹⁶ These rights are either embodied in legislation as indicated, or they may be recognised by the courts, for example, the rights to privacy and identity.¹⁷ The general right can thus be regarded as a general clause on which expansion of personality protection can be based.¹⁸

At the opposite pole are those systems which have and see no need for the recognition of a general right to personality because their law possesses a different foundation for comprehensive personality protection.¹⁹ French law provides a clear example. Here the courts developed an extensive protection of personality interests on the basis of the general delictual provisions of the

¹²J Helle *Besondere Persönlichkeitsrechte im Privatrecht* (1991) at 3–5; Leuze n 3 above at 67ff; E von Caemmerer 'Wandlungen des Deliktsrechts' in E von Caemmerer, E Friesenhahn & R Lange (eds) *Hundert Jahre deutsches Rechtsleben vol 2* (1960) at 102ff; C von Bar *Gemeineuropäisches Deliktsrecht vol 1* (1996) at 42–3; Markesinis & Unberath n 4 above at 26–7, 43, 74–5; W-S Son *Schutz gegen Ehrverletzungen im deutschen und koreanischen Recht* (1996) at 52ff; Nehmelman n 4 above at 10ff; H Walter *Actio Iniuriarum: der Schutz der Persönlichkeit im südafrikanischen Privatrecht* (1996) at 24–6.

¹³H Neumann-Duesberg 'Zum allgemeinen Persönlichkeitsrecht und zu den besonderen Persönlichkeitsrechten im Privatrecht' (1991) 42 *VersR* 957 at 957–8; Nehmelman n 4 above at 22ff.

¹⁴K Larenz & C-W Canaris *Lehrbuch des Schuldrechts vol II/2* (1994) at 491; W van Gerven *et al Tort law* (2000) at 142.

¹⁵Von Bar n 12 above at 583–4; Von Caemmerer n 12 above at 105–6; Helle n 12 above at 6–7; Van Gerven *et al* n 14 above at 63ff, 142ff, 165–6; JM Smits 'Constitutionalisierung van het vermogensrecht' in JM Smits *et al* (eds) *Preadvieszen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking* (2003) 121–3; Walter n 12 at 26–7; E Guldix & A Wylleman 'De positie en de handhaving van persoonlijkheidsrechten in het Belgisch privaatrecht' (1999) 36 *TPR* 1589 at 1620–1621; Nehmelman n 4 above at 16ff; Neumann-Duesberg n 13 above at 957.

¹⁶Helle n 12 above at 11.

¹⁷Hubmann n 3 above at 220ff, 271ff, 321ff; H Hubmann 'Inhalt und Abgrenzung des zivilrechtlichen allgemeinen Persönlichkeitsrechts' in W Waldner & R Künzl (eds) *Erlangen Festschrift für Karl Heinz Schwab* (1990) at 4–5; O-F van Gamm *Persönlichkeits- und Ehrverletzungen durch Massenmedien* (1969) at 28, 39–42; Son n 12 above at 32–5, 52–4; K Lemmens 'The protection of privacy between a rights-based and a freedom-based approach: what the Swiss example can teach us' (2003) 10 *MJ* 381 at 385–387; Nehmelman n 4 above at 30ff; U Kerpen *Das internationale Privatrecht der Persönlichkeitsrechtsverletzungen* (2003) at 5–8, 11; cf Helle n 12 above at 11ff, 27ff, 45ff, 229ff.

¹⁸Cf Larenz & Canaris n 14 above at 518–9.

¹⁹Von Bar n 2 above at 94 n 508.

CC, and especially by extending the concept of damage to personality harm.²⁰ Some of these interests are physical integrity, dignity, good name, feelings (*sentiments d'affection*), privacy and identity (including name and image), and may be identified by the courts as objects of personality rights.²¹ A few of these interests have furthermore been granted legislative protection, the most prominent of which is the express recognition of privacy in the CC.²² As a result of the all-embracing protection of especially the principles of delict, there is no need for the recognition of a general right of personality — as in German law. Besides, the practical significance of such a right is questioned by French jurists since a concretisation of specific rights of personality is in any case still necessary.^{23 24} South African law can also be mentioned here. Since the *actio iniuriarum* provides all-embracing protection of personality, there is no need for the recognition of a general right to personality. Separate personality rights are recognised and protected, including the rights to *corpus* (physical-mental integrity), *libertas* (physical freedom) and *fama* (reputation), as well as the rights relating to *dignitas*, which is regarded as a collective term for all other personality rights, *inter alia* the rights to dignity, privacy and, to a lesser extent, feelings and identity. The concept of *dignitas* accordingly serves as a basis for the recognition of further rights of personality and therefore the extension of personality protection in so far as this may be necessary.²⁵

Thirdly, there are those systems which, although they have another basis for comprehensive personality protection, nevertheless in addition also recognise a general right to personality. This is for instance the case in the Netherlands

²⁰Kerpen n 17 above at 44ff; Van Gerven *et al* n 14 above at 57ff; WVH Rogers (ed) *et al Damages for non-pecuniary loss in a comparative perspective* (2001) at 87–9; Hubmann n 3 above at 104–6; I Schmitz I *Persönlichkeitsrechte und zivilrechtliche Deliktsbaftung im französischen und deutschen Recht* (1967) at 4–6; Gutachten des Max-Planck-Instituts für ausländisches und internationales Privatrecht *Der zivilrechtliche Persönlichkeits- und Ehrenschatz in Frankreich, der Schweiz, England und den vereinigten Staaten* (1960) at 34ff; L-J Constantinesco 'Die Persönlichkeitsrechte und ihr Schutz im Französischen Recht' (1960) 159 *AcP* 320 at 320ff.

²¹Kerpen n 17 above at 44, 46, 47ff; Van Gerven *et al* n 14 above at 110, 152, 166; Schmitz n 20 above at 30ff, 39ff; Hubmann n 3 above at 105; Max-Planck Gutachten n 20 above at 41ff; Joubert n 1 above at 53ff.

²²Kerpen n 17 above at 44, 52ff; Van Gerven *et al* n 14 above at 53, 156–7; Lemmens n 17 above at 385.

²³Kerpen n 17 above at 46; Hubmann n 3 above at 105; Schmitz n 20 above at 18ff; Smits n 15 above at 126.

²⁴In Belgium the concept of personality rights was imported from France and is today still influenced by French literature (Guldix & Wylleman n 15 above at 1589–94). Belgium therefore, also does not know or need a general right to personality, but recognises only separate personality rights which include the rights to privacy, image, life, body, name, dignity and good name (Guldix & Wylleman n 15 above at 1620–1, 1624ff).

²⁵Neethling, Potgieter & Visser n 1 above at 39–59; Joubert n 1 above at 78ff; Walter n 12 above at 42ff, 64ff, 144–8; JM Burchell *Personality rights and freedom of expression. The modern actio iniuriarum* (1998) at 133, 327ff; JM Burchell 'The protection of personality rights' in R Zimmermann & D Visser (eds) *Southern cross: civil law and common law in South Africa* (1996) 639 at 639ff.

and Austria. In Austria the basis for a comprehensive recognition and protection of personality rights is provided not only in the ABGB which expressly emphasises personality rights, but also in the general delictual provisions.²⁶ However, for a long time the courts had an inhibiting influence on the realisation of the full potential of these provisions,²⁷ refusing (*contra legem*) to extend personality protection beyond cases expressly recognised by legislation,²⁸ and this may perhaps be the reason why the general right to personality was recently adopted by the Austrian courts.²⁹ Specific personality rights (such as the rights to life, physical integrity, image, privacy and dignity) are also recognised. In the Netherlands, in spite of the general delictual clause of the BW, and the provision catering for awarding non-pecuniary loss in instances of infringement of the physical person, dignity, reputation, or any other infringement of the person, which entails, *inter alia*, non-physical personal injury (such as psychiatric illness), invasion of privacy and interference with freedom of movement,³⁰ the Hoge Raad recognised the existence of the general right to personality in 1994.³¹ This right is said to underpin other fundamental rights such as the right to privacy, although its juridical nature remains uncertain.³² Although Dutch law recognises rights of personality (such as the rights to life, physical and psychological integrity, freedom of movement, dignity, good name, identity, autonomy, and privacy),³³ the most striking difference between the German and Dutch concepts of the general right to personality is that the former gave rise to the creation of various specific personality rights, while the latter has been very slow to do so.^{34 35}

²⁶Frick n 3 above at 56.

²⁷E Karner & H Koziol *Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform: Verhandlungen des Fünfzehnten Österreichischen Juristentages Innsbruck 2003 vol II/1* (2003) at 17–22; Frick n 3 above at 44–8.

²⁸Frick n 3 above at 59–61.

²⁹Von Bar n 2 above at 94 n 508; cf Karner & Koziol n 27 above at 17–22.

³⁰SD Lindenbergh 'De positie en de handhaving van persoonlijkheidsrechten in het Nederlandse privaatrecht' (1999) 36 *TPR* 1665 at 1692–3; Rogers *et al* n 20 above at 155.

³¹Cf Nehmelman n 4 above at 268.

³²Smits n 15 above at 124; Nehmelmann n 4 above at 115; Lindenbergh n 30 above at 1672–3.

³³Smits n 15 above at 124; Lindenbergh n 30 above at 1667–9, 1673–5; cf Nehmelman n 4 above at 165ff.

³⁴Lemmens n 17 above at 387–8; Nehmelman n 4 above at 215–6.

³⁵Italian law can also be mentioned under this group where, notwithstanding the fact that the provisions for delictual liability are similar to French law, a right to the free self-determination of personality development was recognised by the judiciary, based on the constitution, followed by the acceptance of the rights to privacy and identity (including the right to a name) as separate personality rights. This also seems to be the position in Greece: a general right to personality (dignity and autonomy) was recognised as a legally protected interest within the meaning of its general delictual clause (see Von Bar n 2 above at 93; Von Bar n 12 above at 18–9, 22ff, 584). Von Bar (n 12 above at 24) remarks that the Greek courts have indeed extended the application of the general right far beyond any length to which other European countries have gone.

The fourth group lies between the French and Austrian models. Switzerland was the first country in which the modern theory of personality rights was implemented, providing comprehensive statutory protection against any interference with legal subjectivity or the wrongful infringement of the personality (previously personal relations). This protection was made even more comprehensive in 1983, particularly as far as the mass media were concerned.³⁶ However, there is no consensus on the general right of personality. Some jurists accept Gierke's wide concept, which encompasses not only true personality rights but also the legal personality itself, including freedom of economic activity,³⁷ while others recognise only specific rights of personality.³⁸ In order to facilitate the practical handling of the protection of personality, the approach in practice is to recognise specific rights of personality (in addition to the general right). Personality rights recognised in this manner are the rights to life, physical integrity, freedom of movement, feelings (or sentiments), a good name, dignity, privacy and identity (including the name and image).³⁹ However, like Gareis and Gierke, Swiss law also protects patrimonial (economic) interests such as the business enterprise (against unlawful competition), and immaterial property (trade marks and trade names) as aspects of personality.⁴⁰

It may be concluded that notwithstanding the divergent approaches to the recognition of a general right of personality, in all of the above systems specific personality rights are recognised by either statute or the courts. They *inter alia* include the rights to life, physical integrity, bodily freedom, reputation, dignity, privacy, identity (including name and image), and feelings (*sentiments d'affection*).

In contradistinction to the previous systems, in English law, as with most common law countries, the doctrine and recognition of personality rights are virtually non-existent. As a result of historical development protection of personality is based on tort law. A wide range of torts are applicable here, *inter alia*, assault, battery, false imprisonment, defamation (libel, slander), malicious falsehood, malicious prosecution, intentional infliction of mental suffering, and breach of confidence.⁴¹ The personality interests protected by these torts, which can be identified as physical-psychological integrity, liberty,

³⁶Rogers *et al* n 20 above at 301–4; Frick n 3 above at 286; Hubmann n 3 above at 100–1; Guldix & Wylleman n 15 above at 1621; Joubert n 1 above at 37ff.

³⁷Joubert n 1 above at 37–8; Frick n 3 above at 28, 209–14, 227–30, 285.

³⁸A Bucher *Natürliche Personen und Persönlichkeitsschutz* (1995) at 148ff; Frick n 3 above at 27–8.

³⁹Frick n 3 above at 214ff; Bucher n 38 above at 149ff; Joubert n 1 above at 42–3; Hubmann n 3 above at 100–1; Max-Planck Gutachten n 20 above at 4ff; Lemmens n 17 above at 399.

⁴⁰Frick n 3 above at 227–30; Joubert n 1 above at 42, 43–4.

⁴¹RFV Hueston & RA Buckley *Salmond and Hueston on the law of torts* (1996) at 120ff, 138ff; WVH Rogers *Winfield & Jolowicz on tort* (2002) at 68ff, 81ff, 403ff; Van Gerven *et al* n 14 above at 44ff, 90ff, 159ff; Kerpen n 3 above at 82ff; Walter n 12 above at 115ff; Joubert n 1 above at 63; Hubmann n 3 above at 106–7; Max-Planck Gutachten n 20 above at 100ff; JG Fleming *The law of torts* (1998) at 21ff, 580ff as to Australia.

reputation⁴² and to a lesser extent privacy⁴³ and dignity,⁴⁴ receive very little attention. However, none of these torts is suitable to serve as basis for a comprehensive protection of personality. Moreover, English common law manifestly lacks the ability to recognise and protect interests of personality which do not fall under one of the existing torts but are nevertheless worthy of protection. A clear example is the failure of English law to recognise the rights to privacy and identity, although (more and more expanded) incidental relief for certain instances of infringement of privacy (particularly for breach of confidence) is provided by other remedies.⁴⁵ The argument that the right to privacy would be too uncertain and restrict freedom of the press too much, has not prevented most other countries from recognising this right.⁴⁶ There is also only scant incidental protection of human dignity in England.^{47 48}

Unlike in most other common law countries, for various reasons the idea of personality rights gained acceptance in the USA.⁴⁹ A significant factor was the focus in jurisprudence⁵⁰ on the different interests of personality,⁵¹ as well as the attention directed in theory and practice at the creation of a broader basis for the extension of personality protection. In this regard Warren and Brandeis⁵² laid the foundation for the recognition of the right to privacy as an aspect of the more general right to personality.⁵³ However, the right to privacy in the USA does not only protect privacy but extends much wider, so much so that this right to be left alone portrays surprising similarities to the

⁴²P Milmo & WVH Rogers (eds) *Gatley on libel and slander* (2004) at 17–21.

⁴³C Herth *Persönlichkeitsschutz im englischen Recht* (1989) at 29–53.

⁴⁴Walter n 12 above at 28; Fleming n 41 above at 5–6, 664–6.

⁴⁵Milmo & Rogers n 42 above at 606–9; Rogers n 41 above at 479ff; Van Gerven *et al* n 14 above at 159ff, 163–4, 166–7; Kerpen n 3 above at 142; Herth n 43 above at 29–92; Walter n 12 above at 28, 133ff; R Youngs *English, French and German comparative law* (1998) at 275–6.

⁴⁶Von Bar n 12 above at 286. The recognition of the right to privacy in the Human Rights Act and under the European Convention of Human Rights may nevertheless provide a stimulus for a wider protection of privacy (Milmo & Rogers n 42 above at 609ff; Rogers n 41 above at 484–6; Von Bar n 2 above at 95).

⁴⁷Von Bar n 12 above at 285.

⁴⁸In New Zealand there are indications that the courts may deviate from English common law by recognising the right to privacy (B Atkin, K Evans, G Mcloy & S Petersson *Torts in New Zealand: cases and materials* (2002) 111ff; SMD Todd *et al The law of torts in New Zealand* (1991) 754ff, 763–4; *contra* Fleming n 41 above at 664ff as to Australia), and in Ireland, because of its written constitution, the common law may change in matters where constitutional (personality) rights are involved (Von Bar n 12 above at 304–6). Also in Scotland, where delictual liability is based on general principles and not nominate torts, extension of personality protection and recognition of, for example, the right to privacy, should be possible (Von Bar n 12 above at 307–10).

⁴⁹Joubert n 1 above at 63ff.

⁵⁰Especially by R Pound 'Interests of personality' (1915) 28 *Harv LR* 343, 445 at 343ff, 445ff.

⁵¹SW Halpern *The law of defamation, privacy, publicity, and moral right* (2000) at vii–viii.

⁵²S Warren & L Brandeis 'The right to privacy' (1890) 4 *Harv LR* 193 at 193ff.

⁵³Halpern n 51 above at 410–2; Joubert n 1 above at 64–5; Walter n 12 above at 134–5; Kerpen n 17 above at 109–11.

general right of personality in Germany.⁵⁴ But there is no certainty as to the personality interests involved. Prosser,⁵⁵ whose viewpoint found general support in the courts and with jurists, classifies the right to privacy into four distinct torts (intrusion, publication, false light and appropriation) invading different interests (*viz*, a mental interest, reputation, and a patrimonial interest), while Bloustein⁵⁶ considers human dignity to be the object of protection.⁵⁷ The Supreme Court also protects autonomy under the right to privacy.⁵⁸

GENERAL RIGHT TO PERSONALITY AND SPECIFIC PERSONALITY RIGHTS

The concept of a general right to personality and its relation to specific personality rights require scrutiny. The object of the general right to personality manifestly is the complete human being or personality. But this concept is dogmatically flawed, mainly because the human being is then functioning simultaneously as subject as well as object of a (subjective) right.⁵⁹ However, this does not imply that particular facets of personality cannot function as legal objects. On the contrary, it is apparent from the above that even in countries which adopt the general right to personality, this approach is followed regarding bodily integrity, reputation, privacy and similar interests of personality,⁶⁰ and this notwithstanding the view that the concept of the general right to personality does not really allow for the segmentation of the personality of the individual.⁶¹ Secondly, the concept of a general right to personality is too abstract to be of any practical value⁶² — a concretisation of specific rights of personality is therefore still necessary. The identification and delimitation of these rights facilitates their protection by rendering them dogmatically and practically manageable and promotes legal certainty.⁶³ The precise description of those interests of personality which the law protects, is very important for, *inter alia*, the law of delict, since it increases the courts' (or the legislature's) ability to articulate, develop and apply principles of legal protection. This approach assists in determining how a personality interest, like privacy, differs from what has already been recognised or refused

⁵⁴Strömholm n 4 above at 43–4; Joubert n 1 above at 69–70; Kerpen n 17 above at 139.

⁵⁵WL Prosser 'Privacy' (1960) 48 *Cal LR* 383 at 383ff; WP Keeton *et al Prosser and Keeton on the law of torts* (1984) at 852ff; Fleming n 41 above at 664ff as to Australia).

⁵⁶EJ Bloustein 'Privacy as an aspect of human dignity: an answer to Dean Prosser' (1964) 39 *NYULR* 962 at 962ff.

⁵⁷Halpern n 51 above at 412–3.

⁵⁸Keeton *et al* n 55 above at 866–7.

⁵⁹Joubert n 1 above 124ff; Neethling, Potgieter & Visser n 1 above at 14–5; Lemmens n 17 above at 390.

⁶⁰*Cf* Guldix & Wylleman n 15 above at 1589–94.

⁶¹Von Bar n 2 above at 95.

⁶²Guldix & Wylleman n 15 above at 1621.

⁶³Frick n 3 above at 24–5; S Ulrich *Das Recht auf Identität im zivilrechtlichen Persönlichkeitsschutz* (1995) 19–20; Helle n 12 above at 37–40.

recognition under established legal theory, as well as which measures are necessary for its protection.⁶⁴ Therefore one cannot agree with Larenz and Canaris⁶⁵ where they doubt the usefulness of the recognition of specific rights of personality.⁶⁶ Moreover, it would be a negation of the significance attached to the personality rights entrenched as human rights, to ignore their substantive existence in the private law of delict.⁶⁷

Notwithstanding the above criticism, a general right to personality has a utilitarian function in some systems, that is, because it is not concrete it may provide the basis for the recognition of new personality rights when the need arises.⁶⁸ Thus it may both complement and extend the protection which the particular legal system provides.⁶⁹ However, this observation is valid only with regard to legal systems which have no general (delictual) basis for the comprehensive protection of personality rights in practice (such as German law). In other jurisdictions, like France, Belgium and South Africa, where this basis does exist in positive law, the recognition of a general right to personality is superfluous.⁷⁰ It does not make sense to incorporate a general clause (the general right to personality) into another general clause (general delictual liability).⁷¹

SCOPE OF PROTECTION OF PERSONALITY RIGHTS

Although the focus here is on the law of delict or tort law, criminal law⁷² and particularly constitutional law (human rights)⁷³ also play an important role in the protection of personality rights in various legal systems.

In many systems wrongfulness is the most important requirement for delictual liability in instances of personality harm.⁷⁴ German law regards personality rights recognised by legislation, such as the rights to identity (name, image), body, life, freedom, health, reputation and dignity, as absolute rights which seem to be best protected in the sense that any infringement thereof is indicative of wrongfulness or, in other words, is in the absence of a ground of justification, wrongful.⁷⁵ But this is not the case with the general right of personality which is often in conflict with opposing rights of others, for

⁶⁴J Neethling 'Tort law in South Africa — the mixing of the general and the particular' in J Smits (ed) *The contribution of mixed legal systems to European private law* (2001) 81 at 86; Neethling, Potgieter & Visser n 1 above at 24.

⁶⁵Larenz & Canaris n 14 above at 519–20.

⁶⁶Cf Kerpen n 17 above at 12–3; Joubert n 1 above at 115ff.

⁶⁷Von Bar n 2 above at 61.

⁶⁸Frick n 3 above at 24–5; Ulrich n 63 above at 19–20.

⁶⁹Von Bar n 2 above at 93.

⁷⁰Neethling, Potgieter & Visser n 1 above at 14–5; Karner & Koziol n 27 above at 33–4; Lemmens n 17 above at 385ff; Kerpen n 17 above at 139–40.

⁷¹Von Bar n 2 above at 94.

⁷²Von Bar n 12 above at 597ff.

⁷³See below under *Personality rights as human rights*.

⁷⁴Von Bar n 2 above at 235ff.

⁷⁵Van Gerven *et al* n 14 above at 63; Von Bar n 2 above at 235–6; Von Bar n 12 above at 1–22; Larenz & Canaris n 14 above at 373ff, 500, 501, 518.

example the right to privacy and the right to freedom of expression, so that wrongfulness can be determined only by a weighing up or balancing of the conflicting rights.⁷⁶ In this process the degree of fault of the perpetrator, the nature (seriousness), and intensity (expected consequences) of the infringement, and the motive of the perpetrator, play an important part.⁷⁷ If the other right or interest is regarded as socially more important, the personality right will not be protected.⁷⁸ In the Netherlands wrongfulness is also determined by a weighing up of opposing rights⁷⁹ and the same factors as in Germany are taken into consideration.⁸⁰ ⁸¹ In Swiss law any infringement of a personality right is wrongful in the absence of a ground of justification. To ascertain whether such justification exists, apart from consent, the interest of the victim has to be weighed up against the opposing private or public interest. Where the perpetrator acted to maintain or further a legitimate interest, the wrongfulness of his act is excluded.⁸² Under South African law wrongfulness is also a general delictual requirement for the actionability of personality harm (*iniuria*). A factual infringement of a protected personality interest *contra bonos mores* is *prima facie* wrongful. The perpetrator may then prove justification, if any, for his conduct. Both stages of the wrongfulness inquiry involve a balancing of opposing interests.⁸³ Although particular wrongs (such as seduction, adultery, defamation, insult, and malicious prosecution) have developed their own rules primarily to promote the practical utility of, *inter alia*, the wrongfulness requirement and legal certainty, each of these delicts remains a *species* of the general concept of *iniuria*.⁸⁴ It may therefore be concluded that a similar approach is followed in these systems as wrongfulness is generally determined by weighing up conflicting rights or interests.

In contradistinction to the previous systems, French law does not know the requirement of wrongfulness.⁸⁵ If the general delictual requirements of fault (intention or negligence), damage (including personality harm or *domage*

⁷⁶Larenz & Canaris n 14 above at 498–9; Markesinis & Unberath n 4 above at 76–8, 81–2; Hubmann n 17 above at 5ff; Neumann–Duesberg n 13 above at 957.

⁷⁷Neumann–Duesberg n 13 above at 958; Van Gerven *et al* n 14 above at 142ff, 168; Smits n 15 above at 123; Rogers *et al* n 20 above at 120–2; Hubmann n 3 above at 159ff.

⁷⁸Van Gerven *et al* n 14 above at 167.

⁷⁹Lindenbergh n 30 above at 1677ff.

⁸⁰Smits n 15 above at 123, 124ff; Lindenbergh n 30 above at 1694–5.

⁸¹The Austrian approach is similar to German law, making a distinction between so-called absolute personality rights, such as the rights to life, physical integrity and freedom, which is considered to be the most valuable and where any infringement is indicative of wrongfulness, and other personality rights, such as those to image, privacy and dignity, where wrongfulness is established by weighing up the conflicting interests (Kärner & Koziol n 27 above at 34–5, 40ff).

⁸²Bucher n 38 above at 162ff; Frick n 3 above at 232ff; Hubmann n 3 above at 101.

⁸³Neethling, Potgieter & Visser n 1 above at 54–6.

⁸⁴Neethling, Potgieter & Visser n 1 above at 60–1; Walter n 12 above at 151.

⁸⁵Von Bar n 2 above at 214.

moral) and causation are present, delictual liability is established.⁸⁶ However, where personality rights have been recognised by the courts (for example, the right to bodily integrity) or the legislature (such as the right to privacy in the CC) — elevating these rights to the status of autonomous rights in relation to the general law of delict — a presumption of fault and damage arises. The mere infringement of such a right, without in addition requiring prove of fault and damage, therefore founds liability.⁸⁷ This is in contrast to German law where a claim for infringement of personality still has to comply with all the requirements for delictual liability.⁸⁸ Belgian law has a similar approach to French law, but this does not mean that the general delictual clause has become superfluous as infringement of personality rights may still be based on it.⁸⁹

In English law, and in other common law countries such as the USA and Australia, the scope of protection of the personality interests (physical-psychological integrity, liberty, reputation and to a lesser extent privacy and dignity) safeguarded by the relevant torts, *inter alia*, assault, battery, false imprisonment, libel, slander, malicious prosecution, intentional infliction of mental suffering, and breach of confidence, is entirely dependent upon the rules applicable to each specific tort.⁹⁰ ⁹¹This also applies in respect of the right to privacy in the USA where the act complained of has to comply with the requirements of, as the case may be, the tort of intrusion, publication, false light or appropriation.⁹²

The legal consequences of a tortious personality infringement are to a large degree similar in different countries. First of all, in some systems the victim may approach the court to determine the (threatened) wrongfulness of a personality infringement.⁹³ Secondly, since injunctive relief (prohibitory or mandatory) is often sought in instances of a threatened or continuous infringement of personality rights, such relief is provided for in all legal systems.⁹⁴ Since the interdict is directed at the prevention of a wrongful act,

⁸⁶Kerpen n 17 above at 47, 65–8; Van Gerven *et al* n 14 above at 57ff.

⁸⁷Van Gerven *et al* n 14 above at 110ff, 140.

⁸⁸Van Gerven *et al* n 14 above at 140, 153, 156–7.

⁸⁹Guldix & Wylleman n 15 above at 1625ff, 1634ff.

⁹⁰Hueston & Buckley n 41 above at 120ff, 138ff; Rogers n 41 above at 68ff, 81ff, 403ff; Van Gerven *et al* n 14 above at 45ff, 90ff, 159ff; Walter n 12 above at 115ff; Max-Planck Gutachten n 20 above at 100ff; Keeton *et al* n 55 above at 39ff, 771ff; Kerpen n 17 above at 125, 130ff; Fleming n 41 above at 21ff, 580ff.

⁹¹*Eg*, trespass to the person creates liability *per se*, placing the burden of proof of one of the recognised defences on the defendant (Rogers n 41 above at 69; Hueston & Buckley n 41 above at 120–3, 127ff; Youngs n 45 above at 224–5; Rogers *et al* n 20 above at 54ff; Fleming n 41 above at 21ff, 41, 83ff as to Australia).

⁹²Keeton *et al* n 55 above at 851ff.

⁹³*Eg* Belgian, Dutch and Swiss law, in contrast to *eg* Germany and South Africa (Guldix & Wylleman n 15 above at 1664–5; Lindenbergh n 30 above at 1683–5; Frick n 3 above at 238–9).

⁹⁴Van Gerven *et al* n 14 above at 168; Guldix & Wylleman n 15 above at 1645ff; Lindenbergh n 30 above at 1685–9; Frick n 3 above at 58–9, 237–8; Kerpen n 17 above at 33ff, 68–70, 141; Neethling, Potgieter & Visser n 1 above at 260–1.

and not at retribution for wrongfulness already committed, it is generally accepted that fault is not a requirement.⁹⁵ Apart from this remedy, where relevant, other relief which may also be claimed includes a retraction or correction,⁹⁶ publication of the court's decision, publication of an apology, and the right to reply.⁹⁷ Important is that these remedies are probably much more effective for natural restitution purposes — for example to restore or vindicate a person's good name — than a sum of money.⁹⁸ These forms of relief — especially the right to reply — are, however, unknown in Anglo-American systems.⁹⁹ There is for example no general power in England for a court to order the defendant to publish a correction or an apology even though some relief is provided for by statute.¹⁰⁰ Although a right to reply was recognised earlier in the USA, it has now been prohibited as it conflicts with the freedom of the press.¹⁰¹

All systems, in a varying degree, also make provision for a monetary award (as compensation, satisfaction or even punitive damages) for personality harm where the infringement was accompanied by fault. In Germany satisfaction, which is partially punitive,¹⁰² may be claimed for an intentional or negligent personality infringement provided that the disturbance was serious.¹⁰³ Dutch law compensates serious¹⁰⁴ immaterial damage in three instances: intentional infringement of personality, personal injuries, and, under certain conditions, defamation of a deceased person.¹⁰⁵ In Austria the general delictual clause provides for full compensation for personality infringement accompanied by serious fault, but no satisfaction or punitive damages may be claimed.¹⁰⁶ Under Swiss law a sum of money (as satisfaction) for personality infringement may be claimed in instances warranted by the gravity of the harm

⁹⁵Kerpen n 17 above at 26; Neethling, Potgieter & Visser n 1 above at 261.

⁹⁶Of, eg, an untrue defamatory statement.

⁹⁷Rogers *et al* n 20 above at 125–6, 281, 302–4; Kerpen n 17 above at 8–9, 37–8, 68ff; Lindenbergh n 39 above at 1685–9; Guldix & Wylleman n 15 above at 1648–9, 1655–6; Frick n 3 above at 239ff; Karner & Koziol n 27 above at 44–5; Max-Planck Gutachten n 20 above at 24ff; Bucher n 38 above at 205ff.

⁹⁸Neethling, Potgieter & Visser n 1 at 171; *contra* Rogers (n 41 above at 472–3) who doubts the effectiveness of these remedies and opines that large sums of compensation, coupled with criminal sanctions, will be more effective to protect the personality interests involved.

⁹⁹Kerpen n 17 at 141; Rogers n 41 at 471–3.

¹⁰⁰Milmo & Rogers n 42 above at 229; Hueston & Buckley n 41 above at 138ff; Youngs n 45 above at 265–8; Walter n 12 above at 119ff, 161ff; Rogers n 41 above at 471–473; Rogers *et al* n 20 above at 73–4, 281; Max-Planck Gutachten n 20 above at 103ff.

¹⁰¹Kerpen n 17 above at 134.

¹⁰²Kerpen n 17 above at 141–2.

¹⁰³Larenz & Canaris n 14 above at 375–6, 494–5, 497; Markesinis & Unberath n 4 above at 78; Neumann-Duesberg n 13 above at 958–9; Kerpen n 17 above at 24–5, 29–32; Van Gerven *et al* n 14 above at 146–7, 203; Von Caemmerer n 12 above at 105–7; Walter n 12 above at 26–7. This also applies to personal injuries (Rogers *et al* n 20 above at 252).

¹⁰⁴Lindenbergh n 30 above at 1693–4.

¹⁰⁵Smits n 15 above at 135.

¹⁰⁶Karner & Koziol n 27 above at 24–7.

and to the extent that the wrongdoer has not otherwise given satisfaction to the victim.¹⁰⁷ If the general delictual requirements of fault (intention or negligence), damage, and causation are present, a claim for compensation for non-patrimonial (*domage moral*) loss will lie in France.¹⁰⁸ In South Africa satisfaction (which has a punitive element) is awarded for an intentional infringement of a personality interest, while compensation may be claimed for personal injuries caused negligently.¹⁰⁹ However, intention is not an absolute requirement for an *iniuria*. Negligence has been accepted as sufficient for liability for certain forms of defamation and malicious prosecution, while strict liability applies to wrongful deprivation of liberty and wrongful attachment of property.¹¹⁰ No monetary awards will be made for insignificant personality harm: *de minimis non curat lex*.¹¹¹ Under English law compensation may be claimed for a tort causing non-patrimonial loss, the fault element depending on the requirements of the specific tort. In addition, in instances of, for example, trespass to the person and defamation, aggravated and even exemplary (punitive) damages may be awarded.¹¹² In most European countries liability of personal injuries as a result of road accidents is strict.^{113 114}

From the above it can be concluded that in most countries the object of a monetary award for personality harm is compensation. Clear exceptions to this approach are Germany and South Africa where an award of satisfaction also has a penal function, as well as England where aggravated and exemplary damages may be claimed under certain circumstances. It has been argued that punitive damages are not justifiable in a modern system of law since the basic purpose of a civil action in delict is to compensate the victim for the actual harm done, and that it is for criminal law to punish and thereby discourage such conduct.¹¹⁵ On the other hand, punitive damages for intentional or grossly negligent violations of personality may act as a deterrent and thus promote the preventive function of tort law. In this regard there is indeed a

¹⁰⁷Frick n 3 above at 239ff; Rogers *et al* n 20 at 302–4; Karner & Koziol n 27 at 44–5; Max-Planck Gutachten n 20 above at 24ff.

¹⁰⁸Kerpen n 17 above at 47, 65–8; Van Gerven *et al* n 14 above at 57ff. This also applies to Belgian law but punitive or exemplary damages may not be awarded (Guldix & Wylleman n 15 above at 1651–5).

¹⁰⁹J Neethling, JM Potgieter & PJ Visser *Law of delict* (2002) at 5–6, 13ff, 17–8.

¹¹⁰Neethling, Potgieter & Visser n 1 above at 49–58, 119–20, 166–8, 182, 185; Burchell (1998) n 25 above at 133–5; Walter n 12 above at 144–8, 158–9.

¹¹¹Neethling, Potgieter & Visser n 1 above at 85, 87, 93, 112, 113, 201.

¹¹²Von Bar n 12 above at 271–2, 283ff; Milmo & Rogers n 42 above at 228ff; Kerpen n 17 above at 102ff; Herth n 43 above at 125ff. The position in the USA and Australia is similar (Keeton *et al* n 55 above at 39ff, 771ff; Kerpen n 17 above at 125, 130ff; Fleming n 41 above at 21ff, 580ff).

¹¹³Youngs n 45 above at 259ff; Rogers *et al* n 40 above at 250–1.

¹¹⁴The assessment of the *quantum* of compensation or damages will not be discussed in this contribution (see Neethling, Potgieter & Visser n 1 above at 59–60; Karner & Koziol n 27 above at 119ff as to the position in South Africa and Austria). See generally also BA Koch & H Koziol (eds) *et al Compensation for personal injury in a comparative perspective* (2003) *passim*.

¹¹⁵Neethling, Potgieter & Visser n 1 above at 58 n 218.

tendency in Europe for courts to revive civil punishment for grave violations of the personality. This is particularly evident from decisions that profits made by newspapers from scandalous publications should be taken into account in assessing the *quantum* of damages.¹¹⁶

It is also clear from the above that not every instance of personality harm is compensable. Many systems (such as Germany, The Netherlands and South Africa) require in addition that the infringement of the personality interests should be serious or have a particular gravity. On the other hand, there are systems (like Spain) which rebuttably presume personality harm if a personality interest like privacy or dignity has been violated. This means that such harm is compensable irrespective of its seriousness.¹¹⁷ However, the danger is that courts may then be swamped with trivial claims for personality harm, a situation that should be avoided.

Finally, it should be noted that instances of personality infringement increasingly involve an international dimension. This is particularly so with mass-media publications, the Internet and inter-state freedom of movement for whatever purpose. Therefore, where transborder personality harm occurred and conflict of laws is present, it will have to be ascertained which legal system is applicable. Although international provision was made in 1999, its applicability is not without problems.¹¹⁸

NATURE OF PERSONALITY RIGHTS AND PERSONALITY HARM

There is general consensus that personality rights are private law (subjective) rights which are by nature non-patrimonial and highly personal in the sense that they cannot exist independently of a person since they are inseparably bound up with his personality.¹¹⁹ From the highly personal and non-patrimonial nature of personality rights it is possible to deduce their juridical characteristics: they are non-transferable; unhereditary; incapable of being relinquished or attached; they cannot prescribe; and they come into existence with the birth and are terminated by the death of a human being.¹²⁰ As such, personality rights form a separate category of rights, distinguishable from real, personal and immaterial property rights¹²¹ which are patrimonial rights that can exist independently of the personality.¹²² In this regard Von Bar's¹²³

¹¹⁶Von Bar n 12 above at 604ff; Karner & Koziol n 27 above at 27ff.

¹¹⁷Von Bar n 2 above at 20–1. Von Bar (n 2 above at 27–9) supports this view and propagates that every violation of a personality right should constitute damage compensable with non-patrimonial damages.

¹¹⁸Kerpen n 17 above *passim*.

¹¹⁹Joubert n 1 above at 121, 129; Neethling, Potgieter & Visser n 1 above at 12–3; Frick n 3 above at 28–30; Schmitz n 20 above at 10ff.

¹²⁰Joubert n 1 above at 146–7; Neethling, Potgieter & Visser n 1 above at 13; Van Gamm n 17 above at 39; Frick n 3 above at 28ff; Bucher n 38 above at 159ff; Guldix & Wylleman n 15 above at 1594–5; Lindenbergh n 30 above at 1667–9, 1675.

¹²¹Guldix & Wylleman n 15 above at 1594–5; Lindenbergh n 30 above at 1667–9, 1675.

¹²²Neethling, Potgieter & Visser n 1 above at 13.

¹²³Von Bar n 2 above at 94.

remark that the supporters of specific personality rights hold the view that they are 'simply an aspect of life protected by the law of delict', does not deny the unique character of these rights. But the fact that Swiss law also protects patrimonial (economic) interests, such as the business enterprise (against unlawful competition), and immaterial property (trade marks and trade names), as aspects of personality,¹²⁴ is unacceptable. The concept of personality rights as subjective rights has been criticised, especially by Belgian and French jurists. According to them personality rights are merely private freedoms, especially freedom of privacy, of which the law takes note only where a person enters into relations with others or where conflict arises.¹²⁵ However, this criticism lacks dogmatic support and has had no impact on the protection of personality rights by the courts in Belgium and France.¹²⁶

From this it follows that the infringement of a personality right primarily results in personality harm, non-pecuniary (non-patrimonial) loss or ideal damage, which is any damage or harm to (that is, any diminution in the quality of) a personality (non-patrimonial) interest that does not affect (lead to a diminution of) a person's patrimony *per se* and which can therefore not be rationally calculated in money by reference to a market value.¹²⁷ It has been propagated¹²⁸ that although the infringement of a personality right may also result in patrimonial loss, the personality right concerned does not thereby acquire a patrimonial character. This view raises theoretical problems. If a right to personality only has a specified (non-patrimonial) personality interest as its object, then, logically speaking, only non-patrimonial loss (personality harm) can be present if an impairment of a personality interest has occurred. Instances where infringement of personality also results in patrimonial loss, can accordingly only mean that apart from such infringement, a (as yet unidentified) patrimonial interest connected to the personality has also been damaged. It is an enigma how patrimonial loss can exist without an element of patrimony being involved. This premise can be based on the acceptance of the theory that personality interests may include certain patrimonial elements,¹²⁹ or that¹³⁰ there are patrimonial rights containing aspects of personality which fall outside the sphere of personality rights *stricto sensu*.¹³¹ The recognition of a patrimonial right related to the human body where personal injuries result in medical expenses, should, for example, be

¹²⁴Frick n 3 above at 227–30; Joubert n 1 above at 42, 43–4.

¹²⁵Guldix & Wylleman n 15 above at 1595ff.

¹²⁶*Id* at 1603–4.

¹²⁷Karner & Koziol n 27 above at 11, 119–20; Rogers *et al* n 20 above at 246; Neethling, Potgieter & Visser n 109 above at 242.

¹²⁸*Inter alia* by Joubert n 1 above at 121; Frick n 3 above at 30; Bucher n 38 above at 160; Schmitz n 20 above at 13.

¹²⁹As is accepted in Germany with regard to the post-mortem right to identity (see below under *Right to publicity or advertising (market) value of personality interests*).

¹³⁰As in the case of the right to personal immaterial property or copyright (see below under *Personality rights to creditworthiness and earning capacity and Author's personality right*).

¹³¹Neethling, Potgieter & Visser n 1 above at 64.

considered in this regard. Whether the object of the patrimonial right with regard to the body should be regarded as personal immaterial property (like earning capacity), or even as personal material (patrimonial) property, is controversial.¹³²

A question with important theoretical and practical implications is the role of human consciousness with regard to personality harm. In this regard a distinction must be made between the objective and subjective elements of such harm.¹³³ The objective element refers to the external, generally recognisable and concrete manifestation of personality harm of which the victim need not be aware, and is possible in instances of assault, deprivation of liberty, defamation, violation of privacy and identity, loss of the amenities of life, shortened life expectancy and disfigurement. In such cases consciousness is thus not a requirement for the existence of harm. On the other hand, the subjective element of harm exists only in a person's consciousness. Such harm is usually formed by his reaction to a concrete infringement of his personality (for example, physical pain in the case of assault or affective suffering after defamation), but it can also constitute the complete personality harm (as with insult). In these cases personality harm can naturally not exist in the absence of affective loss.¹³⁴ The distinction between the objective and subjective elements of harm is of practical importance in cases of comatose victims,¹³⁵ juristic persons¹³⁶ and even infants where harm may concretely exist even in the absence of any affective loss or suffering, and the question as to the compensability of the harm is raised. As far as *infantes* and small children are concerned, damages should be awarded for concrete personality harm although the child may not have undergone any mental suffering.¹³⁷ In such cases the objective function of satisfaction under German and Swiss law¹³⁸ makes sense, meaning a symbolic redress of the harm by effecting retribution for the injustice the child-victim has suffered. This view is supported by Roman law where *infantes* could succeed with the *actio iniuriarum* even though they were unaware that their personality had been violated.¹³⁹

SPECIFIC PERSONALITY RIGHTS

The classification of personality rights is an issue on which there are (sometimes vast) differences of opinion in jurisprudence and practice. It is indeed a topic where everything has possibly already been said but not everyone has said it. So this is an addition to this clamour of voices. This

¹³²Neethling, Potgieter & Visser n 1 above at 13.

¹³³Neethling, Potgieter & Visser n 109 above at 242-3; Karner & Koziol n 27 above at 122-3.

¹³⁴Neethling, Potgieter & Visser n 1 above at 51-3.

¹³⁵See below under *Right to physical-psychological integrity*.

¹³⁶See below under *Personality rights of juristic persons*.

¹³⁷*Cf* Von Bar n 2 above at 22.

¹³⁸Frick n 3 above at 31-2.

¹³⁹Neethling, Potgieter & Visser n 1 above at 52 n 161.

classification takes account of factual reality,¹⁴⁰ the personality rights or interests identified and delimited by jurists, the courts and legislatures, as well as typical examples of infringements of personality sanctioned by different legal systems.¹⁴¹

Right to life

It is clear that every natural person has a right to life, his most valuable asset.¹⁴² Life is protected by law in all countries. If a person's life is threatened he may, for example, ward off the threat in defence or necessity, or, if needs be, he may apply for injunctive relief to prevent the threat from being carried out. Also, a tortious reduction of a person's life expectancy through personal injuries (infringement of his right to physical integrity), is in many countries considered to be a form of harm for which damages may be awarded.¹⁴³ Furthermore, in the case of the birth of a deformed child, his mere existence or life is not regarded as damage — no person has a right to non-existence (not to live).¹⁴⁴ The right to life may be classified as a personality right, closely connected to the right to physical integrity — in the sense of a person's right to keep his body alive — because it displays most of the characteristics of that right.¹⁴⁵ But it appears that the right to life differs in certain respects from personality rights: first, the object of this right, human life, is a *conditio sine qua non* for all other personality rights; and second, an infringement of the right to life (that is death)¹⁴⁶ does not bring about any legally recognised personality harm for the deceased, and can therefore not found a claim for satisfaction or compensation — his legal capacity ends at his death and he may therefore not claim on his own behalf.¹⁴⁷ However, seen in the light of the fact that comatose victims are awarded damages,¹⁴⁸ the question arises whether the tortious infringement of the right to life (death), should not be regarded as harm for which damages should be awarded.¹⁴⁹ As Karner and Koziol¹⁵⁰ argue, death is the most serious personality infringement a person can suffer and should therefore be subject to tortious liability. Although the victim cannot be compensated, the objective function of satisfaction (meaning a symbolic redress of the death by effecting retribution for the injustice the victim has suffered), should, as in the case of

¹⁴⁰Neethling, Potgieter & Visser n 1 above at 24.

¹⁴¹Von Bar n 2 above at 95.

¹⁴²Von Bar n 2 above at 63.

¹⁴³Neethling, Potgieter & Visser n 1 above at 16; Van Gerven *et al* n 14 above at 165; Karner & Koziol n 27 above at 63; Rogers *et al* n 20 above at 11, 97, 114, 161, 202.

¹⁴⁴Von Bar n 2 above at 64.

¹⁴⁵Neethling, Potgieter & Visser n 1 above at 15–6, 26; Karner & Koziol n 27 above at 60.

¹⁴⁶Larenz & Canaris n 14 above at 377; Markesinis & Unberath n 4 above at 44–5.

¹⁴⁷Von Bar n 2 above at 62.

¹⁴⁸See below under *Right to physical-psychological integrity*.

¹⁴⁹As is the case in Portugal (Von Bar n 2 above at 62).

¹⁵⁰Karner & Koziol n 27 above at 67ff.

comatose victims, also be employed here.¹⁵¹ The preventive function of delictual damages also play a role in promoting such damages.

Right to physical-psychological integrity

This personality right concerns the human body which comprehends a physical and a mental element (although an attempt to divide these elements into watertight compartments, would be forced and artificial) and includes both physical and mental well-being and health.¹⁵² All legal systems give prominent status to the protection of psycho-physical integrity. Accordingly, generally any conduct which has a detrimental effect on the physique, psyche or even sensory feelings¹⁵³ can be regarded as an infringement of bodily integrity.¹⁵⁴ Specific forms of physical-psychological harm include pain and (affective) suffering, emotional shock or other psychological lesions,¹⁵⁵ disfigurement or physical lesions, loss of amenities of life and shortened life expectancy, but neither pain nor disfigurement appears to be a requirement for infringement. In most systems only medically recognisable psychological injury or illness qualify as harm and not mere sorrow, sadness, grief, fright or anxiety.^{156 157}

In England the intentional torts of battery (direct application of force) and assault (reasonable apprehension of battery), as well as the tort of negligently inflicted injury (including recognisable psychiatric illness in certain cases), protect the physical-psychological integrity.¹⁵⁸ The so-called right to sexual

¹⁵¹See again below under *Right to physical-psychological integrity*.

¹⁵²Neethling, Potgieter & Visser n 1 above at 25-6.

¹⁵³By, eg, noise, smoke, smells and telephone calls — so-called '*Belästigung*' in Germany or nuisance (and harassment) in England and South Africa (Larenz & Canaris n 14 above at 516-7; Rogers n 41 above at 101-2, 503ff; H Ehmann '*Das allgemeine Persönlichkeitsrecht*' in CW Canaris & A Heldrich (eds) *50 Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft vol 1* (2000) 669ff; W Timm '*Das "Allgemeine Persönlichkeitsrecht"*' im Wettbewerbs- und Markenrecht' in U-H Erichsen, H Kollhoser & J Welp (eds) *Recht der Persönlichkeit* (1996) 358 at 360ff; Von Bar n 2 above at 86-8 (noise); Youngs n 45 above at 245; Neethling, Potgieter & Visser n 1 above at 25, 87).

¹⁵⁴Von Bar n 2 above at 69-71; Neethling, Potgieter & Visser n 1 above at 25-6.

¹⁵⁵Including (pre-death) fright or anxiety (Rogers *et al* n 20 above at 39ff, 97, 114, 161, 202, 261-2; Karner & Koziol n 27 above at 64-7).

¹⁵⁶Neethling, Potgieter & Visser n 1 above at 25-6, 90-3; Walter n 12 above at 151-5; Neethling, Potgieter & Visser n 109 above at 17-8, 245ff, 290ff, 332-5; J Neethling '*Troosgeld en kompensasie vir persoonlikheidsnadeel in Suid-Afrika*' in G van Maanen (ed) *De rol van bet aansprakelijkheidsrecht bij de verwerking van persoonlijk leed* (2003) 163 at 165-6; Karner & Koziol n 27 above at 40-4, 48ff, 74ff; Rogers *et al* n 20 above at 1ff, 28ff, 39ff, 87ff, 109ff, 135ff, 155ff, 301ff, 260-6, 283-4; Frick n 3 above at 88-93, 214-5; Larenz & Canaris n 14 at 377ff, 516-7; Van Gerven *et al* n 14 above at 78ff, 110ff, 140, 129-30, 136-9; Von Bar n 12 above at 571-7; Von Bar n 2 above at 69-71, 73-86; Markesinis & Unberath n 4 above at 45-8, 115ff; Karner & Koziol n 27 above at 89-91; Guldix & Wylleman n 15 above at 1626; Koch & Koziol *et al* n 114 above at 424-6, 428-9.

¹⁵⁷In Holland it is required that the psychological trauma must be serious enough to qualify as mental injury — a psychiatric illness in medical terms is not decisive (Rogers *et al* n 20 above at 155ff).

¹⁵⁸Rogers n 41 above at 68ff, 98-102, 176ff, 762ff; Van Gerven *et al* n 14 above at 90ff.

self-determination, which is for example infringed by sexual abuse,¹⁵⁹ is really not a separate personality right but fits comfortably under the right to bodily integrity. In this regard a person clearly has a power of self-determination or autonomy over the inviolability of his body,¹⁶⁰ which naturally applies to organ transplant, blood donation, abortion, medical operation, sexual intercourse, hair cut, and the like.¹⁶¹

The question arises whether the personality right to physical integrity continues to exist in regard to parts of the body which have been separated from the body itself, such as hair, a tooth, a transplanted kidney, a severed hand, or even sperm. One view is that the separated parts no longer form part of the body as an interest of personality, but exist independently as *res* (things) — albeit not things in the ordinary sense — outside the body.¹⁶² In the Netherlands, on the other hand, it is accepted that a personality right continues to exist with regard to the separated parts.¹⁶³ In German law an acceptable midway is followed. A distinction is made between body parts permanently separated from the body where ordinary personal property rules apply, parts destined to be reintegrated which remain part of the body, and parts destined to perform a typical bodily function, such as sperm for procreation, which are also treated as part of body.¹⁶⁴ The destruction of sperm is therefore regarded as interference with bodily integrity (or the general right to personality).¹⁶⁵

A particular problem is whether comatose victims should be able to claim compensation or satisfaction for infringement of their physical-psychological integrity. This is in fact allowed in some countries,¹⁶⁶ while in others,¹⁶⁷ the position is unclear.¹⁶⁸ Arguments against awarding damages are that the victim suffers no harm because he experiences no pain and (affective) suffering, that the money cannot be used for the benefit of the victim and also offers him no consolation — it merely provides a delayed inheritance to dependants. On the other hand it cannot be denied that, objectively viewed, concrete personality harm is not dependent on the consciousness of the

¹⁵⁹Karner & Koziol n 27 above at 92ff; Frick n 3 above at 93–4; cf Larenz & Canaris n 14 above at 515.

¹⁶⁰Rogers n 41 above at 75.

¹⁶¹Guldix & Wylleman n 15 above at 1604–7, 1626; Neethling, Potgieter & Visser n 1 above at 26 n 278.

¹⁶²Neethling, Potgieter & Visser n 1 above at 24 n 262, 86 n 37.

¹⁶³Lindenbergh n 30 above at 1675–6.

¹⁶⁴Van Gerven *et al* n 14 above at 137, 147–9; Karner & Koziol n 27 above at 111–2; Larenz & Canaris n 14 above at 514–5.

¹⁶⁵JTM Labuschagne 'Deliktuele aanspreeklikheid weens liggaamskending as gevolg van spermavernietiging: 'n Verreikende uitspraak van die Duitse Bundesgerichtshof (1995) 58 *THRHR* 148ff.

¹⁶⁶Eg, Germany, Austria, France, Italy, England, Belgium and Switzerland.

¹⁶⁷Such as the Netherlands, Greece and South Africa.

¹⁶⁸Rogers *et al* n 29 above at 257–9; Koch & Koziol *et al* n 114 above at 425; Karner & Koziol n 27 above at 58–60; Von Bar n 2 above at 22–3, cf 23–7; Van Gerven *et al* n 14 above at 137–8; Neethling, Potgieter & Visser n 1 above at 248ff.

victim.¹⁶⁹ However, from a comparative law analysis it is clear that no one believes that such personality harm suffered by a comatose victim can really be compensated. Accordingly, in such cases the objective function of satisfaction under German and Swiss law¹⁷⁰ makes sense, meaning a symbolic redress of the harm by effecting retribution for the injustice the victim has suffered, thereby enabling the law to express society's sympathy for the victim and its sense of outrage at his grievous loss.¹⁷¹

Since the mid 1960s actions for wrongful conception (an action for damages by the parents of a normal child born as a result of a failed sterilization or abortion performed by a medical doctor), wrongful birth (an action by the parents on similar grounds but where the child is born handicapped), and wrongful life (an action by a deformed child who was born as a result of a negligent diagnosis or other act by a doctor) have troubled courts in various countries. The first two actions are mainly concerned with the patrimonial loss of the parents (cost of pregnancy, child-birth and of raising the child). It is generally accepted that the mere existence of a child cannot be regarded as harming the personality of the parents, although it is conceivable that the birth of a deformed child may, for example, cause a parent serious psychological harm.¹⁷² The question also arises whether the personality right to dignity of such a child is not (unfairly) infringed by the fact that the doctor, and not the parents, are paying for his upbringing. This question is controversial,¹⁷³ but the fact that many countries allow such damages against the doctor, is perhaps a clear sign that the child's dignity does not play a decisive role in this regard. As regards the action for wrongful life, the following. If a foetus which is injured or deformed dies *in utero*, it has no legal personality, no right to physical integrity and therefore cannot claim non-patrimonial damages. Yet, if a deformed or injured child is born alive, although his mere existence is not regarded as damage — no person has a right to non-existence — he should be able to claim damages for the infringement of his physical integrity.¹⁷⁴

Right to physical liberty

This personality right is not concerned with the body itself, but with bodily freedom, and is infringed not only by total deprivation of liberty (such as detention or imprisonment), but also by any interference with an individual's liberty to move freely. Consciousness is not an element of the personality harm

¹⁶⁹Eg, loss of amenities of life (see above under NATURE OF PERSONALITY RIGHTS AND PERSONALITY HARM).

¹⁷⁰Frick n 3 above at 31–2.

¹⁷¹PQR Boberg *The law of delict I: aquilian liability* (1984) at 570; Neethling, Potgieter & Visser n 109 above at 248–53, 251 n 339.

¹⁷²Karner & Koziol n 27 above at 116–9.

¹⁷³Smits n 15 above at 130ff.

¹⁷⁴Van Gerven *et al* n 14 above at 138; E Engelhard, T Hartlief & G van Maanen (eds) *et al Aansprakelijkheid in gezinsverband* (2004) 21ff, 221ff; Karner & Koziol n 27 above at 72–3; Von Bar n 12 above at 576ff; Von Bar n 2 above at 71–3; Neethling, Potgieter & Visser n 109 above at 37, 281; Markesinis & Unberath n 4 above at 48–9, 144ff, 156ff.

involved since a person can be deprived of liberty without being aware of it.¹⁷⁵ The right to bodily freedom is protected in all legal systems.¹⁷⁶ In England this protection is under the umbrella of the tort of false imprisonment, that is, the infliction of bodily restraint unauthorised by the law, as well as the tort of malicious prosecution where applicable.¹⁷⁷ Bodily freedom should be distinguished from the general freedom to act (especially in the economic sphere) or the freedom to develop the personality.¹⁷⁸ Freedom to act in this sense does not relate to a specific interest of personality, the infringement of which causes personality harm, but is rather an aspect of human self-determination in society and therefore of legal subjectivity itself.¹⁷⁹

Right to dignity

Dignity embraces a person's subjective feelings of dignity or self-respect: his personal sense of self-worth or *innere Ehre*.¹⁸⁰ Infringing a person's dignity means insulting that person. It stands to reason that because of its complete subjectivity, a person cannot be protected against every insult. Therefore, in all systems where the right to dignity is recognised, protection is directed at serious insults only, which can be difficult to determine in borderline cases.¹⁸¹ In South Africa, for example, actionability requires not only that the victim feels insulted, but also that a reasonable person in his position would have felt insulted.¹⁸² The Austrian and English protection of dignity is unjustifiably scant.¹⁸³ It should be noted that dignity is sometimes used in

¹⁷⁵Neethling, Potgieter & Visser n 1 above at 26, 113; Von Bar n 2 above at 92; see also above under *Nature of personality rights and personality harm*.

¹⁷⁶Neethling, Potgieter & Visser n 1 above at 16, 26, 111ff; Walter n 12 above at 155-60; Karner & Koziol n 27 above at 97-8; Frick n 3 above at 94-8; Van Gerven *et al* n 14 above at 78, 139; Larenz & Canaris n 14 above at 385-6, 513; Von Bar n 2 above at 89-93; Von Bar n 12 above at 567-8; Rogers *et al* n 20 above at 122-3, 168, 284-5; Youngs n 45 above at 245; Markesinis & Unberath n 4 above at 49.

¹⁷⁷Rogers n 41 above at 81ff; Heuston & Buckley n 41 above at 123-7; Von Bar n 2 above at 92; Youngs n 45 above at 245; Rogers *et al* n 20 above at 75-6; Van Gerven *et al* n 14 above at 90; Walter n 12 above at 118-9, 131-3; Fleming n 41 above at 33ff as to Australia.

¹⁷⁸This distinction is not always made in, eg, Austrian, German and Swiss law (Bucher n 38 above at 139ff; Ehmann n 153 above at 613-4; Ulrich n 63 above at 29; Frick n 3 above at 94, 96-8, 259-60).

¹⁷⁹Joubert n 1 above at 123, 127; Neethling, Potgieter & Visser n 1 above at 15, 16; cf Von Bar n 2 above at 90.

¹⁸⁰Kerpen n 17 above at 13, 47-8; Son n 12 above at 38-41; Neethling, Potgieter & Visser n 1 above at 28.

¹⁸¹Youngs n 45 above at 270-1; Kerpen n 17 above at 13ff, 47-8; Guldix & Wylleman n 15 above at 1629-30; Larenz & Canaris n 14 above at 500-1; Van Gamm n 17 above at 36; Son n 12 above at 75ff. In the USA serious insults are protected under the tort of intentional infliction of mental suffering (Keeton *et al* n 55 above at 57-60; Rogers n 41 above at 100).

¹⁸²Neethling, Potgieter & Visser n 1 above at 28, 194-6.

¹⁸³Karner & Koziol n 27 above at 98-101; Frick n 3 above at 99-100; Heuston & Buckley n 41 above at 120-1; Rogers n 41 above at 69; Von Bar n 12 above at 285. In Austria protection of dignity is dependent on the presence of patrimonial loss. Violation of dignity by the mass media, or by assaulting the victim, or by publishing his image, is nevertheless in principle wrongful (Karner & Koziol n 27 above at

the much broader sense of embracing the whole human personality. A clear example is the recognition of the general right to personality in Germany which primarily emanated from the significance attached to human dignity in the constitution.¹⁸⁴ The right to dignity as a human right probably also connotes this broad context, which should be distinguished from dignity in the narrower sense of a substantive personality interest.¹⁸⁵

Right to reputation

A person's reputation or good name is the opinion, regard or esteem which he enjoys in society; his *äussere Ehre*, in contradistinction to self-esteem in the case of dignity.¹⁸⁶ Any words or conduct which tarnishes or lowers his reputation within the community infringes his good name.¹⁸⁷ The right to reputation is protected in all European systems.¹⁸⁸ Although true words may be defamatory, the truth is in principle a defence against an action for defamation.¹⁸⁹ This is also the position in England.¹⁹⁰ Whether the truth should in all circumstances be a defence is controversial — for instance, where facts about physical deformities or long forgotten scandals are published merely to satisfy the salacious appetite of the public — and the law has been changed in a few common law countries¹⁹¹ to limit the defence to the publication of true facts which are also in the public interest.¹⁹² This also reflects the law in South Africa.¹⁹³ In general a flexible weighing up of the rights to reputation and freedom of expression (of the mass media) must be undertaken by the courts.¹⁹⁴ Under certain circumstances even the publication of untruth may be justified. In Germany, for example, although the intentional publication of untruth cannot be lawful, innocent or negligent untruth may be justified where the publication concerns a matter of public

98–101; Frick n 3 above at 99–100). In England the right to dignity is not recognised or directly protected by any tort (cf however Fleming n 41 above at 41), but damages may be recovered for insults due to interference with the person that has done no physical harm at all (Heuston & Buckley n 41 at 120–1; Rogers n 41 above at 69).

¹⁸⁴See above under *Recognition and basis of protection of personality rights*.

¹⁸⁵Cf Neethling, Potgieter & Visser n 1 above at 28.

¹⁸⁶Son n 12 above at 38–41; Kerpen n 17 above at 47–8.

¹⁸⁷Neethling, Potgieter & Visser n 1 above at 27; Halpern n 51 above at vii–viii, 5; Milmo & Rogers n 42 above at 8; Rogers n 41 above at 404; Frick n 3 above at 225; Ehmann n 153 above at 636. Even true words may therefore be defamatory (Milmo & Rogers n 42 above at 8; Neethling, Potgieter & Visser n 1 above at 38, 131).

¹⁸⁸Von Bar n 1 above at 100–4; Rogers *et al* n 20 above at 150, 280–1; Van Gamm n 17 above at 37, 39; Youngs n 45 above at 271–4; Kerpen n 17 above at 48ff; Frick n 3 above at 102–3, 225–6.

¹⁸⁹Van Gamm n 17 above at 37; Youngs n 45 above at 269–70; Kerpen n 17 above at 21–2, 24, 61–2.

¹⁹⁰Milmo & Rogers n 42 above *passim*.

¹⁹¹*Eg*, Australia.

¹⁹²Milmo & Rogers n 42 above at 267–8.

¹⁹³Neethling, Potgieter & Visser n 1 above at 153–5; Burchell n 25 above at 272ff.

¹⁹⁴Von Bar n 1 above at 100–6; Von Bar n 12 above at 588–99; Guldix & Wylleman n 15 above at 1629; Kerpen n 17 above at 20–1, 24, 63–4; Neethling, Potgieter & Visser n 1 above at 129ff.

interest and no insult is involved,¹⁹⁵ and in the Netherlands liability for an untrue statement was excluded where the reporters carried out diligent research.¹⁹⁶ In this regard a defence of media privilege, that is the fair or reasonable publication of (even untrue) defamatory statements about matters of public interest (including political speech), has recently been accepted in common law countries (like England and Australia) and also in South Africa, underlining modern conceptions of democracy as to freedom of expression and the role of the media in this regard.¹⁹⁷

The protection of reputation is of course the field of libel (as a rule written defamation) and slander (generally oral defamation) in English common law, and many other common law countries which remain close to the English model.¹⁹⁸ The law of defamation in South Africa law has also benefitted from adopting much of the detail of English common law.¹⁹⁹ The requirements for libel and slander, which is the outcome of the balancing process between reputation and freedom of expression, are the publication (disclosure to a third person) of defamatory matter (tendency to lower the victim in the estimation of right-thinking members of society) about the victim. The most important defences, apart from truth (justification), are privilege and fair comment.²⁰⁰ Except for a few instances where negligence is required for liability,²⁰¹ liability is strict.²⁰² In this regard the courts in the USA developed constitutional privilege as an additional defence that requires at least negligence,²⁰³ and in the case of public officials and figures, intent or actual malice²⁰⁴ for liability. The strict liability of English law for defamation generally was never imposed on innocent defamers.²⁰⁵ Since strict liability tilt the scale unfairly in favour of the victim,²⁰⁶ while *vice versa*, liability based on intent tends to benefit the defendant,²⁰⁷ liability based on negligence seems to position the scale in a proper and fair balance. Liability based on negligence has in fact long been established in many European systems and has also been accepted, for example, in South Africa, for liability of the mass media for defamation.²⁰⁸

¹⁹⁵Kerpen n 17 above at 20–1, 24.

¹⁹⁶Von Bar n 2 above at 103.

¹⁹⁷Milmo & Rogers n 42 above at 451–82; Rogers n 41 above at 459–63; Neethling, Potgieter & Visser n 1 above at 155–7.

¹⁹⁸Milmo & Rogers n 42 above at 4–7; Von Bar n 12 above at 283–4; Kerpen n 17 above at 112ff.

¹⁹⁹Neethling n 64 above at 93.

²⁰⁰Milmo & Rogers n 42 above *passim*; Kerpen n 17 above at 99ff, 123ff.

²⁰¹The press may, for example, prove absence of fault.

²⁰²Milmo & Rogers n 42 above at 8–10.

²⁰³Halpern n 51 above at 5.

²⁰⁴That is, defamatory falsehood published with knowledge of its falsity, or recklessly.

²⁰⁵Keeton *et al* n 55 above at 802ff; Rogers n 41 above at 460.

²⁰⁶As generally in England and previously in South Africa with regard to the press.

²⁰⁷Especially the mass media, as in the USA.

²⁰⁸Neethling, Potgieter & Visser n 1 above at 167.

Right to privacy

Privacy is a personal condition of life characterised by seclusion from, and therefore absence of acquaintance by, the public. A person himself determines or controls the scope of his privacy.²⁰⁹ Seen thus, privacy can only be infringed by an unauthorised acquaintance by outsiders with a person or his private affairs, which acquaintance can occur in two ways. Firstly, by intrusion into the private sphere (that is, where an outsider himself becomes acquainted with a person or his personal affairs). Secondly, by disclosure or publication of private facts (that is, where a third party acquaints outsiders with a person or his personal affairs which, although known to that party, remain private).²¹⁰ Examples of *prima facie* wrongful invasions of privacy are entering a private residence, observing a person in closed quarters, reading private documents, eavesdropping on private conversations, shadowing a person, taking blood tests, and the police interrogation of a person. Examples of violation of the right to privacy by disclosure, are the disclosure of private facts that have been acquired by a wrongful act of intrusion, the disclosure of private facts in breach of a confidential relationship (for example, between doctor-patient, legal advisor-client, bank-client, priest-penitent, police-informant, etcetera), and the publication of private facts by the mass media.²¹¹ The fixing or recording of private facts (for example, by photography, photocopying and tape recording), whether by outsiders or insiders, should *per se* also be wrongful in principle because such an act, by exposing privacy to the danger or risk of intrusion or disclosure, constitutes a threat to the right to privacy.²¹² The right to privacy is recognised in numerous systems,²¹³ the most notable exception being English common law,²¹⁴ and other common law countries which follow the English model closely.²¹⁵ As with other personality rights, the right to privacy is often in

²⁰⁹Cf Lemmers n 17 above at 383–4.

²¹⁰Neethling, Potgieter & Visser n 1 above at 30–3. In the USA, the torts of ‘intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs’, and ‘the public disclosure of embarrassing private facts about the plaintiff’ represent these two ways of infringing privacy (see above under *Recognition and basis of protection of personality rights*; Prosser n 55 above at 383ff; Keeton *et al* n 55 above at 852ff).

²¹¹Neethling, Potgieter & Visser n 1 above at 222–5, 226–36; Karner & Koziol n 27 above at 101–3; W van Gerven *et al Tort law* (1998) 183–90; Larenz & Canaris n 14 above at 503ff, 508ff; Van Bar n 2 above at 106–19.

²¹²Neethling, Potgieter & Visser n 1 above at 236–40. This is the position in Germany with regard to the clandestine taking of photo’s (Larenz & Canaris n 14 above at 506–7; Youngs n 45 above at 278).

²¹³Karner & Koziol n 27 above at 101ff; Rogers n 20 above at 17–18, 50, 74–5, 104, 120–122, 168, 183, 220, 281–283; Von Bar n 12 above at 28, 31, 43 n 157; Von Bar n 2 above at 94–5, 106–18; Neethling, Potgieter & Visser n 1 above at 217–20; Halpern n 51 above at 410–2; Walter n 12 above at 134–5; Kerpen n 17 above at 109–11; Keeton *et al* n 55 above at 852ff; Van Gerven *et al* n 211 above at 171ff, 201–2, 203; Lemmers n 17 above at 381ff; Guldix & Wylleman n 15 above at 1625–6; Lindenbergh n 30 above at 1674; BS Markesinis *The German law of torts: a comparative introduction* (1990) at 294ff; Youngs n 45 above at 277, 278; see also as to Germany, France, Belgium, South Africa, Austria, the Netherlands, Switzerland, and the USA, above under *Recognition and basis of protection of personality rights*.

²¹⁴See above under *Recognition and basis of protection of personality rights*.

²¹⁵Cf n 48 above.

conflict with opposing private rights and the public interest, requiring a fair balancing outcome. The most important public interest, and simultaneously the most difficult to delimit *vis-à-vis* the right to privacy, is the public interest in (true) information about people (maintained especially by the freedom of expression of the mass media).²¹⁶

Various kinds of conduct are often regarded as infringements of privacy while other personality interests and even patrimonial interests are at stake. They are physical-psychological integrity (including sensory feelings), dignity, identity, autonomy, self-realisation, and trade secrets.²¹⁷ As has been argued,²¹⁸ such an equation of dissimilar interests is unacceptable, and should, for purposes of conceptual clarity, dogmatic and practical manageability and legal certainty, be avoided.

An important aspect of the right to privacy in most countries is data protection, which entails the protection of a person (data subject) with regard to the processing of his personal data by another person or the state.²¹⁹ There is general agreement on the core data protection principles²²⁰ which should be embodied in any effective data protection regime,²²¹ and many countries²²² have adopted data protection legislation reflecting these principles.²²³ It is submitted that all countries will in future have to adopt such legislation to ensure adequate protection of privacy and the continuous free cross-border flow of personal information.²²⁴

Right to identity

Identity as an interest of personality can be defined as a person's uniqueness or individuality which identifies or individualises him as a particular person and thus distinguishes him from others.²²⁵ Identity is manifested in various *indicia* by which a person can be recognised; in other words, facets of his personality which are characteristic of or unique to him, such as his name,

²¹⁶Neethling, Potgieter & Visser n 1 above at 240ff, 245–9; see also *idem* 246 n 238, 247 n 239 as to Germany and the USA.

²¹⁷Neethling, Potgieter & Visser n 1 above at 33–6.

²¹⁸See above under *General right to personality and particular personality rights*.

²¹⁹Neethling, Potgieter & Visser n 1 above at 267ff; LA Bygrave *Data protection law: approaching its rationale, logic and limit* (2002) *passim*; A Roos *The law of data (privacy) protection: a comparative and theoretical study* (2003) *passim*; CJ Bennett *Regulating privacy: data protection and public policy in Europe and the United States* (1992) *passim*; Electronic Privacy Information Centre (EPIC) *Privacy and human rights: an international survey of privacy laws and developments* (2002) *passim*; Karner & Koziol n 27 above at 102.

²²⁰*Cf* Roos n 219 above at 650–2.

²²¹Roos n 219 above at 480ff; Bygrave n 219 above at 57ff.

²²²More than forty by the end of 2002.

²²³Roos n 219 above at 480ff identifies the following principles: fair and lawful processing; purpose specification; minimality; data quality; disclosure limitation; data subject participation; openness; sensitivity; security and confidentiality; and accountability.

²²⁴Neethling, Potgieter & Visser n 1 above at 281.

²²⁵Hubmann n 3 above at 271; PPJ Coetser *Die Reg op Identiteit* (1986) 140–8; Neethling, Potgieter & Visser n 1 above at 36; Ulrich n 63 above at 52, 131–2.

physical image (or likeness), voice, life history, creditworthiness, handwriting, character, etcetera. A person's identity is infringed if any of these *indicia* are used in ways which cannot be reconciled with his true identity; in other words, where his identity has been falsified, or a wrong image of his personality has been communicated.²²⁶ Where a person's name, image or any other *indiciu*m identifies him with true personal facts, they merely have an identification function and are relevant with regard to the protection of privacy, forming part of the private facts to which they relate.²²⁷ *Indicia* of identity may serve as the object of a specific right to personality. In various countries²²⁸ this has happened with regard to, for example, the right to a name and the right to image.²²⁹ The right to one's own voice is also recognised in a few systems.²³⁰

The right to identity has been recognised *eo nomine* in countries such as Italy, France, Switzerland and South Africa.²³¹ In the USA, the torts of putting a person in a false light in the public eye, and appropriation, for the defendant's advantage, of the plaintiff's name or likeness,²³² are thus rather examples of protection of identity than of privacy.²³³ This naturally also applies to the German sanctioning of the falsification or distortion of the personality image, as well as the economic misappropriation of the name or image,²³⁴ but the right to identity still needs general recognition by the courts.²³⁵ In England identity is not directly protected but such protection may take place incidentally under other torts, for example, malicious falsehood and passing off.²³⁶ Although the publication of untruth is in principle wrongful,

²²⁶Hubmann n 3 above at 273–4; Neethling, Potgieter & Visser n 1 above at 36–7; Ehmman n 153 above at 628, 643; Ulrich n 63 above at 29, 133ff, 183ff; Von Bar n 2 above at 105–6.

²²⁷Hubmann n 3 above at 272 n 10; Neethling, Potgieter & Visser n 1 above at 37; Halpern n 51 above at 413–4; Frick n 3 above at 82ff, 105ff, 159ff.

²²⁸Such as Germany, France, Switzerland, Liechtenstein, Italy, Austria and Belgium.

²²⁹Von Bar n 12 above at 584; Von Bar n 2 above at 96–8, 107–8; Hubmann n 3 above at 271; Helle n 12 above at 21–2, 45ff; Van Gamm n 14 above at 39, 40–1; Coetsers n 225 above at 26ff, 37ff; Neethling, Potgieter & Visser n 1 above at 36–8, 255ff; Rogers *et al* n 20 above at 150; Youngs n 45 above at 275–8; Guldix & Wylleman n 15 above at 1625, 1627; Frick n 3 above at 62ff, 105ff, 230ff, 260ff; Bucher n 38 above at 243ff.

²³⁰*Eg*, Belgium, Austria, Germany and Liechtenstein (Guldix & Wylleman n 15 above at 1626; Frick n 3 above at 151ff, 264; Kerpen n 17 above at 17–8).

²³¹Ulrich n 63 above at 129–30; Neethling, Potgieter & Visser n 1 above at 255.

²³²But only in so far such use of the name or likeness creates the false impression that plaintiff has given consent to such conduct, or has received financial remuneration therefor, or supports the advertised product, service or business (Neethling, Potgieter & Visser n 1 above at 37).

²³³Neethling, Potgieter & Visser n 1 above at 37; *cf* Halpern n 51 above at 428–9; Ehmman n 153 above at 643; Ulrich n 63 above at 130; Kerpen n 17 above at 118ff; Keeton *et al* n 55 above at 852ff.

²³⁴Larenz & Canaris n 14 above at 499–500, 502, 517; Van Gamm n 17 above at 39; Youngs n 45 above at 277–8; Ulrich n 63 above at 53ff, 150ff; Kerpen n 17 above at 17ff; *cf* Von Bar n 2 above at 98–100.

²³⁵Ulrich n 63 above at 104ff, 112ff.

²³⁶Rogers n 41 above at 476ff, 674ff; Herth n 43 above at 88–91; Von Bar n 2 above at 107.

infringement of identity may be justified by freedom of expression, as with defamation.²³⁷

It should be noted that although, in for example Germany or France, the rights to a name, image, written and spoken word are regarded as separate personality rights,²³⁸ conduct which is considered to be infringements of these rights may also be relevant with regard to other interests of personality (such as identity, privacy and reputation) and even the so-called patrimonial components of personality.²³⁹ For the sake of jurisprudential clarity and legal certainty, it is suggested that those personality infringements should rather be accommodated and classified under the rights to identity (falsification), privacy (intrusion into the private sphere and the publication of private facts), reputation (lowering of esteem), and dignity (insult).

Other personality rights

Apart from feelings of dignity (*Ehrgefühl*, which are the most prominent feelings protected by law),²⁴⁰ a person has a wide variety of other spiritual-moral feelings or inherent perceptions on matters such as love, faith (religion), sentiment and chastity.²⁴¹ Disregard for his or her feelings — where insult or infringement of dignity need not be present — causes (intense) moral suffering. However, as with insult, not every affective infliction can be actionable; the infringement should be of a serious nature. Under South African law the *actio iniuriarum* protects *inter alia* the right to feelings of engaged couples and spouses in instances of breach of promise and adultery, abduction, enticement and harbouring.²⁴² Interference with parental care (for example, the abduction of a child) can probably also be accommodated under this right.²⁴³ A number of systems²⁴⁴ grant damages for bereavement (*pretium affectionis*) to certain relatives or to other persons having a firm relationship or ties of affection with a dead victim, but others²⁴⁵ reject such claims altogether. Although France — which has an almost overly generous approach in this regard²⁴⁶ — Belgium and Switzerland also award damages to others in the case of non-fatal injury of the victim, other countries have not

²³⁷See above under *Right to reputation*; Ehmann n 153 above at 645–6; Neethling, Potgieter & Visser n 1 above at 261–2.

²³⁸Helle n 12 above *passim*.

²³⁹*Cf* Kerpen n 17 above at 140; see also below under *Right to publicity or advertising (market) value of personality interests*.

²⁴⁰See above under *Right to dignity*.

²⁴¹Neethling, Potgieter & Visser n 1 above at 28–9, 199ff; *cf* Larenz & Canaris n 14 above at 516–7 as to feelings of chastity.

²⁴²Neethling, Potgieter & Visser n 1 above at 204ff; Von Bar n 2 above at 124–9 as to Europe; Frick n 3 above at 215–6.

²⁴³*Cf* Von Bar n 2 above at 121ff; Neethling, Potgieter & Visser n 1 above at 193, 200.

²⁴⁴*Eg*, England, France, Switzerland, Belgium, Spain, Greece and Italy.

²⁴⁵Such as Germany, the Netherlands and South Africa.

²⁴⁶Van Gerven *et al* n 14 above at 139.

followed, probably because of substantial arguments the other way.²⁴⁷ In France feelings (*sentiments d'affection*) are even protected where an animal has been killed, and in Switzerland where an organ was transplanted without the consent of relatives.²⁴⁸ Belgium and France furthermore recognise a right to family memories.²⁴⁹

The rights to informational self-determination, self-realisation, freedom from utterances not made, concerning sexuality and marriage, and the right to resocialising are also identified as specific personality rights.²⁵⁰ However, it seems that the fields of application of these rights can quite comfortably be accommodated under legal subjectivity, as well as the rights to privacy, identity, reputation and dignity.²⁵¹

In Germany a person's right to know his own descent or parentage has been deduced from the general right to personality, and it has also been imbedded in Dutch law, but it is controversial whether such a right is recognised in Switzerland.²⁵² This right must of course be weighed against the parent's right to privacy not to have the information disclosed — a process in which various factors may play a role.²⁵³ However, it seems that the right to know one's own descent is not a specific independent right of personality, but rather an aspect of a person's right to privacy (in the sense of his right of access to and therefore control over his own personal information: his right to informational self-determination),²⁵⁴ or of his right to identity (which should include the power to know one's own real identity). Smits²⁵⁵ considers knowledge as to one's own descent as part of human dignity.

PERSONALITY RIGHTS AND PATRIMONIAL RIGHTS

Personality rights, with their highly personal and non-patrimonial nature form a separate category of rights, distinguishable from patrimonial rights that can exist independently of the personality.²⁵⁶ This distinction is problematic in the following instances:

²⁴⁷Rogers *et al* n 20 above at 87ff, 262–5; Koch & Koziol *et al* n 114 above at 25, 70, 64, 140, 203, 273–4, 349–50, 429–30; AJ Verheij 'Compensation of pretium affectionis — A constitutional necessity' (2004) 67 *THRHR* 394 at 394ff; Smits n 15 above at 135ff; Van Maanen n 156 above *passim*; Frick n 3 above at 216–7.

²⁴⁸Neethling, Potgieter & Visser n 1 above at 201 n 26.

²⁴⁹Guldix & Wylleman n 15 above at 1628–9.

²⁵⁰Nehmelman n 4 above at 128ff, 145ff, 186ff, 196ff.

²⁵¹Neethling, Potgieter & Visser n 1 above at 34–5, see also above under the discussion of these personality rights.

²⁵²Frick n 3 above at 216, 285.

²⁵³Smits n 15 above at 126ff; Hubmann n 17 above at 18ff; Nehmelman n 4 above at 206ff.

²⁵⁴Smits n 15 above at 127 n 347; see also above under *Right to privacy*.

²⁵⁵Smits n 15 above at 128.

²⁵⁶See above under *Nature of personality rights and personality harm*.

Author's personality right

It is generally accepted in many European countries²⁵⁷ that apart from his immaterial property right, an author also has a personality right (*droit moral*) which protects his spiritual relationship with his work. In mostly common law systems²⁵⁸ this right has not been expressly recognised although they arrive at comparable results as regards protection.²⁵⁹ The essential characteristic of the author's moral right is that it flows from the creation of his work and exists in conjunction with his immaterial property right.²⁶⁰ It particularly encompasses an author's power to keep his work secret until he decides to publish it; his power to recall the work because of change of opinion; his power to the recognition of his authorship; his power (to the exclusion of others) to effect changes to the work and thus to secure the integrity of his creation; and his power to gain admission to his work.²⁶¹ In this regard some countries (such as France) and writers support a so-called dualistic doctrine, maintaining that copyright is not a single right but a dual right consisting of an immaterial property right as well as a personality right. Others (such as Germany) propagate a monistic theory, in terms of which copyright is a unitary right which comprises both patrimonial and personality elements. Thus copyright includes an author's personality right.²⁶² It is submitted that the monistic approach is dogmatically sound since the personality elements are directed at the work and not the personality of the author.²⁶³ However, the two theories do not differ much from a practical point of view, the only differences being that in terms of the monistic theory copyright as a whole is heritable and limited in time, while in terms of the dualistic theory this applies only to the immaterial property right.²⁶⁴

In order to avoid confusion with the substantive personality rights, the term author's personality right should be avoided since the protected interest remains the immaterial property of the author and not his personality.²⁶⁵ Hence, personality rights and the author's personality right are not treated

²⁵⁷Eg, Germany, France, the Netherlands, Austria and Italy.

²⁵⁸Such as England, Ireland, South Africa and the USA.

²⁵⁹A Dietz *Copyright law in the European Community* (1978) at 66, 77; Neethling, Potgieter & Visser n 1 above at 22 n 230; Halpern n 51 above at 639-40.

²⁶⁰Joubert n 1 above at 22, 58, 133, 139 n 72; Neethling, Potgieter & Visser n 1 above at 20ff; H Hubmann & M Rehbinder *Urheber- und Verlagsrecht* (1995) at 154ff; Karner & Koziol n 27 above at 107-8; Frick n 3 above at 168ff; ST Schacht *Die Einschränkungen des Urheberpersönlichkeitsrechts im Arbeitsverhältnis* (2004) at 56-9; Nehmelman n 4 above at 58ff.

²⁶¹Dietz n 259 above at 69-77; Joubert n 1 above at 22, 133; Neethling, Potgieter & Visser n 1 above at 22; Hubmann & Rehbinder n 260 above at 154ff; Halpern n 51 above at 635-40; Guldix & Wylleman n 15 above at 1627-8; Frick n 3 above at 168; A Gregoritza *Die kommerzialisierung von Persönlichkeitsrechten Verstorbener* (2003) at 29-30; Schacht n 260 above at 59, 162ff; Nehmelman n 4 above at 67-70.

²⁶²Dietz n 259 above at 67-8; Joubert n 1 above at 139 n 72; Neethling, Potgieter & Visser n 1 above at 21-2; Frick n 3 above at 168.

²⁶³Dietz n 259 above at 67; Gregoritza n 261 above at 31-2; Neethling, Potgieter & Visser n 1 above at 21-2.

²⁶⁴Dietz n 259 above at 67-8; Gregoritza n 261 above at 32-4.

²⁶⁵Neethling, Potgieter & Visser n 1 above at 22.

alike as far as, for example, transferability (heritability and cedability) is concerned: unlike personality rights, copyright is transferable,²⁶⁶ but it is nevertheless controversial to what extent the legal successor of the author, whether *inter vivos* or *mortis causa*, may exercise the personality powers of copyright.²⁶⁷ Therefore, it is preferable to use the concepts patrimonial and non-patrimonial powers of an author with regard to his creation. This does not imply that an author's personality rights may not be infringed by the appropriation or denial of his powers in respect of his creation. For instance, an author's privacy may be infringed by an unauthorised publication of his work, while unauthorised amendments to his work, or denial of authorship may lead to an infringement of his identity, his reputation, or his dignity.²⁶⁸

Personality rights to creditworthiness and earning capacity

Since aspects of the human personality play an important role in the creation of a person's earning capacity and his creditworthiness, it has long been thought that these interests are personality interests.²⁶⁹ However, although these interests display similarities to personality interests — they are highly personal²⁷⁰ in the sense that they cannot exist separately from human personality (and are consequently incapable of being ceded, inherited and attached) and can exist only during the lifetime of a person (although they do not necessarily originate at his birth and may be terminated before his death) — they are immaterial patrimonial assets of a person's estate. Earning capacity and creditworthiness are thus neither solely aspects of personality nor pure immaterial property (which can exist separately from the personality) but contain elements of both. They can therefore be described as personal immaterial property. Personal immaterial property is accordingly immaterial patrimonial property which is inseparably linked to the human personality.²⁷¹

Right to publicity or advertising (market) value of personality interests

In this regard the American view that the right to privacy (identity) protects not only personality interests, but also patrimonial interests, should be considered.²⁷² Such protection is given in the case of persons (for example, well-known actors or sports personalities) whose identities have a definite market or advertising value and who suffer patrimonial loss as a result of the unauthorised use or appropriation (for example, for advertising purposes) of particular aspects of their personality, such as their name or likeness, or even

²⁶⁶Frick n 3 above at 170–2; Hubmann n 3 above at 342–3; A Fisher *Die Entwicklung des postmortalen Persönlichkeitsschutzes* (2004) at 50–2.

²⁶⁷Gregoritza n 261 above at 34–6; Shacht n 260 above at 123ff; cf Halpern n 51 above at 639.

²⁶⁸Neethling, Potgieter & Visser n 1 above at 22–3; cf Halpern n 51 above at 638.

²⁶⁹Neethling, Potgieter & Visser n 1 above at 17 n 183.

²⁷⁰See above under *Nature of personality rights and personality harm*.

²⁷¹Neethling, Potgieter & Visser n 1 above at 17–20; Neethling, Potgieter & Visser n 109 above at 52–3 n 70.

²⁷²Halpern n 51 above at 524ff.

their life history.²⁷³ The explanation for this position is evidently — as has been accepted in the USA²⁷⁴ and by implication in countries such as Germany and France²⁷⁵ where it is recognised that the personality interests mentioned may also have patrimonial value — that a separate, independent patrimonial (immaterial property) right may, in addition to the personality right to identity, also be infringed through the act of appropriation. In England this patrimonial interest is not directly protected but only incidentally through other traditional torts, such as passing off.²⁷⁶ This right has been described by South African writers as the right to the advertising image, or the right to individual marketing power, while in American law it has been labelled the right to publicity.²⁷⁷ It has also been suggested that the right to a name should in this respect be recognised as an immaterial property right in Germany.²⁷⁸

In so far as this right or interest is patrimonial, it should be transmissible *inter vivos* and fall into the owner's estate when he dies, to be at the disposal of his heirs for their commercial exploitation to the exclusion of third parties.²⁷⁹ This is indeed the position in the USA.²⁸⁰ Fischer²⁸¹ opines that this protection also covers the potential commercial value of *indicia* of identity — in German law known as the patrimonial elements or components of the right to personality which, unlike the personality elements, can be inherited²⁸² — which could at the time of their concrete commercial value then be utilised by the heirs.²⁸³ However, it is submitted that although one may agree with the outcome of the German position, it seems better not to consider the potential commercial value as an element of a personality right, which in essence has a non-patrimonial character,²⁸⁴ but rather as part of the immaterial property right to the advertising image (of the deceased). This viewpoint is supported by the fact that only the patrimonial components of the personality right are heritable.²⁸⁵ Accordingly, a dualistic model which recognises two separate rights (personality and patrimonial) in this regard, different from the monistic copyright model in Germany,²⁸⁶ is accepted.²⁸⁷

²⁷³Kerpen n 17 above at 60–1.

²⁷⁴Halpern n 51 above at 525ff; Ehmann n 153 above at 667; Timm n 152 above at 357–8; H-P Götting *Persönlichkeitsrechte als Vermögensrechte* (1995) at 168ff; Neethling, Potgieter & Visser n 1 above at 37 n 386; Kerpen n 17 above at 121–3; *contra* Gregoritza n 261 above at 101–3.

²⁷⁵Kerpen n 17 above at 17–20, 58–61, 142.

²⁷⁶*Id* at 142.

²⁷⁷Neethling, Potgieter & Visser n 1 above at 37 n 386; Halpern n 51 above at 524–5; Gregoritza n 261 above at 100–1; Kerpen n 17 above at 121–3, 142.

²⁷⁸S Koos 'Der Name als Immaterialgut' (2004) 106 *GRUR* 808 at 808ff.

²⁷⁹Fischer n 266 above at 199ff, 266–71; *cf* Kerpen n 17 above at 43.

²⁸⁰Kerpen n 17 above at 123.

²⁸¹Fischer n 266 above at 238ff, 267.

²⁸²Gregoritza n 261 above at 82ff.

²⁸³*Id* at 109ff.

²⁸⁴See above under *Nature of personality rights and personality harm*.

²⁸⁵Gregoritza n 261 above at 133ff.

²⁸⁶See above under *Author's personality right*.

Right to family name (identity) as trade name

When an entrepreneur uses his own name to distinguish his business (or products), it falls outside his personality sphere. This is clearly evident from the facts that after the death of the entrepreneur the trade name continues to exist, and that after transfer of the undertaking the new owner may continue to use the old name. Consequently the trade name is no longer an *indicium* of the identity of the entrepreneur, but in fact individualises his business and accordingly serves as the object of an immaterial property right.²⁸⁸ Although the same word (family name) may therefore individualise a person as well as his business, two different rights are involved.²⁸⁹ The fact that Swiss law protects immaterial property (such as trade names) as aspects of personality,²⁹⁰ is thus subject to criticism.

Breach of contract or damage to property and personality harm

It is a moot question whether violation of a patrimonial right, in particular breach of contract and damage to another's property, gives rise to actionable personality harm in addition to patrimonial damage. Most legal systems are against or very strict in awarding damages for mere sentimental loss in cases of property damage, while the position as regards breach of contract is not clear.²⁹¹ This also applies to breach of promise.²⁹² It is submitted that while it is true that, broadly speaking, all rights serve as a means whereby a person develops and asserts his personality in the legal order, the human personality is not directly protected by every private law right. That is the function of personality rights only — patrimonial rights protect the personality only indirectly or incidentally. For this reason a distinction between the two classes of rights is essential. A claim for non-patrimonial damages can therefore only lie where breach of contract or damage to another's property also infringes a personality right of the victim. This will for example be the case where damage to property is insulting and infringes the right to dignity, or breach of contract serious physical inconvenience or discomfort and therefore violates the right to bodily integrity.²⁹³

PERSONALITY RIGHTS AS HUMAN RIGHTS

Many human rights which are constitutionally enshrined as fundamental rights relate to rights of personality. A survey of different charters or bills of human rights reveals that the following personality rights or interests are so protected: life, security of the person, (physical-psychological integrity) freedom (also freedom of movement) of the person, dignity and privacy.²⁹⁴ However, these

²⁸⁷Gregoritza n 261 above at 117–23.

²⁸⁸*Cf* Koos n 278 above at 808ff.

²⁸⁹Neethling, Potgieter & Visser n 1 above at 38.

²⁹⁰Frick n 3 above at 227–30.

²⁹¹Rogers *et al* n 20 above at 285–7; Karner & Koziol n 27 above at 108ff.

²⁹²Neethling, Potgieter & Visser n 1 above at 204–5; *cf* Von Bar n 2 above at 125–6.

²⁹³Neethling, Potgieter & Visser n 1 above at 63–5; Karner & Koziol n 27 above at 110.

²⁹⁴Youngs n 45 above at 107–25, 155–68; Neethling, Potgieter & Visser n 1 above at 16–7.

rights do not for this reason change their juridical form. They remain personality rights as described previously,²⁹⁵ but receive, apart from delictual (and criminal) protection, first of all also vertical constitutional protection in that the state may not take any action which arbitrarily infringes or limits these rights. If a bill of human rights has horizontal operation (*Drittwirkung*), the protection of the relevant personality rights between individuals is naturally also enhanced.²⁹⁶ Such constitutionalisation of private law²⁹⁷ is occurring in varying degrees in most systems.²⁹⁸

In Europe and South Africa the following fundamental personality rights are intensively influencing the development of private law: the rights to bodily freedom (of movement), life, bodily integrity (particularly with regard to the duty of the state to prevent the death or injury of its citizens),²⁹⁹ dignity, reputation and privacy.³⁰⁰ The fundamental right to an environment that is not harmful to health or well-being, an aspect of the right to physical integrity, also enhances this personality right.³⁰¹ Viewed from the side of the perpetrator and not the victim, situations will inevitably occur where an entrenched personality right is in conflict with another fundamental right, for example, the right to reputation (dignity) or the right to privacy on the one hand, and the right to freedom of expression on the other; or the right to privacy versus the right to life,³⁰² or the right to identity or dignity versus the right to freedom of art and science.³⁰³ In such situations a careful and proper balancing or weighing up of the opposing rights should take place. In this regard the right to freedom of the press has already had a marked influence on the law of defamation in England and South Africa,³⁰⁴ as well as in other European countries where the relevant personality right(s) are

²⁹⁵See above under *Nature of personality rights and personality harm*; cf Guldix & Wylleman n 15 above at 1609–11; Lindenbergh n 30 above at 1669–71.

²⁹⁶Neethling, Potgieter & Visser n 1 above at 16–7.

²⁹⁷Markesinis & Unberath n 4 above at 28–32; Kerpen n 17 above at 143–4.

²⁹⁸*Eg.*, Germany (where the recognition of the general right of personality was based on the constitution: Van Gerven *et al* n 14 above at 142–3, 146, 152; Kerpen n 17 above at 39ff; Smits n 15 above at 119ff; Son n 12 above at 42–4); Austria (Frick n 3 above at 52–8); Ireland (Von Bar n 12 above at 304–6); Italy (Von Bar n 12 above at 567–71); the Netherlands (where developments are still in their early stages: Smits n 15 above at 119ff; Lindenbergh n 39 above at 1669–71; Nehmelman n 4 above at 175–9); Belgium (by implication in some cases but in others expressly rejected: Guldix & Wylleman n 15 above at 1612ff); France (Kerpen n 17 above at 73ff); Switzerland (after initial resistance: Frick n 3 above at 249–51); and South Africa (where the Bill of Rights expressly binds the state as well as natural and juristic persons: Neethling, Potgieter & Visser n 1 above at 55–6, 73ff; Neethling, Potgieter and Visser n 109 above at 18–23).

²⁹⁹Smits n 15 above at 139ff; Neethling, Potgieter & Visser n 1 above at 94 n 127.

³⁰⁰Von Bar n 12 above at 567ff; Ehmann n 153 above at 638–40; Neethling, Potgieter & Visser n 1 above at 74–8.

³⁰¹Von Bar n 12 above at 581–3.

³⁰²*Eg.*, where a medical practitioner wants to disclose his patient's HIV/AIDS status to the latter's sexual partner (Neethling, Potgieter & Visser n 1 above at 75).

³⁰³Larenz & Canaris n 14 above at 522ff.

³⁰⁴Von Bar n 12 above at 588–9; Neethling, Potgieter & Visser n 1 above at 129ff.

often found to weigh less than the right to freedom of expression.³⁰⁵ This also applies to the USA, where freedom of expression is highly valued and constitutional privilege was, for example, introduced as a defence to defamation.³⁰⁶ In England the debate furthermore is to what extent their Human Rights Act will have horizontal application in that country and may, for example, lead to the recognition of a right to privacy in tort law.³⁰⁷

POST-MORTEM PERSONALITY PROTECTION

There is general consensus that (at least some of) the personality rights (such as the rights to bodily integrity, privacy, identity and reputation) which a person possessed during his lifetime, should be afforded protection after his death.³⁰⁸ In this regard two main schools of thought can be identified.³⁰⁹ The traditional school, which is accepted in France and Switzerland,³¹⁰ asserts that since all personality rights are terminated by the death of a person,³¹¹ the idea of post-mortem personality rights is rejected. A deceased person's body, privacy or reputation can according to them only be protected in the context of the personality rights of his (close) relatives (for example, the right to their feelings of regard and piety for the deceased).³¹² The other school, recognised for example in Germany and Austria, propagates that the personality rights of a person — particularly his human dignity — continue after his death and are maintained by his relatives as fiduciaries (*Treuhänder*)³¹³ — dogmatically thus the continuation of subjective rights without a subject.³¹⁴ However, according to this school the only remedies are the interdict and a claim for retraction or a reply³¹⁵ since immaterial damages with the aim of salving the injured feelings of the deceased, cannot serve this purpose.³¹⁶ Some systems, like the Dutch, nevertheless allow non-patrimonial damages if it would have been granted to the deceased had he been alive.³¹⁷ Such damages can simultaneously also serve to salve the injured feelings of relatives. The above also applies to the commercial exploitation of the deceased's identity although patrimonial damages may in

³⁰⁵Von Bar n 12 above at 589–90.

³⁰⁶Keeton *et al* n 55 above at 804ff; Kerpen n 17 above at 134ff, 136–7.

³⁰⁷Smits n 15 above at 45–9; Kerpen n 17 above at 106ff.

³⁰⁸Von Bar n 2 above at 129–30.

³⁰⁹JMT Labuschagne 'Regsubjektiviteit na die dood? Opmerkinge oor die regsteoretiese implikasies van die ontplooiing van die postmortale persoonlikheidsreg' (2003) 66 *THRHR* 185 at 185ff.

³¹⁰Youngs n 45 above at 271; Frick n 3 above at 34–5, 217–8.

³¹¹See above under *Nature of personality rights and personality harm*.

³¹²Fischer n 266 above at 52ff; Gregoritza n 261 above at 76ff.

³¹³Fischer n 266 above at 129ff; Gregoritza n 261 above at 51ff.

³¹⁴Fischer n 266 above at 65–7.

³¹⁵See above under **SCOPE OF PROTECTION OF PERSONALITY RIGHTS**.

³¹⁶Larenz & Canaris n 14 above at 531ff; AW Bender 'Das postmortale allgemeine Persönlichkeitsrecht: Dogmatik und Schutzbereich' (2001) 52 *VersR* 815 at 815ff; Hubmann n 3 above at 340ff; Labuschagne n 309 above at 190ff; Karner & Koziol n 27 above at 106–7; Frick n 3 above at 32–4, 36–8; Fischer n 266 above at 27ff, 166ff; Gregoritza n 261 above at 67ff.

³¹⁷Von Bar n 2 above at 131 n 779.

addition be claimed by heirs if his identity had commercial value.³¹⁸ Fisher³¹⁹ proposes that post mortal personality protection should be limited to the same period after death as that applicable to copyright (70 years in Germany). Understandably, an author's right of personality is also protected after his death since society has a need to maintain the integrity of its cultural heritage.³²⁰ In addition, because the author's right of personality is part of his copyright, it is heritable and may be exercised by his heirs.³²¹ The English common law knows no post-mortem protection of the personality.³²²

PERSONALITY RIGHTS OF JURISTIC PERSONS

On the one hand, it can be argued that juristic persons do not possess personality rights since the personal suffering which normally results from violation of a personality interest is something which an abstract legal entity such as a *universitas* cannot experience.³²³ On the other hand, it is submitted that since personality harm can exist objectively without the victim subjectively experiencing injured feelings,³²⁴ and since juristic persons have a legitimate interest in the protection of certain personality interests such as their reputation, it is not only theoretically feasible, but also realistic and fair from a policy point of view to recognise that juristic persons possess certain personality rights. Of course, juristic persons can possess only those rights which are compatible with their nature or naturally apply to them.³²⁵ These personality rights are the rights to reputation, privacy and identity,³²⁶ the objects of which may be infringed without the victim being aware of it. Not so in the case of the rights to dignity and feelings since a violation of these personality interests exists only when there is actual mental suffering.³²⁷ Therefore, juristic persons should not be able to claim for the death of a natural person, as happened in for example Italy.³²⁸ It also stands to reason that juristic persons do not have a physical body and therefore cannot possess the rights to physical-psychological integrity and physical freedom.³²⁹ In

³¹⁸Fischer n 266 above at 199ff, 266–71; Gregoritza n 261 above at 81ff, 197ff.

³¹⁹Fischer n 266 above at 188ff, 195–7.

³²⁰Halpern n 51 above at 639.

³²¹Frick n 3 above at 170; Hubmann n 3 above at 342–3; Fisher n 266 above at 50–2; see also above under *Author's right of personality*.

³²²Von Bar n 2 above at 130.

³²³Neethling, Potgieter & Visser n 1 above at 68; Walter n 12 above at 149.

³²⁴See above under *Nature of personality rights and personality harm*.

³²⁵Hubmann n 3 above at 334; Von Bar n 2 above at 133. This viewpoint is endorsed by the South African Constitution (Neethling, Potgieter & Visser n 1 above at 68 n 334, 68ff; Walter n 12 above at 149–50).

³²⁶Frick n 3 above at 40, cf 255–6; Hubmann n 3 above at 336–7; Neethling, Potgieter & Visser n 1 above at 68ff.

³²⁷See above under *Nature of personality rights and personality harm*.

³²⁸Von Bar n 2 above at 132.

³²⁹Neethling, Potgieter & Visser n 1 above at 68ff; Frick n 3 above at 40; Hubmann n 3 above at 335.

Germany the name, dignity³³⁰ and privacy of juristic persons are protected, but they may not claim satisfaction³³¹ since they cannot experience satisfaction.³³² This is also the position in England as regards the defamation of juristic persons.³³³ However, in various other countries³³⁴ the courts allow a juristic person (and in Belgium even the state) to claim compensation for non-patrimonial harm as a result of infringement of its reputation.³³⁵ Although a claim for non-patrimonial damages by juristic persons is not unknown in Austria, its field of application is very limited.³³⁶

³³⁰Probably in the sense of '*äussere Ebre*' and not '*innere Ebre*' which a juristic person cannot possess.

³³¹Larenz & Canaris n 14 above at 520–1; Youngs n 45 above at 272; Nehmelman n 4 above at 51–2.

³³²Frick n 3 above at 41.

³³³Von Bar n 2 above at 132.

³³⁴Like Belgium, Italy, the Netherlands, France, Switzerland and South Africa.

³³⁵Von Bar n 2 above at 132 n 783; Youngs n 45 above at 267, 271; Frick n 3 above at 41, 227; Neethling, Potgieter & Visser n 1 above at 68–9.

³³⁶Frick n 3 above at 42.