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that is to say one which is fully informed and voluntary—a position which leaves considerable scope for interpretation. That said, the principle of causation, and its basis, have been clearly set out by the House of Lords and they have the potential to exclude liability in certain cases. But what is the “principle” of causation defended by the appeal court? If it is not respect for autonomy, neither does it seem to be a defence of a more limited position where an act of informed consent might break the causal chain. Administration, it seems, will not break the chain of causation, and supply for immediate consumption will be treated as equivalent to administration—if not also reckless in the circumstances.²⁵ Causation, it appears, is not really playing any effective role here, as everything will in practice be based on the judgment of recklessness. This is unquestionably a practical approach, but it is hard to see what remains of the principles of causation.

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Unincorporated Associations Reform

“All our law is about persons, things and actions. Let us first consider persons”. From Gaius,¹ through Justinian,² to the Scotland Act 1998,³ the tripartite distinction of private law has had an enduring influence. Yet it is a curious fact that the first pillar of the Gaian scheme has, in Scotland, with the important exception of child and family law, been all but ignored. It is not taught at university. There is no book on the subject. And outside academia the law of persons is perhaps not even widely recognised as a subject. In daily practice, however, there are a myriad of problems. The law of persons might be broken down into various sub-categories: persons and non-persons; natural persons and legal persons; persons and patrimonies. It is in the law of persons that concepts on legal personality and legal capacity need to be studied. The law of persons, though core, is too often ignored.

The law of clubs and unincorporated associations may be regarded as falling within what Rudolf von Jhering termed *Die Jurisprudenz des täglichen Lebens* (Law in Daily Life).⁴ If the law of unincorporated associations does not sound like a

²⁵ *MacAngus* and *Kane* at paras 50-51.

¹ Gaius, *Inst.* 1. 8: *omnia autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones. [sed] prius videamus de personis.*

² Justinian, *Inst* 1.2.12 is taken from Gaius.

³ Scotland Act 1998 s 126(4).

⁴ Cf A I Phillips, “Rating relief: miscellaneous organisations and associations” (1958) 1 *Conveyancing Review* 80: “The majority of solicitors represent one or more among the hundreds of clubs and non-commercial organisations whose objects exclude profit-making or use it only as a means to an end;

glamorous area of the law, that might be because associations are banal and, generally speaking, not-for-profit. But it does not reflect well on Scots law where the law on the banal and mundane is inaccessible, uncertain or unsatisfactory. Unfortunately, in the case of associations, the law is often all of these things. The Scottish Council for Voluntary Organisations estimates that there are some 45,000 voluntary organisations in Scotland, the majority of which are unincorporated associations.⁵ To put that figure in perspective, figures from Companies House for October 2008 indicate that there are some 147,000 companies registered in Scotland, of which 418 are public companies, while there are about 1,800 Scottish limited liability partnerships. Still, while most lawyers have some appreciation of company and partnership law, even the inquisitive lawyer will be hard pushed to find a clear statement of the Scots law of associations. Those associations that do not appear to encounter legal difficulties may do so in spite of the law and not because of it. The Scottish Law Commission has thus included the law of unincorporated associations in its present programme of law reform. That decision is welcome. In a discussion paper published in December 2008⁶ the Commission has identified a number of problems and suggested some possible solutions.

A. PRESENT DIFFICULTIES

The discussion paper highlights a number of areas where the present law is thought to be unsatisfactory. First and foremost, the Commission considers the problems that ensue from the status of an association as “unincorporated”. Not being a legal person, an association cannot commit delicts,⁷ enter into contracts⁸ or own property. There is some evidence to suggest that unincorporated associations may find it more difficult to obtain adequate insurance cover.⁹ Much of the discussion paper is therefore focused on the issue of legal personality and the extent to which the law can be reformed to rectify some of the difficulties associated with it. There is no doubt that lack of personality is a major issue. But there are many other difficult issues too. Legal personality does not necessarily imply active transactional capacity. It is not clear to what extent an *ultra vires* doctrine may apply to associations. The law, at present, appears not to provide any protections for third parties who transact in good faith with a person purporting to act, say, as an office bearer of an association. Since

each firm has its Honourable Company of Sputnik Worshipers or local table-tennis association whose legal problems make up by their complexity and imperative character for their lack of patrimonial consideration”. Many unincorporated associations, of course, have patrimonies of considerable wealth to which much consideration is given.

⁵ Scottish Law Commission, Discussion Paper on *Unincorporated Associations* (Scot Law Com DP No 140, 2008; available at www.scotlawcom.gov.uk). See too C Tyre, “Persons unknown” (2009) 54(1) JLSS 22.

⁶ Discussion Paper (n 5) para 1.2.

⁷ *Harrison v West of Scotland Kart Club* 2004 SC 615.

⁸ So a member buying a drink in the bar of an unincorporated club may not (subject to the details of licensing law) have a contract, a point made by a young Harold Laski in his interesting article “The personality of associations” (1915) 29 Harvard L Rev 404 at 420.

⁹ Discussion Paper (n 5) para 3.9, drawing on a study undertaken in England in 2003.

the “association”, lacking legal personality, cannot be the principal, the usual rules of ostensible authority cannot apply.¹⁰ The law of trusts can, in some circumstances, provide assistance, but only where office bearers purport to act as trustees.¹¹ In day-to-day contracts, however, few do so. There are also problems with internal governance and procedure: there are no hard and fast rules governing how, when or where meetings should be called. One recurring theme throughout the discussion paper is the expressed desire that any reform of the law of associations should not impose additional formalities or regulatory costs on the voluntary sector. But if there is to be a root and branch reform, such as attribution of legal personality, it is difficult to see how associations can have their cake and eat it – can benefit from separate legal personality without publicity. The reason that associations can be run so informally at the moment is, in short, because an association is not a legal person.

B. SUGGESTED SOLUTIONS

The Scottish Law Commission focuses on the legal personality issue. There are essentially four alternative proposals:¹²

- (1) optional acquisition of legal personality by registration;
- (2) optional acquisition of legal personality by expression of intention;
- (3) automatic attribution of legal personality;
- (4) attribution of legal personality where a minimum threshold is fulfilled.

C. DISCUSSION

Although the law of persons in Scots law is underdeveloped, there is a long history. In general the approach has been liberal. The law has long conferred personality on partnerships without much formality. This approach is perhaps reflected in the Court of Session’s famous decision to recognise a common law limited partnership (a partnership *en commandite*) without appearing to require additional formality.¹³ A similarly liberal approach to other legal persons can be detected, with custom recognising as legal persons such diverse associations as the Aberdeen Harbour

10 *Tinnevelly Sugar Refining Co Ltd v Mirrless, Watson & Yaryan Co Ltd* (1894) 21 R 1009. If the members are the principals, there is no reason why their liability to third parties should be limited to the funds contributed. But compare Lord Marnoch in *Harrison* (n 7) at para 23.

11 A trustee can expressly contract to the effect that only the trust funds should be liable: *Gordon v Campbell* (1840) 2 D 639 affd (1842) 1 Bell’s App 428. The contractual liability of trustees has its own problems: see Scottish Law Commission, Discussion Paper on *Liability of Trustees to Third Parties* (Scot Law Com DP No 138, 2008).

12 Para 4.20 of the discussion paper suggests a number of alternative thresholds: (i) a minimum number of members; (ii) a minimum asset value; (iii) a minimum annual income or turnover; or (iv) adoption of a constitutive document containing essential provisions concerning the association’s objects and internal governance.

13 The “Arran Fishing Company” case: *Stevenson & Co v Macnair* (1757) Mor 14560 and 144667, 5 Br Sup 340, Kames Sel Dec 191. See generally J Robertson Christie, “Joint stock enterprises in Scotland before the Companies Acts” (1909) 21 JR 128.

Board,¹⁴ the Royal Faculty of Procurators,¹⁵ the Faculty of Advocates, even prior to formal incorporation (in the case of the Harbour Board and the Royal Faculty). A similar approach can also be found in respect of trusts where, in one case at least, Lord President Inglis conferred on a trust contractual capacity.¹⁶ The primary reason for this approach, however, may simply be that Scots law appears not to have engaged with theoretical niceties that have long troubled Continental and English jurists.¹⁷ So the Commission's suggestion that associations be accorded legal personality is thus certainly in line with the traditional Scottish approach. But there are many other difficult issues, not raised in the discussion paper, which would also have to be addressed. The law of persons involves complex legal questions: legal personality, active and passive transactional capacity, perpetual succession and liability. They cannot all be covered here and they could not all be covered in the discussion paper. For now, I would raise only four general issues.

First, conferring legal personality on associations means, in principle, that each association, and not its members, is liable for its obligations. In practical terms the members would not be liable beyond their subscriptions. In the absence of a register, however, it is difficult for third parties to obtain any information about the "person" with whom they contract. It is desirable therefore that some form of registration be required, even if that is registration of a constitutive document and constitution in the Books of Council and Session. If it were decided to confer personality without publicity there might be a case for an exception to the general rule and the members being fixed with secondary liability, as cautioners, for the debts of the association.

Second, automatic attribution of personality appears problematic since it is possible that such a rule might cover "associations" which do not wish to be legal persons.

Third, if registration is to be required, it might be queried whether a new legal person is needed. For the law already provides numerous vehicles – unlimited companies, companies limited by guarantee, community interest companies, and the Scottish charitable incorporated organisation – that could equally serve the function. That said, however, there may still be a gap for a "ScAss" (Scottish Association), for associations which are not charitable, which do not need an asset-lock and which do not wish to be subject to the Companies Acts. But the problem may be as much to do with inaccessibility of legal rules as their content: if existing corporate vehicles available to the not-for-profit sector are being ignored because of the perceived administrative burden, the worry is that there will be a similarly low uptake for the ScAss. And, if there is a low uptake of existing vehicles, it might also suggest that the problem of a lack of legal personality is not as great as the representations made to the Commission suggest.

14 J Micklethwait and A Woodridge, *The Company: A Short History of a Revolutionary Idea* (2003) 23 confer on the Aberdeen Harbour Board the accolade of being the oldest company in the UK. See generally J R Turner, *Scotland's North Sea Gateway: Aberdeen Harbour, AD 1136-1986* (1986) 3.

15 D Murray, "The Faculty of Procurators in Glasgow" (1897) 13 *Scottish Law Review* 36.

16 *Alexander's Trs v Dymock's Trs* (1883) 10 R 1189.

17 See, in particular, the discussion in R L C Hunter, "Corporate personality and the Scottish burgh", in G W S Barrow (ed), *The Scottish Tradition: Essays in Honour of Ronald Gordon Cant* (1974) 223.

Finally, the discussion paper makes no proposals to deal with some of the difficulties surrounding internal and external relations. That is, perhaps, understandable. Under the present law an unincorporated association, not being a legal person, has no obligations: the default position is that office bearers or members will be personally liable on any contracts that they make. Once a new legal person is admitted, however, it is necessary to prescribe, even if only at a basic level, rules on its relationships, both internally (with members) and externally (with third parties). Rules regulating the insolvency of the association will also be required.¹⁸

D. DEVELOPMENT OF THE LAW OF PERSONS

The law of persons is core to private law. In other legal systems, particularly on the Continent, there are detailed and systematic regimes which have proved popular for pan-European associations. The proposed reform of the law of unincorporated associations highlights an unfortunate lacuna in Scots private law. The discussion paper and any subsequent reform of unincorporated associations cannot, perhaps, bridge that gap in its entirety. The law of associations is but part of a larger law of persons and it is in this context that the wider implications of legal personality ought to be considered: capacity, internal proceedings, external transactions, third party protection, insolvency. My own view is that there is, on balance, probably room for a new legal person for associations and that some, even minimal, formality should be required in order for an association to benefit from legal personality. But some basic principles are also needed for regulating the consequences of legal personality.

The discussion paper contains some valuable proposals on the law of associations. Of equal importance, however, it breaks the seals on a much neglected area of law, one too long hidden from view.

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Statutory Derivative Proceedings in Scotland: A Procedural Impasse?

Where a shareholder seeks a remedy on behalf of a company on the basis that a director has engaged in an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust, sections 265 to 269 of the Companies

¹⁸ An association can be sequestrated: Bankruptcy (Scotland) Act 1985 s 6(1)(c). It is also possible to petition the court for the appointment of a judicial factor over the affairs of the association: *Munro v Edinburgh & District Trades Council Social Club* 1989 GWD 6-120. Any reforms to the law of associations should retain this possibility.