



Lindsay, B. (2019) The reform of defamation law in Scotland. *Media and Arts Law Review*, 23(1), pp. 109-114.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/188542/>

Deposited on: 24 July 2019

Enlighten – Research publications by members of the University of
Glasgow

<http://eprints.gla.ac.uk>

Scotland Media Law Update

The reform of defamation law in Scotland

*Bobby W M Lindsay**

Introduction

True to the mixed nature of Scots law itself, the law of defamation in Scotland consists of Romanistic foundations which subsequently have been built upon (or, more polemically, eroded) by the reception of English precedent and principle.¹ The resulting body of law is not always coherent.² For example, how does Scots law's adoption of the objective *Sim v Stretch* test,³ conceiving of defamation as an injury to reputation, fit with its delictual roots; with the *actio iniuriarum* of Roman Law protecting interests beyond reputation such as dignity? Moreover, how can that objective test — enquiring as to the effect which the impugned statement would have on the pursuer's reputation in the eyes of a hypothetical reasonably-minded observer — be used to assess the defamatory nature of statements made to the pursuer alone, which are actionable as defamation in Scotland? And where do the various 'verbal injury' delicts, which crystallised before the heyday of English reception, fit in:⁴ verbal injury simpliciter;⁵ *convicium*;⁶ and slander of title, property, and business.⁷

One would think that this conceptual muddle would invite targeted reform. However, while reform is afoot, the effect of this will be to further assimilate Scots to English law without consideration of the underlying bedrock. The impetus for this reform instead is campaigner-driven. The *Defamation Act 2013* (UK) — save for a few minor provisions — does not apply to Scotland. Condemnation of this position came to a head at the same time when the Scottish Law Commission ('SLC') was inviting suggestions as to what to include in its Ninth Programme of Law Reform.⁸ The SLC duly turned its consideration to the law of defamation.

* Lecturer in Private Law, University of Glasgow School of Law. Email: bobby.lindsay@glasgow.ac.uk.

¹ For a historical account, see, eg, John Blackie, 'Defamation' in Kenneth Reid and Reinhard Zimmerman (eds), *A History of Private Law in Scotland* (Oxford University Press, 2000) vol 2, 633

² For modern attempts to explain the law, see, eg, Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (W Green, 2010) chs 7–11; Brian Pillams, *Delict: Law & Policy* (W Green, 5th ed, 2014) ch 5; Joe Thomson, *Delictual Liability* (Bloomsbury Professional, 5th ed, 2014) ch 15; Kenneth Mck Norrie, *Defamation and Related Actions in Scots Law* (Butterworths, 1995).

³ [1936] 2 All ER 1237, 1250.

⁴ This is not to mention the place of the protection of privacy: there has been no Scots law case definitively adopting the English approach to 'misuse of private information', but it is thought that such an outcome is likely given the shared influence of the *Human Rights Act 1998* (UK).

⁵ See, eg, *Paterson v Welch* (1893) 20 R 744.

⁶ A delict based upon the making of an insulting or vituperative statement regarding the subject with the intention to inflict harm. Interestingly, truth has never been definitively established to be a defence to this delict. See David M Walker, *The Law of Delict in Scotland* (W Green, 2nd ed, 1981) 736–40.

⁷ See, eg, *Steele v Scottish Daily Record & Sunday Mail Ltd* 1970 SLT 53 (business); *Mclrvine v Mclrvine* [2012] CSOH 23 (7 February 2012) (title).

⁸ Scottish Law Commission, *Ninth Programme of Law Reform*, Scot Law Com No 242 (2004).

This resulted in a Discussion Paper of March 2016,⁹ which, after consultation, led to its Report in December 2017.¹⁰ In January 2019, the Scottish Government¹¹ issued a consultation on ‘Defamation in Scots Law’ which closes on 5 April 2019.¹² Though the bulk of the consultation relates to the recommendations made by the SLC in its Report, the Scottish Government added two proposals which were not the subject of discussion by the SLC in its Discussion Paper or Report.

This note first will outline the recommendations made by the SLC, and then will turn to the additional points raised by the Scottish Government.

The Scottish Law Commission’s proposals: An overview

In its Report, the Scottish Law Commission made several recommendations, many of which emulate the reforms made by the *Defamation Act 2013* (UK) to English law. The key points are as follows:

- The introduction of a ‘serious harm threshold’
- The introduction of the need for third-party communication
- Limitation and codification of rules on responsibility for publication
- Clarification and codification of defences, with abolition of common law equivalents:
 - Truth
 - Public interest publication
 - Honest opinion
- Consolidation of statutory provisions relating to privilege
- Clarification and codification of offer to amend procedure
- A new rule of subject matter jurisdiction
- Removal of presumption of jury trial
- Codification of ‘economic slander’ delicts
- Abolition of all common law ‘verbal injury’ delicts
- Codification and clarification of the *Derbyshire* prohibition on defamation actions by public authorities.
- Reduction of limitation period to one year, and removal of multiple publication rule for limitation purposes
- Remedial clarification: making of statements

The net effect of these recommendations would be to assimilate Scots law with English law even further. Some of the provisions are indeed simply copied and pasted from the *Defamation Act 2013*. The following comments are directed to the more controversial proposals.

⁹ Scottish Law Commission, *Discussion Paper on Defamation*, Discussion Paper No 161 (2016) (‘SLC DP’).

¹⁰ Scottish Law Commission, *Report on Defamation*, Scot Law Com No 248 (2017) (‘SLC Report’).

¹¹ Defamation, as part of delict and thereby ‘Scots private law’, is a matter devolved to the Scottish Parliament: *Scotland Act 1998* (UK) s 29(4), read with s 126(4).

¹² Scottish Government, *Defamation in Scots law: A consultation* (January 2019) (‘ScotGov CP’) <www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2019/01/defamation-scots-law-consultation/documents/defamation-scots-law-consultation/defamation-scots-law-consultation/govscot%3Adocument>.

Thresholds: Jurisdiction

It is proposed¹³ to enact a rule based on s 9(2) of the *Defamation Act 2013*. The effect of this is that the Scottish courts will only have jurisdiction over a non-EU or EEA (European Economic Area) domiciled defender if the court is satisfied that, out of all of the places of publication of the statement, Scotland clearly is the most appropriate place to bring defamation proceedings in respect of this. Two comments can be made about this proposal, which is viewed relatively benignly by the Scottish Government. First, the proposal as presently drafted makes reference to EU/EEA mandatory rules of jurisdiction, which may no longer be necessary in the aftermath of Brexit. Secondly, as has been observed in relation to the equivalent English provision,¹⁴ the effect will be to create a limit on the subject matter jurisdiction of the Scottish court, which may (depending on the interpretation to be accorded to what is ‘appropriate’) result in a denial of justice in extreme cases.¹⁵ It would be preferable to express the rule as a general presumption that jurisdiction will not be exercised if Scotland is not the most appropriate place to bring proceedings, which could be rebutted in exceptional cases.

Thresholds: Serious harm

Once the jurisdictional hurdle has been overcome, it is proposed to then impose a ‘serious harm’ threshold on lines identical to s 1 of the *Defamation Act 2013*.¹⁶ Such a filtering device might appear disproportionate given the low number of defamation actions which are issued in Scotland. However, it could be argued that the object is to dissuade unjustified threats of defamation action. To this, it could be countered: (i) a more precise deterrent may be formulated;¹⁷ (ii) a more general deterrent, in the form of the development of the delict of malicious prosecution, could be formulated;¹⁸ (iii) a more effective procedural mechanism for weeding out unmeritorious claims could be developed (at present, Scots law does not have a developed doctrine of abuse of process¹⁹ or a ‘strike-out’ mechanism).²⁰ The notion that there may be delictual wrongdoing, but that that wrongdoing is not actionable because the harm is not ‘serious’ enough is an anathema to the fabric of the principles of Scots law, and it might be more valuable to seek to develop a functionally similar safeguard without creating two tiers of defamatory statements: those which are wrongful but not actionable, and those which are both wrongful and actionable.

Third-party communication

¹³ SLC Report, above n 10, 76–8 [8.2]–[8.10].

¹⁴ See Alex Mills, ‘The law applicable to cross-border defamation on social media: whose law governs free speech in “Facebookistan”?’ (2015) 7 *Journal of Media Law* 1, 6.

¹⁵ See James Fawcett, Maire Ni Shuilleabhain and Sangeeta Shah, *Human Rights and Private International Law* (Oxford University Press, 2016) 542-3 [10.189]–[10.194].

¹⁶ SLC Report, above n 10, 9–11 [2.9]–[2.13].

¹⁷ See the ‘unjustified threats’ remedy which has been proposed in the Scottish Government’s consultation, discussed below.

¹⁸ There is sparse authority on this delict in Scotland, and it is yet unclear if it would be extended to cover civil claims: cf, for English law, *Willers v Joyce* [2018] AC 779.

¹⁹ See Lord Reed, ‘Lies, damned lies: Abuse of process and the dishonest litigant’ (Speech delivered at the 5th Annual Lecture, Centre for Commercial Law, University of Edinburgh, 26 October 2012) <www.supremecourt.uk/docs/speech-121026.pdf>. His Lordship refers (at 4) to the defamation case of *Levison v Jewish Chronicle Ltd* 1924 SLT 755.

²⁰ A fact noted by the Scottish Government in its consultation: see ScotGov CP, above n 12, 20–1 [57]–[58].

Scots law presently permits the subject of a defamatory statement to pursue the source from which it emitted even if the statement was communicated no further than the subject-recipient. This allowance for purely private defamation is striking: it is not shared by English law, nor the major continental systems. The rule stems from early 19th century case law concerning the sending and receipt of letters which savaged the subject's character, but eventually was extended to include bipartite verbal communications. Therefore, it simply may be a product of the incipient nature of the law of defamation at that time, where the objective test of English law had not yet been fully adopted and the 'verbal injury' delicts held more prominence.

The Scottish Law Commission proposed the abolition of the rule,²¹ and the Scottish Government appears poised to accept the need for third-party communication without further consultation. True, the idiosyncratic nature of the rule readily may suggest that it is without merit and merely is an accident of the particular historical development of the law in Scotland. Nevertheless, the Scottish Law Commission did recognise that the proposal to impose a requirement for third-party communication may create a lacuna in the causes of action available to an affronted pursuer, which would be compounded by the proposal to abolish the non-business verbal injury delicts. Moreover, precious little attention has been directed at the development of the 'purely private' communication rule, and no study has been undertaken as to the relationship between that rule and the essential nature of defamation in Scots law. There therefore is the danger that abrogating the rule may have unintended consequences for the wider fabric of the delict of defamation. It may also be seen as disproportionate: if the 'serious harm' threshold is enacted, then it likely will preclude many 'purely private' actions. Furthermore, if a 'purely private' defamatory communication can, in theory, pass the 'serious harm' threshold, then it should be capable of triggering a remedial response.

Honest opinion defence

The proposals to codify the defences of truth and publication in the public interest (formerly 'Reynolds privilege') would cast them almost identically to the equivalent provisions in the *Defamation Act 2013*.²² More noteworthy is the proposal to enact a statutory defence of 'honest opinion'.²³ The law in Scotland on this point has not yet crystallised fully, and there is some uncertainty as to whether or not the developments reflected in the UK Supreme Court's judgment in *Joseph v Spiller*²⁴ apply north of the border. In *Massie v McCaig*,²⁵ the Inner House of the Court of Session opined that 'this court is concerned with what the law in Scotland actually is and not what it might become, should it develop in the same way as it has in England' before emphasising the need for the comment to be based on true facts and for the matter to be one of the public interest.²⁶ And, in a recent high-profile defamation action,²⁷ a first instance judge opined that, while there may be a good argument that the law of Scotland reflects *Joseph v Spiller*, that determination was not required at that, interlocutory, stage.²⁸ Therefore, the

²¹ SLC Report, above n 10, 7–9 [2.2]–[2.8].

²² SLC Report, above n 10, 109–111 clauses 5 and 6, cf *Defamation Act 2013* (UK), ss 2 and 4.

²³ *Ibid* 20–31 [3.14]–[3.62]

²⁴ [2011] 1 AC 852.

²⁵ 2013 SC 343.

²⁶ *Ibid* 353 [32]–[33].

²⁷ *Campbell v Dugdale* [2018] SC EDIN 49 (17 August 2018).

²⁸ *Ibid* 35 [163]–[164].

proposal to adopt a defence along the lines of that contained in the 2013 Act – thereby removing the ‘public interest’ requirement - is to be welcomed.

The Scottish Government consultation: An overview

Of the proposals suggested by the SLC, the Scottish Government sought views only on the following: the serious harm threshold; the rules on ‘secondary publishers’; honest opinion; offer to make amends; the retention of the ‘economic interest’ slander delicts, the multiple limitation rule and limitation. The Scottish Government was content to accept the other proposals without further consultation.²⁹ However, the consultation also raises two issues of its own accord: a statutory definition of defamation, and an ‘unjustified threats’ remedy.

Defining defamation

It avowedly was not the intention of the SLC to suggest codification of the entire law of defamation. As such, nowhere did it suggest, or consult upon, the enactment of a statutory definition of what amounts to defamation. It therefore is surprising that the Scottish Government has consulted on such a provision, especially without first seeking to set out a definition potentially worthy of statutory enshrinement.³⁰ While such a move tentatively is justified on the basis of legal certainty, a statutory definition of what essentially is a simple test³¹ would do little to ameliorate uncertainty in the absence of complete codification. This would be of little assistance to a pursuer or defender when several important and technical matters — for instance, the rules as to the context and meaning of imputations, the issue of identification, and defences such as fair retort — are left uncodified.

Unjustified threats

A more interesting and novel proposal floated by the Scottish Government is the introduction of an ‘unjustified threats’ regime, similar to that which operates in the context of trademarks and patents.³² The notion is that, where a party receives a threat of defamation proceedings, then the recipient can raise proceedings against the sender to justify their threat.³³ If they are unable to, then the recipient may seek an interdict³⁴ and/or damages. Questions no doubt arise as to what heads of damages would be recoverable, and how they would be assessed. Moreover, again the mischief aimed at by such a proposal might be more generally a result of the lack of a ‘summary judgment’ mechanism in Scotland. However, the proposal is a thoughtful, targeted response to the ‘chilling’ effect of threats to raise defamation proceedings and is worthy of further consideration.

Conclusion

It is about time that the Scots law of defamation was reformed. Although one can caution about the need for sensitivity when dealing with the mixed foundations of Scots law, it is unsurprising that the reforms contained in the *Defamation Act 2013* have proved an appealing model of reform north of the border. Even once the consultation process is over, however, it may be

²⁹ Listed in ScotGov CP, above n 12, 13–16 [37].

³⁰ Ibid 17–18 [39]–[47].

³¹ The consultation paper recognises the simple nature of the definition at ibid 18 [46].

³² See the amendments made by the *Intellectual Property (Unjustified Threats) Act 2017* (UK).

³³ See ScotGov CP, above n 12, 27–8 [82]–[93].

³⁴ The Scottish term for an injunction.

some time before the enactment of these reforms: quite how much legislative time in the Scottish Parliament will be left for matters other than Brexit and its effect on the continuing place of Scotland within the United Kingdom remains to be seen.