The Defamation and Malicious Publications (Scotland) Bill: An Undignified Approach to Law Reform?

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The Defamation and Malicious Publications (Scotland) Bill was introduced to the Scottish Parliament in December 2019. The introduction of this Bill stems from the Scottish Law Commission's Report on Defamation (Report No.248), which was published in 2017. If passed, the legislation will (amongst other things) sweep away the nominate 'verbal injuries'[1] known to Scots law (s.27), abolish certain key common law defences to an action of defamation (s.8), replacing them with a range of statutory defences (ss.5-7), and introduce a requirement that a defamatory statement must result in 'serious harm' to an individual's reputation in order to be actionable (s.1 (2) (b)). Scots law, thus altered, will then largely mirror the law of England and Wales as set out in the Defamation Act of 2013. This, in the present author's opinion, would be most regrettable. Although there is little doubt that the present Scots law of defamation is in need of reform – as, indeed, is the wider law pertaining to the protection of 'personality rights' in this jurisdiction, since this area of law largely remains (to quote Professor Reid) a 'thing of shreds and patches'[2] – this reform should not seek to make Scots law more like English law, but should rather draw on and develop Scotland's historical European connections.

Defamation, in Scotland, originally grew out of the received Roman law relating to *iniuria* ('injury', in the technical sense of contumelious wrongdoing inflicting an 'insult' or 'affront' to or upon another person, as opposed to the now-usual meaning of 'bodily wounds' sustained) and so is, properly speaking, a nominate sub-species of *iniuria verbalis* or 'Verbal Injury'. Initially, the law in this area was used as a means of protecting individual interests in *fama* ('fame', or 'reputation') and *dignitas* ('honour', or 'dignity'). This marks a key conceptual difference between the law of Scotland and that of England and Wales; the latter jurisdiction has not, traditionally, regarded 'dignity' as an interest which is worthy of express legal protection. The Anglo-American law of libel and slander, as contrasted with the Scots law of Verbal Injury, is conceptually concerned with the reparation of quantifiable patrimonial loss effected by the wrongdoing in question. Damage to reputation is reparable since the consequences of such can be comprehended in monetary terms (e.g., you falsely said that I put poison in my croissants: now no one will come to my bakery and so I have lost business and custom); affronts to dignity alone, as forms of non-patrimonial injury, have by contrast not been historically thought reparable at common law (though, through statutory intervention, Parliament did introduce an *iniuria*-like tort – 'harassment' – to English law via the Protection from Harassment Act 1997).

In Scotland, on the other hand, affronts which lead to no patrimonial loss, but only hurt to one's pride or self-esteem, have always been reparable at common law. It has long been

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[1] The law of 'Injury' has traditionally divided into two governing categories; 'Real Injury', which comprehends injuries inflicted by any means *other than* words and 'Verbal Injury' which comprehends injuries inflicted by words spoken, written or published. In this blogpost, 'Verbal Injury' or 'Verbal Injuries' – capitalised as such – can be contrasted with the lower case 'verbal injuries' which are, properly speaking, sub-species of Verbal Injury.

[2] Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law*, (Edinburgh: W. Green, 2010), para.1.02

recognised that 'damages' are payable to one who suffers loss, with the remedy of '*solatium*' being granted to 'soothe' one who suffers wounded feelings as a result of a delictual wrong. Though typically conflated or taken together, these remedies are conceptually separate: damages repair instances of *damnum* (loss), while an award of *solatium* affords reparation for non-patrimonial 'injury' or affront. Although the Anglo-American Common law has adopted the terminology of *solatium*, it has not adopted the taxonomy which led to the recognition of this remedy. Thus, in spite of some superficial commonality, the law of Scotland, unlike that of the rest of the United Kingdom, does not conceive of 'reputation' in purely patrimonial terms, nor does the law of defamation afford remedy only in cases of *damnum* (i.e., patrimonial loss).

Throughout Continental Europe – and within Scotland – the Roman law of *iniuria* was developed to protect a range of 'personality interests', including (but clearly not limited to) individual interests in one's physical integrity, liberty, privacy, dignity and 'honour'. Affronts to these interests may be repaired by an award of *solatium*, even where no loss is suffered by the pursuer. In the case of defamation, specifically, there existed (indeed, may yet exist, the remedy having never been expressly abrogated) an additional remedy for non-patrimonial injury: the palinode. The palinode involved the defender's formal recantation of the offensive statement followed by a public apology for having defamed the pursuer. Though it has been said that 'money is the universal solvent' (*Auld v Shairp* (1874) 2 R. 191, at 199 *per* Lord Neaves), the palinode proves that this is not so. A victim of defamation, who has suffered affront rather than loss, may wish no more than their name to be cleared publicly and, historically, Scots law possessed a mechanism to allow for this. The Scots law of defamation, from its inception, has thus possessed the potential to afford remedy in cases in which no quantifiable loss or 'damage' was suffered by the person defamed. At a root level, then, the purpose or goals of the Scots law of defamation differ in character from those South of the border.

That the Scots delict of defamation has long possessed the potential to afford remedy in cases of patrimonial loss and non-patrimonial injury alike has proven in part to be a liability, rather than an asset, however. It has led to defamation becoming, to borrow Professor Norrie's memorable terminology, a 'Janus-headed delict' which has 'not surprisingly, but with disastrous effects on the coherence of the law', allowed for the conflation of liability based on the occurrence of some culpable wrongdoing (i.e., a claim based on the need for reparation of *damnum iniuria datum* – loss caused by wrongful conduct) with that based on the occurrence of 'injury' in its nominate sense (i.e., a claim based on affront caused by *contumelia* – i.e., contumelious – that is, hubristically insulting – conduct).[3] The patrimonial interest which one has in one's reputation (e.g., in the form of business goodwill) is logically distinct from the non-patrimonial interests that one has in one's good name (i.e., one's general interest in the estimation in which one is held by other members of the community), but the action for defamation has come to be the prime means of vindicating both interests.

Due to the primacy of defamation as an action, the other nominate 'verbal injuries' have been neglected and are typically passed over by pursuers (or, rather, their agents/counsel), who find that they have an easier time making out a case of defamation than one of, say, *convicium*

[3] See Kenneth McK. Norrie, *The Scots Law of Defamation*, in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: Dundee University Press, 2009), pp.438-439

or injurious or malicious falsehood. This is because defamation, unlike the other sub-species of Verbal Injury, evolved, in the nineteenth century, into a delict of *de facto* strict liability, meaning that there ceased to be a need to prove *contumelia* on the part of the defender. Rather than requiring the pursuer to allege, and prove, that the defender exhibited *animus iniuriandi* (an intention to injure) in making the defamatory statement, the Scottish courts instead came to formulate an irrebuttable presumption of malice in all cases in which it was established that the words complained of had, or were capable of having, a defamatory meaning. Similarly, in all cases in which the defamatory nature of the words complained of was established, it also came to be presumed that the words complained of are untrue, although, unlike in the case of the presumption of malice, it has always been possible to rebut the presumption of falsity by means of a successful defence of *veritas*, or 'truth'.

Although the law has, by recognising the defence of 'qualified privilege' (which arises 'when it is the duty or the right of the defender to speak upon the subject', *per Watson v Burnet* (1864) 24 D. 494, *per* Lord Deas) and 'responsible journalism' (*Ewing v Times Newspapers Ltd*. [2008] CSOH 169 *per* Lord Brodie at para.27), ceased to inflexibly hold that all (*prima facie*) defamatory statements are unquestionably uttered or published with malicious intent, it remains the case, at the moment, that the pursuer in any defamation action starts in a strong position. Provided that the words that are complained of are 'derogatory or demeaning' in the eyes of the reasonable reader, then the pursuer benefits from two presumptions which place the onus of proof on the defender to justify their actions. This may be contrasted with the position in respect of the other 'verbal injuries'. To succeed in such a claim of slander of goods or slander of title, for instance, it must be established that the defender made 'false statements, either written or verbal', which were 'maliciously communicated to third parties' and which were 'calculated or likely to produce, and which in fact do produce, actual damage to the pursuers' business interests' (*Barratt International Resorts Ltd. v Barratt Owner's Group Ltd.* [2002] A2387/99, *per* Lord Wheatley at para.26). In such cases, the pursuer does not benefit from a presumption of falsity, nor from a presumption of malice on the part of the defender. They must aver and prove each point and they must demonstrate patrimonial loss.

Likewise in cases of *convicium*, or of 'verbal injury to feelings', the pursuer must aver and prove the falsity of the injurious words, as well as malevolence on the part of the defender. It must also be demonstrated that 'injury [in the sense of affront] resulted' (*Steele v Scottish Daily Record* 1970 SLT 53, *per* Lord Wheatley at p.60), though it can perhaps be generally inferred that one who has proven willing to incur the time and expense of litigation has, axiomatically, suffered sufficient 'injury'. In any case, the attractiveness of the nominate delict of defamation, in contrast to the other sundry sub-species of Verbal Injury, is readily apparent: it allows a pursuer to reclaim both damages (as might be claimed in a claim of slander to goods or title) *and solatium* (which might be claimed in a case of *convicium*) without there being any need to advance positive proof of malice or falsity, as is required when another nominate sub-species of Verbal Injury is averred.

In light of this, the move to abolish the common law verbal injuries by way of s.27 of the Defamation and Malicious Publications (Scotland) Bill seems reasonable. Likewise, the need for reform is manifestly apparent; the legal position in respect of defamation and verbal injury, as outlined above, remains, as Professor Norrie noted in 2009, 'needlessly complex'. This does not mean, however, that it is appropriate to simply copy over a foreign statute from an alien tradition into Scots law. English law, with its unique legal history, may not recognise

'dignity' as a valuable interest worthy of legal protection within the law of tort, but that does not mean that the Scots law of delict should jettison its tools for the protection of non-patrimonial interests. Indeed, while the Scottish Parliament is taking time to debate the Defamation Bill, the First Minister's Advisory Group on Human Rights has recommended the introduction of a new statute affirming the centrality of 'human dignity' within the fabric of the human rights law of Scotland. It would be unjust, unreasonable and illogical for the Scottish Parliament to create a new framework for human rights which recognises 'dignity' as a core human right with one hand while at the same time with the other it excises a core mechanism for the protection of 'dignity' – and dignitary interests – from private law.

Further to this, although private law actions to protect and preserve dignitary interests have come under considerable criticism at times throughout their history,[4] it is a base fact of the human condition that 'there will always be occasions when judges will seem to protect one party from being held up to hatred, contempt or ridicule by another, and that however much the *actio iniuriarum* may be suppressed, it is liable only to appear elsewhere in the law'.[5] The veracity of this observation is evidenced by the English experience, where – as noted – Parliament was moved to create an '*iniuria*-like' tort through statutory intervention, but also through the experience of Germany where the *actio iniuriarum* was thrown out "by the front door," yet nevertheless "managed to sneak in through the back window" as a result of the recognition of an *Allgemeines Persönlichkeitsrecht*—a general personality right introduced by the Basic Law and later expanded to functionally serve the same purposes as the *actio iniuriarum*.[6] More pertinent to the present Scottish experience, however, is the fact that at the same time as it is proposing to strip away the protection of non-patrimonial dignitary interests within private law, the Scottish Government is now simultaneously proposing, through the enactment of the Hate Crime and Public Order (Scotland) Bill, the criminalisation of injurious words.

The incoherence of, on the one hand, limiting the scope of Scots private law to afford redress to one affronted by injurious communications, while simultaneously seeking to criminalise those who communicate 'insulting material to another person' (as s.3 of the Hate Crime Bill would do, if enacted) is manifest. It certainly shows little regard for 'the [traditional Scots] commitment to the institutional scheme or, in other words, to a more systematic approach'.[7] If Scotland is to retain a coherent system, rather than a mere fragmented and piecemeal body, of law, then our legal practitioners and jurisprudents require the support of the Scottish Government and legislature. This requires our politicians and parliamentarians to consider the law holistically and recognise the fact that Scots jurisprudence is, and has been since the 17th century, concerned with a rational, interconnected system of law (singular), rather than a discrete and disjointed series of rules or laws.

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[4] Lee, for instance, described the *actio iniuriarum* as a 'squalid little action', although he nevertheless acknowledged that it had been 'unquestionably received' into Scots law: Robert W. Lee, *Introduction to Roman-Dutch Law*, 5th ed. (Oxford: Clarendon Press; 1953), at 335

[5] S. C. Smith, *When the Truth Hurts,* 1998 Scots Law Times (News) 1, at 5.

[6] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: Clarendon Press, 1996), at 1092

[7] Peter Birks, *More Logic and Less Experience: The Difference between Scots Law and English Law*, in David L. Carey Miller and Reinhard Zimmermann (Eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, (Berlin: Dunker & Humblot, 1997), p.174

Putting the emphasis on politicians, here, is not intended to absolve the Scottish universities or legal profession of blame for the fragmentation of the legal system. The attraction of looking to England for guidance in the absence of express Scots case law or legislation (other legal sources such as institutional writings and reason being relegated in favour of these so-called 'primary' sources of positive law) has been a feature of legal practice, writing and teaching for over two centuries now. Across the Scots law of obligations – and particularly within the province of the law of delict – the discussion and importation of Common law authorities has been favoured over the development of native Scots and broader Civilian concepts, to the overall detriment of the Scottish legal system. The Scottish route to the recognition of 'privacy' as a discrete and freestanding legal interest (recognised, expressly, in the recent case of *BC and Ors. v Chief Constable of Police Scotland and Ors.* [2019] CSOH 48), to take but one example, was far longer and more tortuous than would have been the case had the value of the Roman *actio iniuriarum* been recognised (as, indeed, is implied through the *obiter* remarks of Lord Bonomy in *Martin v McGuinness* 2003 SLT 1424, at para.28). The development of this historic and institutionally-received concept would not have required concerted historical scholarship; more limited comparative research would have sufficed. The modern law of South Africa, which is remarkably similar to that of Scotland in many respects, has already utilised its connection to this action to afford remedy in a range of situations in which the non-patrimonial interests of legal persons have been affronted.

Reform of the law of defamation, verbal injury and 'malicious publications', then, should be primarily focused on ensuring the further development of the Scots law of personality rights, rather than simple conformity with the jurisprudence of our political neighbours. A useful roadmap for reform was suggested by Professor Norrie in his 2009 contribution to Whitty and Zimmermann's comparative study on personality rights:[8] the presumption of 'malice' which operates in favour of the pursuer should be abrogated. By (again) making proof of the defender's malice an express requirement in all cases of defamation (effectively returning the law of defamation to its *actio iniuriarum* roots), the law would 'achieve a more appropriate balance between free speech and reputation than we presently have'.[9] Defences such as 'responsible journalism', 'qualified privilege' and so on would thus be redundant. Demonstrable malice on the part of the defender would axiomatically nullify any 'public interest' considerations arising from the defender's conduct and so it would be no defence for the defender to appeal to the significance of the information revealed.[10] The focus, instead, would be properly placed on the defender's actions prior to publication or communication of the relevant material.

Logically, with defamation again (expressly or implicitly) recognised as a species of *iniuria*, the Scottish action should likewise be altered so as to preclude recovery of patrimonial loss. The common law presently recognises other, more appropriate actions for the recovery thereof in cases of malicious publication. By recognising defamation as an action to protect

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[8] See Kenneth McK. Norrie, *The Scots Law of Defamation*, in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective*, (Dundee: Dundee University Press, 2009), pp.433-451

[9] *Ibid.* pp.449-450

[10] If – as in the case of Parliamentarians – the view is taken that, as a matter of the public interest, journalists should be permitted to reveal information regardless of their motivation, it would be more logical to afford journalists, as a class, absolute privilege. This, however, would undoubtedly give rise to more problems than it would solve and the suggestion is not endorsed here.

dignitary (non-patrimonial) interests, the ostensibly obsolete nominate verbal injuries – slander to goods, to title, *convicium* etc. – would no longer appear as confused, uncertain nor as superfluous as they do at present. Each could be developed so as to protect the patrimonial interests of one who suffers demonstrable loss (*damnum*) as a result of false statements published by another. One who suffers from a diagnosable psychiatric illness as a result of being held up to public hatred, ridicule or contempt ought to be able to recover damages for their loss; *convicium* would appear to be an appropriate mechanism for obtaining redress in such cases.[11] Business losses could conceivably be repaired through actions for slander to goods or title, while patrimonial loss of any sort resulting from the negligent publication of false information could be repaired simply because they are definitionally examples of negligence.

With the law of defamation appropriately and expressly returned to its roots as a species of *actio iniuriarum* (which serves to preserve dignitary interests in a broad sense), the question of remedy thus arises. As an action for 'injury' (in the sense of affront) rather than an action to repair loss, it is clear that damages are not to be thought an appropriate remedy in such cases. Rather, if money is to be awarded, it ought to be in the form of *solatium* paid in recognition of the affront felt by the pursuer. But of course, such is not to say that a monetary award will be thought appropriate in all cases. Through recognition of the fact that the palinode has historically been a useful remedy in respect of harm effected to non-patrimonial interests, a view could be taken on the wider reinvigoration and modernisation of 'apology' and recantation as a discrete private law remedy (as opposed to, as apology appears in the proposed Defamation Bill, a mere offer to make amends which might be accepted and thus bar pursuit of a defamation action).

An analogy, here, may be drawn with Article 167 of the Dutch Civil Code, which provides that in any action for defamation 'the court may, upon a right of action… order the tortfeasor to publish a correction in a way to be set by court.'[12] By adopting and adapting a rule of law of this kind, the Scottish courts would be empowered to ensure (insofar as such is possible) the restoration of the successful pursuer's good name in the eyes of those in which it was besmirched, rather than simply ordering that they be compensated for loss thereof. As there is evidence of considerable public support for mandating that 'corrections' in newspapers are to be published in the same place and with the same prominence as was given to the original story giving rise to the need for correction, the public policy justification for development of the palinode, in this direction, seems sound.

Of course, further reform to court processes would be required to limit the 'chilling-effect' of defamation law, while still preserving the ability of Scots law to protect non-patrimonial dignitary interests. Litigation is an expensive – perhaps ruinously expensive – endeavour, and there is always the possibility of one with means pursuing a case which they can afford to lose against one who cannot afford to defend themselves. That expenses typically follow the success of an action does not mitigate this; indeed, this may in some cases compound the issue, as one who is in the position of having a defensible case may not wish to take the

[11] Whether a functional equivalent to the brocard *veritas convicii non excusat* should be introduced in respect of such cases, or not, is a matter of policy consideration. The motivation underlying the Hate Crime and Public Order (Scotland) Bill would appear to suggest that truth, here, should be no defence to the act of causing psychiatric injury by words which 'stir up hatred'.

[12] Official translation.

risk of litigation, where failure might see them forced to pay not only their own legal fees, but those of their opponent also. Thus, the present costs and structure of the process of litigation in Scotland may well do more to limit the ability to speak freely and in the public interest than does the letter of the substantive law of defamation and verbal injury, whatever reforms be enacted. Suggestions for reform to general court procedure, or indeed even to court procedure in specific cases of defamation or verbal injury, are however beyond the scope of a short article such as this.

In any case, it is readily apparent that by uncritically Anglicising the Scots law of defamation and verbal injury, the potential to develop protection of the dignitary aspects of the human experience would be irreparably stymied. Although the case for reform of the Scots law of defamation and verbal injury has been made and is all but irrefutable, the direction that the proposed reforms of the Defamation and Malicious Publications (Scotland) Bill are entirely wrongheaded. Rather than stripping out and abolishing potentially useful actions, tools and remedies, the Scottish Parliament should, instead, consider a root and branch reform of the civil (*i.e.,* private) law of 'injury' (in its specific sense) and 'personality rights' (or interests) alongside the development of the criminal law pertaining to 'hate crimes'. Any such review should not confine the scope of its comparative consideration to the island of Great Britain, or to jurisdictions within the Common law family. Rather, such should look, too, to wider Civilian and Mixed jurisprudence in Europe and beyond to ensure that changes enacted to our law are consistent with, and fit within, the traditions and taxonomy of the Scottish legal system.