

## **Reform of the law on defamation and verbal injury**

### **Supplementary comments by Eric Clive 25 April 2016**

#### **Introduction**

Prompted by the excellent conference on 22 April I would like to offer this supplementary comment on the idea of providing expressly that it is competent for a person to seek and obtain a declarator of the falsity of any harmful statement published about that person by another.

#### **A declarator of falsity: advantages**

This would complement a stiff “serious harm” threshold very well. One of the defects of the present Scottish law on defamation is that it can facilitate gold digging actions – or threats of action – by those who are not really offended or harmed but who see a chance of extracting money. A “serious harm” threshold would be an answer to this problem. It should apply to all pursuers, not just corporate bodies, because gold diggers may often be individuals. And preferably it should be a high threshold, not one which could be watered down by a too ready application of proof by inference. The drawback would be that such a threshold might leave some genuinely aggrieved pursuers unprotected. Take the example of a young man who has trained hard over years, and made sacrifices, in order to attain a high level of athletic performance. He is accused, entirely falsely, of using illegal performance-enhancing drugs. Let us suppose that he could not prove serious harm or the likelihood of it. Maybe he has been injured in a crash and is now out of athletics. Maybe his employer simply does not believe the allegations and stands fully by him. Whatever the reason, there is no loss and no serious harm. But there is a genuine hurt and grievance. It would be unfortunate if he had no redress at all and if those who made the allegation could stand by it and repeat it. So it would be very useful if he could obtain a declarator of the falsity of the allegations.

The availability of such a remedy might well in itself prompt an apology and retraction. People faced with a threat of a defamation action will be inclined to take legal advice and, if possible, put up some defence. They will not want to face a large award of damages. People faced with the prospect of a declarator of falsity would not have the same need to defend.

I was recently involved in the drafting of the Apologies (Scotland) Bill introduced by Margaret Mitchell MSP which became the Apologies (Scotland) Act 2016. The Act expressly excludes defamation actions from its scope, because of the special provisions on apologies in the defamation legislation. The research for that Bill showed that many people who suffer from some negligence (e.g. medical negligence) just want an apology and recognition that their complaint is justified and accepted. It seems probable that the same applies to many people who have been defamed, especially if the culpability of the defamer is negligible or non-existent. As with the Apologies (Scotland) Act, the hope would be that damaging and unnecessary litigation could be avoided.

The availability of a simple declaratory of falsity would also sit well with a strengthening of the defences in defamation actions, especially perhaps with a significant strengthening of the defence of fair comment. It might also, depending on how it was constructed, serve to fill any gaps caused by a tidying up of the law on verbal injury.

#### **Grounds**

The ground of action could be the publishing of a false and harmful statement about the pursuer. There would be a harm threshold (to discourage unnecessary litigation) but not a serious harm

threshold. As even innocently published damaging falsehoods should be correctable perhaps there should be no requirement to prove intention or negligence.

### **Burden of proof**

The pursuer could be expected to bear the burden of proving falsity and harm.

### **Limitations**

It should perhaps be provided expressly that it would *not* be competent to claim damages in any such action. This would be the essence of the proposal.

### **Defences**

The present absolute and qualified privileges could be defences (because of the high value of absolute freedom of speech in parliaments, courts etc) but not fair comment or public interest.

### **Other matters**

Other matters (jurisdiction, procedure, expenses etc.) could be regulated as in defamation actions.

### **Alternative approaches**

An alternative approach would be to stick with defamation actions (rather than introducing a new type of stand-alone declarator) but to link the serious harm threshold and the defences of fair comment and public interest to, and only to, any conclusion for damages. So, for example, the threshold requirement might read “In an action for defamation a person may not obtain damages for any defamatory statement unless its publication has caused or is likely to cause serious harm to that person’s reputation”. The fair comment provision might read “In an action for defamation a person may not obtain damages for any defamatory statement if the defender shows that the following conditions are met.” And similarly for the public interest defence. Somewhere in the legislation (either in the relevant sections or separately) it could be made clear that a person could obtain a declarator of the falsity of the defamatory statement founded on. This could even appear along with a provision on statements in open court (as mentioned in question 38 in the SLC Discussion Paper) in a bit on non-damages remedies.

Yet another possibility would be to express the serious harm threshold as a cap on damages. “In an action for defamation a person may not obtain damages exceeding £300 for any defamatory statement unless its publication has caused or is likely to cause serious harm to that person’s reputation”. The figure is arbitrary but would be designed to discourage actions brought for money rather than vindication. The Scottish Ministers could be given power to vary any figure set. The advantage of this approach is that it would address the mischief of gold-digging actions by those who have not suffered serious harm without requiring any new remedies or procedures and without going further than is required to address the mischief.

### **Conclusion**

The details of any solution along the above lines would clearly need to be carefully considered but the main point is that the idea of restricting the availability of damages while allowing some scope for merely vindicatory remedies might be worth pursuing as a way of achieving a suitable balancing of interests.