Response to Scottish Law Commission Discussion Paper

Discussion Paper 161

Defamation.

By Graeme M Henderson, Advocate.

Introduction

I am an Advocate who called to the Bar in 1987 and have been continuously been involved in cases in relation to Defamation and related matters. Much of my specialist knowledge has been gleaned from information that is not available from the provisions contained in the Statutes or published judgments. My knowledge of the law is based on my experience in handling Defamation actions. In most actions there is no Court involvement. Even where there is Court involvement there are unlikely to be written opinions issued. In most cases where interim interdict is sought a decision is made without the Court issuing an opinion. My knowledge is also based on discussions of cases that I have not been involved in where no judgment has been issued.

The Scottish Law Commission is to be congratulated on raising the issue of what is to happen to the development of Scots Law in the light of changes that have taken place in England and Wales. It should be noted that there appears to be no gathering force of public sentiment in Scotland, analogous to the events that led up to the passing of the Defamation Act 2013.

Answer to question 1

The central issue that this paper has not addressed is why the English Courts provide specialist courts and procedure for this aspect of the Law and the Scots Courts do not.

The Scots Courts have undertaken significant reforms in relation to the processing of personal injury claims. The Court of Session has devised a set of Rules to speed personal injury claims through the Court. Such Rules have been replicated in the Sheriff Court. It seems clear that the framers of the Rules were well aware that Defamation actions are to be categorized as personal injuries. Court of Session Practice note number 2 of 2003 makes it clear that it is not intended that actions of Defamation should be included. A similar interpretation is likely to be made to the analogous Sheriff Court Rules.

Whilst the Sheriff Court Rules provide Summary Cause Rules for small claims this simplified procedure is not open to Defamation actions. I understand that ,if such an action is raised in the Summary Cause, it will be immediately transferred to the Ordinary Cause Rolls. This is in marked contrast to the Statutory provision

which enables the Courts of England and Wales to hold Summary Trials. This provision was not extended to Scotland.

There is no explanation for this difference in treatment between claimants seeking damages for personal injuries. Someone with a sprained wrist will be provided with a Rolls Royce service. The Court will provide them with a timetable setting out when each step of their case will take place.

By way of contrast someone who has a significant Defamation claim has no means of knowing when their case will finally resolve. The situation is likely to be remedied by the introduction of a specialist court dealing with these issues.

Other procedural reforms

Were a specialist Court to be created it would be more likely to introduce bespoke procedural rules to deal with a number of obvious problems in need of a solution;

- The Court is likely to introduce fast tracking rules.
- The Court may well introduce rules for dealing with spurious claims. At the moment a Defender may well encounter significant costs in dealing with a party litigant with limited resources. The Defender faces the expense of endless continuations, amendments and the lodging of documents.
- Unlike England there is no practice of providing affidavits, and other evidence, in relation to interim interdict applications. This matter is likely to be revisited. With the advent of Section 12 of the Human Rights Act the Court requires to consider whether or not one the applicant is likely to establish that publication should not be allowed. It does not seem satisfactory that this should be decided on submissions.
- I have encountered situations where the Court appears to have been unaware of right of the Defender to be heard in interim interdict proceedings. A specialist Court is likely to be well aware of this issue.
- In the event that the Court is minded to grant an application for interim interdict, in the absence of the Defender, it may well devise rules for reporting what was said and the basis for the granting of the application.
- A specialist Court is likely to consider devising rules confirming the locus of certain parties to be heard.
- If an application is made to restrict media reporting the application will trigger an order requiring service on the media. Despite this there is no express right ,in the Rules, for the media to appear. This position could be clarified.
- It is not unknown for one Pursuer to raise several actions against several publishers arising out of the publication of similar material. Consideration should be given to case management. At the moment one newspaper could apply for a sist without other defenders being able to comment. For

example should one newspaper that have its case sisted only if it agrees to contribute to the costs of another ?

- There is no reason why the Court should not devise rules setting out a time limit by which an offer of amends must be accepted. This appears to have been introduced in England without requirement to alter the statutory provision. This involves a different solution to that proposed in question 34.

Question 2 economic impact.

The discussion of economic impact, in the discussion paper, appears to be confined to the inconvenience of publishers. It should be noted that most British newspapers publish an Irish edition.

In any event the economic impact of a change in Defamation law may prove to be difficult to assess.

Question 3.

There is no reason in principle why the Law of Scotland should be altered. The fact that other jurisdictions do not permit such a claim arises out of differing views on the nature of Defamation. In a Jurisdiction where the claim is based on an economic loss (right to reputation) there has to be a communication to a third party to trigger this wrong.

The Scottish position is that Defamation is a claim based on injury to feelings. An injury to the feelings of the Pursuer can arise where only the Defender is present.

The situation is best explained by TB Smith "Short Commentary of the Law of Scotland . (page 725)

In practice the maker of a statement to a Pursuer in private will sometimes be protected by other means. In practice the maker of the statement may told the Pursuer something that the maker has a duty to convey to them. The recipient of the statement may well have an interest to her what the maker has to say to them. The issue of privilege may well arise.

Question 4.

I do not consider that a threshold test ought to be introduced into the law of Scotland. The Scottish Courts have not experienced the level of spurious claims that the Courts south of the border have required to endure. The introduction of a threshold test would add another procedural obstacle to the resolution of a dispute between the parties.

Question 5

For the reasons explained earlier a test based on harm to reputation is alien to the Law of Scotland. There is no reason why the law should not remain one based upon personal injury and not economic loss.

Question 6

Yes. It should be noted that ,so far as I am aware, the largest sum of damages awarded by a Scottish Court in Defamation matters arose out of a claim by an insurance company. There is no reason why the maker of defamatory statement should not be liable in damages for the economic consequences of that statement.

Question 7

No. This would introduce a further complication into the law of Defamation that is uncalled for.

Question 8.

My answer to this , and much of the remainder of the questions, is that I see little merit in attempting to formulate the usual defences , which are available in Defamation actions in Statutory form. As was submitted at the outset there is no climate of change in Scotland.

In any event the suggestion that a Statutory restatement will assist the Law of Scotland is misconceived. It would be open for the law of veritas to be restated in a Statutory provision. The precise form that it would take would be a matter for debate. The Commission could scour the Commonwealth and beyond looking for various versions of this defence. Whatever the wording of the statute was there would inevitably be issues of interpretation that would require to be tested in the Courts.

Question 9

In my experience the Courts have accepted that the "public interest" threshold ,in this defence, is so low that it is seldom a hurdle to any defender. I can see little practical purpose in its abolition.

Question 10.

I agree that the issue of honesty should remain although it creates problems.

Question 11.

No. See answer 8. The reformulation of the defence is likely to create uncertainty. To some extent the Scottish position has been clarified by Massie v McCaig.

Question 12

It would help if the name of the Defence was rebranded to reflect on modern usage of the English language. This could be achieved judicially.

Question 13.

Most practitioners regularly refer the Courts to London Artists v Littler [1968] 1 ALL ER 1075. Why should this clear explanation of the Law be replaced by a statute ?

Question 14

This issue usually only arises in Reynolds privilege cases. As a matter of logic a fair comment can only be made at the time when facts exist upon which comment can be made.

Question 15

No.

Question 16

There is little doubt that Reynolds Privilege will apply in Scotland. There has been no judgment issued which suggest that such a defence offends against Scots Law. I can see little purpose in attempting to codify this area of law.

Question 17

The suggestion in this proposal would involve conflating the defence of fair comment with Reynolds privilege.

Question 18

If there is to be such a defence it is essential that reportage should be included. In a free society the media ought to be able to report allegations provided that they are not adopted by the reporter.

Question 19

No. The 2002 directive should provide sufficient protection.

Question 20.

No . See answer 19

Questions 21 -25

My short answer is that ,if the 2002 directive is out of date, it should be amended.

Question 26

No

Questions 27 and 28

Yes. With the advent of the internet the extent of privilege should be modernised to include analogous situations to the situations which currently enjoy privilege.

Question 29 ,30 and 31

No.

Question 32

I consider that the Law of Interdict should be revisited.

I have highlighted potential procedural changes.

A further issue arises out of the widespread dissemination of defamatory material on the internet. The maker of the statement may have no resources by which the target of his statement can obtain damages.

The maker of the statement may well have mental health and other social issues. Should interdict prevent him from making statements, prevent him from using his computer after a certain time of night or prevent him from using a computer at all?

The court has no power to order that someone in breach should undergo a mental health assessment.

Question 33

No. I have found this regime to work well without the need to amend it.

Question 34

No. The English Courts saw little difficulty in imposing a time limit by which an offer could be accepted. There was no need for the statute to be altered. This issue could be resolved by introducing Rules of Court enabling the Courts to set time limits.

Question 35

I would not wish the regime to be tinkered with.

Question 36

Yes. There is a logic in requiring that the result should be published in the relevant publisher should publish the judgement .

Question 37

There may be practical difficulties in the Court ordering a specific act that is not possible in its jurisdiction.

Question 38.

Since the purpose of an action involves vindication of reputation this procedure would assist. At present the only time the result of a settled case is published is when the press report a dispute on expenses. At that time the basis upon which an action was raised and defended will be ventilated in open court.

Question 39

No. If a publisher takes the commercial decision to republish then the publisher can bear the consequences of doing so. They will require to bear in mind that with the change of times something which they published my not have been defamatory at the date of publication but may be so now.

Question 40

No.

Question 41

No. There has been no call for a reduction. In practice the existence of the three year period means that advisors can tell their client to wait and consider what the impact of the defamatory publication was. There is an argument that a Corporation should be permitted to sue within five years of

it suffering economic loss. Why should the quinquennium not apply in the event that a Company sues ?

Question 42

No.

Question 43.

No

Question 44

No.

Question 45

No. The Scottish Courts have not encountered Libel tourism and the introduction of such a rule would introduce further complication to the law.

It is arguable that the creation of a specialist Court may make the Scottish Experience more consumer friendly. However the creation of such a Court may mean that spurious claims are more likely to be thrown out more quickly.

Question 46.

The current regime is not satisfactory. Irrespective of what the litigants think a case may be unsuitable for jury trial. In the event that a specialist Court is created part of its case management system would involve the Court assuming the power to consider whether or not a case should be sent to Jury trial.

It may also introduce a degree of sophistication into Scots procedure. For example could a Jury be asked to decide a case where a defence of Reynolds privilege is pled ?

Questions 47 to 51

No. I would refer to the response by the Faulty of Advocates to the 2011 Scottish Government Consultation on this issue.

Question 52

Whilst I consider that almost all of the more exotic forms of action referred to in this Section should be retained I have doubts over the viability of an action based upon verbal injury to feelings caused by exposure to public hatred contempt and ridicule. I agree that there is little point in raising such an action when a defamation action is available (13.33).

The question is whether it is worth the effort of Parliament to abolish it.

Question 53

I see no merit in codifying this esoteric branch of the Law.

Graeme M Henderson

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