DISCUSSION PAPER ON DEFAMATION (DP No 161)

RESPONSES TO QUESTIONS 52 AND 53

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QUESTION 52

Against the background of the discussion in the present chapter, we would be grateful to receive views on the extent to which the following categories of verbal injury continue to be important in practice and whether they should be retained:
- *Slander of title;*
- *Slander of property;*
- *Falsehood about the pursuer causing business loss;*
- *Verbal injury to feelings caused by exposure to public hatred, contempt or ridicule;*
- *Slander on a third party.*

Case law in this area is certainly now scarce (perhaps due in part to (i) the perception that the law is this area is troubled and obscure (see, e.g., *Steele v Daily Record* 1970 SLT 53, Lord Wheatley at 60); (ii) the challenges of proving malice in this context: and (iii) the overlap with the law of defamation, which offers the advantages of presumptions of falsity and malice). However, the infrequency of litigation is not necessarily an argument for abolishing verbal injury in all contexts.

Falsehood about the pursuer causing business loss; slander of title; slander of property

As regards the verbal injuries that deal with economic or business interests, some of the mischiefs previously encompassed by verbal injury have to an extent been taken over by developments elsewhere in the law of delict. The "staggering march of negligence" (T Weir, "The Staggering March of negligence, in P Cane and J Stapleton (eds), *The Law of Obligations* (1998) 97) has extended the reach of negligence into protection of reputation where economic loss has been caused by misstatement. We now have a clearer understanding of the frameworks for the delicts of inducing breach of contract and causing loss by unlawful means. And in addition, there is of course now more extensive public law control of comparative advertising. But while these factors have marginalised the economic verbal injuries, the disappearance of verbal injury from this context would nonetheless leave an important gap.

It is desirable that a civil remedy *should* remain available to deal with deliberate lies told to the detriment of pursuer's economic interests. Even when taken together the developments noted above do not directly address that principle for all contexts. Neither negligence nor indeed defamation map clearly on to the facts of the leading English case of *Ratcliffe v Evans* [1892] 2 QB 524, for example, and there are numerous scenarios in the case law that would not readily lend themselves to liability under another head (see, e.g., *Joyce v Motor Surveys Ltd* [1948] Ch 252). Indeed, it is noticeable that there was little suggestion in England prior to the 2013 Defamation Act, or in Northern Ireland that the equivalent "malicious falsehoods" should be abandoned.

If verbal injury is to be retained in this context, there would appear to be little point in changing the generic label, "falsehood about the pursuer causing business loss", or the

familiar and established terms for the subcategories of "slander of title" and "slander of property". This terminology has the virtue of familiarity and reasonable clarity of meaning. There is, however a case for a statutory restatement of what these entail (discussed below in the response to question 53).

Slander on a third party

On the other hand, there is little to be lost in abandoning slander upon a third party as a distinct category (except in exceptional circumstances that lend themselves in any event to the more general category of a falsehood calculated to cause business loss to the pursuer). The authorities as to the ambit of this delict were never clear, although latterly they confined it to the business domain only, but the absolute absence of case law for over a century speaks to it having lapsed into desuetude.

In this connection I leave aside the overlap with question 47 – the issue whether an action should be available for defamation of the dead, which was the real gist of the wrong in *Broom v Ritchie* (1904) 6 F 942.

Injury to non-economic interests: false statements

Although the case for retaining the economic verbal injuries in some form is perhaps not contentious, greater difficulties attach to the continued existence of the verbal injuries relating to non-economic interests. There was indeed a line of thinking at the end of the nineteenth century to the effect that the only surviving form of verbal injury addressed economic interests only. However, the Inner House clearly acknowledged in *Steele v Daily Record* in 1969 that a form of liability for verbal injury persists in the non-economic sphere. At the same time, as noted in the Discussion Paper, the scope of verbal injury in this context has been severely constricted by the formulation adopted in *Steele*. While the verbal injuries discussed above are measured by their impact on economic interests, this type of verbal injury is apparently measured by its impact on reputation. As formulated in *Steele*, it requires that impact to be acute (bringing the pursuer into "public hatred and contempt", causing the community if not to "hate" then to "condemn or despise" him or her, so that the test is "something stronger" than the class test for defamation set out in *Sim v Stretch*). In other words over the course of the twentieth century this form of verbal injury has drawn on the terminology of defamation to define itself, but in a form that sets a more exacting threshold for measuring the harm, as well as requiring malice and falsity to be proved. If the offending statement can meet these criteria, it will almost certainly have crossed the threshold required for a successful claim in defamation. If this form of verbal injury is defined in the terms set out in Steele, little would be lost therefore by abandoning it. But two further questions also require attention.

First, is there scope for a form of non-economic verbal injury <u>to reputation</u> in which harm is measured by a different standard from that indicated in Steele?

This question should be answered in the negative. The creation of a form of injury to reputation in which the threshold of harm is set lower than in the law of defamation would not only create confusion but would also raise problems of compliance with article 10 ECHR. Indeed if we consider the subject matter of this kind of verbal injury in the nineteenth century, it often involved allegations of impropriety in lifestyle or ridiculous satirical depictions of public and semi-public figures that were shocking to the

Victorians but are not appropriate as the stuff of litigation in the twenty-first century. It is also doubtful whether it is practical to create a lesser form of injury to reputation that would be actionable in Scotland but not in England.

Secondly, is there still scope for a form of (false) verbal injury that defines itself otherwise than by injury to reputation?

A problem here is how to deal with the dissemination of false facts that may be damaging or hurtful, but do not meet the traditional "*Sim v Stretch*" test in the sense that the subject's reputation has been lowered. Take, for example, a false assertion that a prominent clergyman had been born out of wedlock. In a society where more than 50% of births now occur outwith marriage and in a legal system which has long since eliminated discrimination between legitimate and "illegitimate" children, it would be invidious to recognise such an imputation as diminishing the subject's reputation in the regard of "right-thinking" persons. But the individual concerned may wish, quite naturally, to suppress the circulation of a false story of this nature. Similar considerations would affect the dissemination of false information about sexual orientation, or health matters, for example, which should not have an impact upon reputation as measured by the standard applied in "*Sim v Stretch*"/*Steele*, but which nonetheless might be deeply unwelcome. In this regard a parallel may be drawn with what the US scholar, William Prosser termed "publicity which places the plaintiff in a false light in the public eye" ("Privacy", (1960) 48 *California Law Review* 383).

Media allegations of this nature would almost certainly fall foul of the *Editors' Code of Practice*, but the question remains whether they should also give rise to civil liability. As a matter of principle, the answer to that question is almost certainly "yes". Until the latter part of the nineteenth century verbal injury did indeed encompass such matters, but after a gap of more than a century, and with all the uncertainties attached to those nineteenth century authorities, the law of verbal injury could not usefully be revived in this context. The issues presented by such cases are now more clearly addressed by twenty-first century discussion on the scope of the law of privacy. The English case law gives a steer that while the tort of misuse of private information for the most part concerns unwelcome disclosure of the truth, it can also deal with false information about the private domain (see e.g. *McKennitt v Ash* [2008] QB 73 per Longmore LJ at para 86). In short, therefore, disclosure of false facts that does not necessarily injure the individual's reputation, but impinges on his or her private domain should be actionable, but the better way forward is to acknowledge a law of privacy rather than to attempt to breathe new life into the nineteenth-century law of verbal injury.

Injury to non-economic interests: true statements

As the Discussion Paper notes, the authorities tend to the view that a form of verbal injury perpetrated by truthful imputations did *not* survive into the twentieth century. Setting asides possible divisions of opinion on legal history, however, the more important question here is in regard to modern policy choices. *Should* some form of liability for truthful imputations be preserved in the modern law?

The discussion on this point runs in parallel with that concerning the *veritas* defence in defamation. It has often been observed that individuals should not normally be entitled to protect a reputation that is based on lies, and it goes without saying that truth should not be suppressed without cogent reason. (See also the observation made recently by

Lord Neuberger in *O v Rhodes* [2016] AC 219 at para 111 in regard to the *Wilkinson v Downton* tort of intentional infliction of mental harm: it is "vital that the tort does not interfere with the give and take of ordinary human discourse (including unpleasant, heated arguments, whether in domestic, social, business or other contexts, sometimes involving the trading of insults or threats), or with normal, including trenchant, journalism and other writing.")

But there is a further aspect to this question, which in a sense is nothing new. Disclosures about illness, or long-past misdemeanours, or romantic entanglements were the types of verbal injury for which Hume and Borthwick regarded the *veritas* defence as particularly inappropriate, and indeed it remains difficult to disagree with the view that a remedy should be available when "some secret matter, known only to the defender, has been officiously and unnecessarily circulated to the world" Hume, *Lectures,* vol 3, p 160. At the same time, the more relevant characterisation of such injury is not so much the denting of reputation – in the twenty-first century no one should suffer in his or her reputation because of an episode of mental illness, for example – but rather the unwanted intrusion into the private sphere. What then is the most appropriate vehicle for delictual liability in that context?

Even assuming the survival in the modern law of some form of verbal injury for truthful disclosure, this is hardly credible as providing the modern framework for redress in this context. There has been no case law for over a century, and such nineteenth century authority as exists is complex and confusing. Moreover, while this form of injury was discussed by the Institutional writers, it was against the background of a very different cultural and social understanding of the private sphere – and indeed of the importance of freedom of expression. Looking beyond Scotland to comparative authority we now have an abundant literature elsewhere to guide us on the modern implications of breach of privacy as an independent delict/tort. In short, therefore, the more appropriate mechanism for dealing with truthful disclosure of this nature is to be found in acknowledging infringement of informational privacy as a delict in its own right (as now supported by article 8 ECHR). Truth should not be readily suppressed, and due weight must be given to article 10 ECHR, but the law of privacy can provide a starting point for setting boundaries on liability in a way that verbal injury, as it has come down to us, cannot do.

Conclusion

In summary, verbal injuries should be retained insofar as they deal with *economic interests*, since removing them would leave a gap that would not always be filled by other areas of liability, but in order to reduce uncertainty it *would* be helpful to set these out in statutory form.

However, verbal injury in so far as it deals with *non-economic interests* has for practical purposes fallen into desuetude, in regard to false *and* truthful imputations. If a remedy is to be provided in this sphere for injurious disclosure, true or false, that does not necessarily detract from reputation as such, the more suitable modern framework is to be found in the law of confidentiality and privacy. It is further worth noting that outwith the private sphere the more egregious mischiefs addressed by verbal injury in the nineteenth century are now dealt with the Protection from Harassment Act 1997, and also arguably by the "*Wilkinson v Downton*" delict of intentional infliction of mental harm, assuming that the Scots courts accept its recent reformulation in *O v Rhodes* [2016] AC 219.

QUESTION 53

We would also be grateful for views on whether and to what extent there would be Advantage in expressing any of the categories of verbal injury in statutory form, assuming they are to be retained.

If some categories of verbal injury are to be retained (as proposed in my response to question 52), a restatement in statutory form is desirable in order to dispel confusion and to resolve conflicting views as to their ambit. The infrequency and inconsistency of the case law, together with a shortage of recent Inner House authority, provide an insecure foundation for the modern law. The consequence is a lack of focus in the basic taxonomy of verbal injury (see e.g. *Continental Tyre Group Ltd v Robertson* 2011 GWD 14-321 on slander of property), as well as in regard to the fundamental requirements of liability. For example, the old uncertainties regarding malice in fact and malice in law in regard to privilege in the law of defamation have also made their mark upon the malice requirement in verbal injury. Thus differing approaches are found to the significance of injurious intention, as contrasted with hostility or "bad motive", and to the relevance of knowledge or imputed knowledge of the falsity of the statement. These differences are perhaps not huge in practical terms, but given the challenges of proving malice in any event, they makes it difficult for litigants to assess exactly what they are required to prove. (Compare the analysis of the malice requirement as between, for instance, *Steele v Daily Record* 1970 SLT 53, *Barratt International Resorts Ltd v Barratt Owners Group* 2003 GWD 1-19, *Westcrowns Contracting Services Ltd v Daylight Insulation Ltd* [2005] CSOH 55. Note also *McIrvine v McIrvine* [2012] CSOH 23, in which Lord Brodie at para 23 stated "that it is not necessary to show malice…in order to obtain interdict of false assertions as to a party's title", which seems to go against English authority on injunctions and malicious falsehood: *British Railway Traffic and Electric Co Ltd V CRC Co Ltd* [1922] 2 KB 260.) A statutory restatement that clearly set out the framework of the surviving verbal injuries would therefore be valuable in improving the coherence and accessibility of the law.

The areas of uncertainty that might usefully be addressed in such a statutory provision might include the following:

- *Malice*: Malice remains a key requirement, in order to protect legitimate discussion of the comparative merits of goods or services and to avoid undue interference in disputes between businesses, but clearly some of the uncertainties indicated above should be resolved. In this connection the Scottish courts (see e.g. *Westcrowns*, *Barratt*) have taken note of Glidewell LJ's statement in *Spring v Guardian Assurance* that "the test of what constitutes malice in the tort of malicious falsehood is the same as the test in relation to the torts of libel and slander" ([1993] 2 All ER 273 at 288). But at the same time it is debatable whether the context of qualified privilege in defamation is directly equivalent to that of malicious falsehood; a better comparator may in fact be found in the discussion of targeted and untargeted harm in the other economic delicts, in particular the delict of causing loss by unlawful means (see, e.g., *Global Resources Group v Mackay* 2009 SLT 104 per Lord Hodge at para 17).

- *Falsehood*. It is important to distinguish between on the one hand self-commendation and on the other disparagement or denigration of the pursuer's goods or services. However, in this regard it will be necessary to reflect on how this form of verbal injury measures up against any new definitions applied to

defamation (so that an exacting threshold in defamation does not result in a flow of claims into verbal injury if more loosely defined).

On a related point of detail, thought should also be given to the merits of following the English decision in *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd [2011] QB 497 in which the Court of Appeal ruled that* the single meaning rule that *does* apply in defamation *does not* apply in malicious falsehood (so that rather than fixing on one meaning, if two or more meanings are plausible, they can all be considered).

- *Publication*. Unlike in the Scots law of defamation, publication to a third party/world at large seems essential, but the question of liability for republication remains open.

- *Damage*. As the Defamation Act 1952 s 3(1) indicates, verbal injury does not require actual damage - the pursuer may proceed on injury "calculated to cause damage". Two issues arise, however.

  The first is how probable the damage requires to be in terms of projected consequences for sales etc. (See *Tesla Motors Ltd v BBC* [2011] EWHC 2760 underlining the importance of establishing the specific nature and amount of the loss allegedly caused by such a slander; *Kennedy v Aldington* [2005] CSOH 58 allowing proof before answer but underlining the need to assess the "loss of a chance" of a sale.)

  The second is whether economic loss only is recoverable, or whether, as seems proper, anxiety and distress to individuals should be compensated when it flows from economic loss to their business interests (cf English cases such as *Kaye v Robertson* [1991] FSR 62, and *Joyce v Sengupta* [1993] 1 WLR 337 and conflicting interpretations of *Paterson v Welch (*1893) 20 R 744).