Scottish Law Commission
promoting law reform

RESPONSE FORM

DISCUSSION PAPER ON DEFAMATION

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List of Questions

1. Are there any other aspects of defamation law which you think should be included as part of the current project? Please give reasons in support of any affirmative response.

(Paragraph 1.21)

Comments on Question 1

I would like to see the Commission's opinion on the Anti-SLAPP law in the USA and its potential implementation in Scotland.

2. We would welcome information from consultees on the likely economic impact of any reforms, or lack thereof, to the law of defamation resulting from this Discussion Paper.

(Paragraph 1.25)

Comments on Question 2

«InsertTextHere»

3. Do you agree that communication of an allegedly defamatory imputation to a third party should become a requisite of defamation in Scots law?

(Paragraph 3.4)

Comments on Question 3

Not for the purpose you suggest. I do not see the purpose of fundamentally changing the law in such a conceptual way simply to placate social attitude to the action. The fact that you can bring an action against someone for solatium does not bring about a social harm. It does not allow the significant threat of an action of defamation, patrimonial loss, and therefore should be of little concern. It is better not to fiddle with the law on the conceptual level unless there is a valid concern. The reason for the two heads of claim is an historical one, and it is one which could be usefully re-employed as discussed in answer to question 40.

From an internet perspective this conceptual basis has no effect as is illustrated by the case of *Evans & Sons v. Stein & co.*[1] As the International regulation of defamation was specifically excluded by the Rome II Regulations for non-contractual obligations[2], S.13 of the Private

[1] *Evans & Sons v Stein & Co*. 1904 7 F 65.

[2] European Parliament and Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199/40 31.7.2007. Article 1.2.

International Law Act 1995 excludes defamation from the choice of law provisions of the Act meaning the common law still applies in the UK.[3] This means that the double actionability rule still applies as decided in *McElroy v. McAllister.*[4] The delict will occur where the defamatory material is downloaded (where the material was distributed and where the injury is felt - Longworth v Hope 3 M 1865 1049, per Lord Deas, p. 1057, cited by Lord Hope in Berezovsky v Michaels and Another [2000] 1 W.L.R. 1004. At p. 1026).

It could be argued that in order to limit the possibility of a claim the solatium aspect of the delict should be removed. However I am not aware that this is a problem or even a potential danger, as the main drive for the action is the patrimonial loss, and this cannot be founded in Scotland where the only head claimed is hurt feelings. I suppose that it is possible someone might argue that the Scottish Court's have jurisdiction based on the solatium aspect of a claim. However I would expect that the Commission would require evidence that this was a either a likely scenario or current problem.

4. Should a statutory threshold be introduced requiring a certain level of harm to reputation in order that a defamation action may be brought?

(Paragraph 3.24)

Comments on Question 4

«InsertTextHere»

5. Assuming that communication to a third party is to become a requisite of defamation in Scots law, are any other modifications required so that a test based on harm to reputation may "fit" with Scots law?

(Paragraph 3.24)

Comments on Question 5

The heads of claim have essentially coalesced anyway, so this probably would not have any foreseeable effect to keep or remove it, other than as discussed in Q3.

6. Do you agree that, as a matter of principle, bodies which exist for the primary purpose of making a profit should continue to be permitted to bring actions for defamation?

(Paragraph 3.37)

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[3] Private International Law (Miscellaneous Provisions) Act 1995. S.13

[4] *McElroy v. McAllister* 1949 SC 110.

Comments on Question 6

It could be argued that they have just as much if not more of an interest in defending themselves against defamatory comments. However this is at its heart a political question. There is no legal reason why these bodies should be treated differently. Companies which are run for profit almost exclusively exist on the back of their reputation, it is conceivable that to remove this provision would be damaging to them, unless there was an argument that different legal heads were more appropriate or could be formed for their specific purposes.

7. Should there be statutory provision governing the circumstances in which defamation actions may be brought by parties in so far as the alleged defamation relates to trading activities?

(Paragraph 3.37)

Comments on Question 7

«InsertTextHere»

8. Do consultees consider, as a matter of principle, that the defence of truth should be encapsulated in statutory form?

(Paragraph 4.15)

Comments on Question 8

«InsertTextHere»

9. Do you agree that the defence of fair comment should no longer require the comment to be on a matter of public interest?

(Paragraph 5.11)

Comments on Question 9

«InsertTextHere»

10. Should it be a requirement of the defence of fair comment that the author of the comment honestly believed in the comment or opinion he or she has expressed?

(Paragraph 5.12)

Comments on Question 10

«InsertTextHere»

11. Do you agree that the defence of fair comment should be set out in statutory form?

(Paragraph 5.21)

Comments on Question 11

«InsertTextHere»

12. Apart from the issues raised in questions 9 and 10 (concerning public interest and honest belief), do you consider that there should be any other substantive changes to the defence of fair comment in Scots law? If so, what changes do you consider should be made to the defence?

(Paragraph 5.21)

Comments on Question 12

«InsertTextHere»

13. Should any statutory defence of fair comment make clear that the fact or facts on which it is based must provide a sufficient basis for the comment?

(Paragraph 5.21)

Comments on Question 13

«InsertTextHere»

14. Should it be made clear in any statutory provision that the fact or facts on which the comment is based must exist before or at the same time as the comment is made?

(Paragraph 5.21)

Comments on Question 14

«InsertTextHere»

15. Should any statutory defence of fair comment be framed so as to make it available where the factual basis for an opinion expressed was true, privileged or reasonably believed to be true?

(Paragraph 5.21)

Comments on Question 15
«InsertTextHere»

16. Should there be a statutory defence of publication in the public interest in Scots law?

(Paragraph 6.15)

Comments on Question 16
«InsertTextHere»

17. Do you consider that any statutory defence of publication in the public interest should apply to expressions of opinion, as well as statements of fact?

(Paragraph 6.15)

Comments on Question 17
«InsertTextHere»

18. Do you have a view as to whether any statutory defence of publication in the public interest should include provision as to reportage?

(Paragraph 6.15)

Comments on Question 18
«InsertTextHere»

19. Should there be a full review of the responsibility and defences for publication by internet intermediaries?

(Paragraph 7.33)

Comments on Question 19
«InsertTextHere»

20. Would the introduction of a defence for website operators along the lines of section 5 of the Defamation Act 2013 address sufficiently the issue of liability of intermediaries for publication of defamatory material originating from a third party?

(Paragraph 7.39)

Comments on Question 20
«InsertTextHere»

21. Do you think that the responsibility and defences for those who set hyperlinks, operate search engines or offer aggregation services should be defined in statutory form?

(Paragraph 7.47)

Comments on Question 21
«InsertTextHere»

22. Do you think intermediaries who set hyperlinks should be able to rely on a defence similar to that which is available to those who host material?

(Paragraph 7.47)

Comments on Question 22
«InsertTextHere»

23. Do you think that intermediaries who search the internet according to user criteria should be responsible for the search results?

(Paragraph 7.47)

Comments on Question 23
«InsertTextHere»

24. If so, should they be able to rely on a defence similar to that which is available to intermediaries who provide access to internet communications?

(Paragraph 7.47)

Comments on Question 24
«InsertTextHere»

25. Do you think that intermediaries who provide aggregation services should be able to rely on a defence similar to that which is available to those who retrieve material?

(Paragraph 7.47)

Comments on Question 25
«InsertTextHere»

26. Do you consider that there is a need to reform Scots law in relation to absolute privilege for statements made in the course of judicial proceedings or in parliamentary proceedings?

(Paragraph 8.9)

Comments on Question 26
«InsertTextHere»

27. Do you agree that absolute privilege, which is currently limited to reports of court proceedings in the UK and of the Court of Justice of the European Union, the European Court of Human Rights and international criminal tribunals, should be extended to include reports of all public proceedings of courts anywhere in the world and of any international court or tribunal established by the Security Council or by an international agreement?

(Paragraph 8.12)

Comments on Question 27
«InsertTextHere»

28. Do you agree that the law on privileges should be modernised by extending qualified privilege to cover communications issued by, for example, a legislature or public authority outside the EU or statements made at a press conference or general meeting of a listed company anywhere in the world?

(Paragraph 8.19)

Comments on Question 28

«InsertTextHere»

29. Do you think that it would be of particular benefit to restate the privileges of the Defamation Act 1996 in a new statute? Why?

(Paragraph 8.19)

Comments on Question 29

«InsertTextHere»

30. Do you think that there is a need to reform Scots law in relation to qualified privilege for publication (through broadcasting or otherwise) of parliamentary papers or extracts thereof?

(Paragraph 8.23)

Comments on Question 30

«InsertTextHere»

31. Given the existing protections of academic and scientific writing and speech, do you think it is necessary to widen the privilege in section 6 of the 2013 Act beyond a peer-reviewed statement in a scientific or academic journal? If so, how?

(Paragraph 8.27)

Comments on Question 31

«InsertTextHere»

32. Do consultees agree that there is no need to consider reform of the law relating to interdict and interim interdict? Please provide reasons if you disagree.

(Paragraph 9.8)

Comments on Question 32
«InsertTextHere»

33. Should the offer of amends procedure be incorporated in a new Defamation Act?

(Paragraph 9.12)

Comments on Question 33
«InsertTextHere»

34. Should the offer of amends procedure be amended to provide that the offer must be accepted within a reasonable time or it will be treated as rejected?

(Paragraph 9.12)

Comments on Question 34
«InsertTextHere»

35. Are there any other amendments you think should be made to the offer of amends procedure?

(Paragraph 9.12)

Comments on Question 35
«InsertTextHere»

36. Should the courts be given a power to order an unsuccessful defender in defamation proceedings to publish a summary of the relevant judgement?

(Paragraph 9.18)

Comments on Question 36
«InsertTextHere»

37. Should the courts be given a specific power to order the removal of defamatory material from a website or the cessation of its distribution?

(Paragraph 9.18)

Comments on Question 37
«InsertTextHere»

38. Should the law provide for a procedure in defamation proceedings which would allow a statement to be read in open court?

(Paragraph 9.20)

Comments on Question 38
«InsertTextHere»

39. Do you consider that provision should be enacted to prevent republication by the same publisher of the same or substantially the same material from giving rise to a new limitation period?

(Paragraph 10.20)

Comments on Question 39

The focus of most reform movements is to move from a 'multiple publication rule' to a 'single publication rule' in order to remove the perpetual nature of the delict. This is particularly pertinent to online archives as in *Loutchansky v Times Newspapers Ltd*.[5] This dicta from Europe seems to make the *Brunswick* case less tenable in the light that the Duke brought the action 17 years after original publication.[6] In the case of *Budu v. BBC* the court held that a period of five years was too long a period, certainly in the light of the fact the BBC had made efforts to put notices on their website.[7]

The main argument against a multiple publication rule (especially considering that archives and online material which can exist for many years) is that it creates a perpetual liability without limitation.[8] Lord Lester himself argued in *Loutchansky* that the Limitation Act 1980[9] was 'rendered nugatory' in respect to online archives making '…the maintainer of the website…liable to be indefinitely exposed to repeated claims in defamation'.[10] The "social

5 *Loutchansky v Times Newspapers Ltd and Others* (Nos 4 and 5) [2002] Q.B. 783
6 *Duke of Brunswick v Harmer* (1849)117 E.R. 75.
7 *Budu v BBC* [2010] EWHC 616 (QB)
8 Ministry of Justice, Defamation and the Internet: the multiple publication rule, 16 Septemeber 2009 CP 20/09. P. 11
9 Limitation Act 1980. S4A; As amended by Defamation Act 1996. S. 5-6.
10 *Loutchansky v Times Newspapers Ltd and Others (Nos 4 and 5)* [2002] Q.B. 783, per Lord Phillips, p.814

utility" that Lord Lester argued was recognised by the ECHR as important for the public as a free and '…important source for education and historical research'.[11] However they recognised the *ratio* of the Court of Appeal in England, that archives must be maintained and '…the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material' resulting in lesser damages.[12]

What this decision does neglect is the fact that a lot of material may not be known to be defamatory in the first instance. Further it underestimates the impact a defamation action can have whether the actual damages awarded are high or not. It was recognised by the Joint Committee on the draft Defamation Bill that unless cost is tackled 'financial inequality [, which] has allowed the wealthy to use bullying tactics in threatening costly legal action…' will continue.[13] The same could be said of Scots law.[14] Hence why Anti-SLAPP might be a better way forward.

It has still to be seen but an abandonment of said rule may lead to a worse situation for both pursuer and defender. Some defamation pursuers wait to see if aspersions die a natural death before pursuing. The introduction of this rule may increase litigation by those who wish to quell the imputation, where waiting would lead to losing the claim.

The limiting factor in Section 8(5)a & b of the Defamation Act 2013, appears to address the second objection, that a publisher can simply publish in an obscure way and then subsequently publish later on. However a better solution may be simply creating provisions to specifically protect archives instead of imposing a blanket single publication rule.[15]

It may be instructive to look at the American experience. Gleeson CJ et al in *Dow Jones v Gutnick* discussed the development of the USA's single publication rule.[16] In effect the rule evolved from a successful argument that the multiple publication rule defeated their statute of limitations. Unlike in *Loutchansky* a number of courts in America at the county level recognised that a publication of an article could be disseminated indefinitely and therefore the first publication should be the day on which limitation ran from. Any subsequent publications were to be considered as a part of the original publication – essentially one delict.[17] Prosser, writing in 1953 America wrote (commenting on the Duke of Brunswick):

The rule may or may not have been appropriate in 1849 to small communities and limited circulations. It scarcely needs pointing out that it is potentially disastrous today, when a periodical such as Life is distributed to some 3,900,000 individual readers[18]

At the time Prosser was writing the multiple publication rule applied still to interstate actions

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[11] *Times Newspapers Ltd v United Kingdom* [2009] E.M.L.R. 14. p. 267
[12] *Loutchansky v Times Newspapers Ltd and Others (Nos 4 and 5)* [2002] Q.B. 783, per Lord Phillips, p.817-8
[13] House of Lords and House of Commons, *Joint Committee on the Draft Defamation Bill* 12 October 2011 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/> accessed 04/03/2012. p.18
[14] T Ludbrook, 'Defamation and the Internet: where are we now and where are we going: part 2: where are we going?' (2004) 15(7) Ent. Law 203; In a recent suit involving Lord Robertson there was a settlement of £25,000 for internet defamation.
[15] Joint Committee on the Draft Defamation Bill, *Written Evidence Vol 3 (HL Paper 203 & HC 930-III)* <http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/Final%20Written%20Evidence%20Vol%20III.pdf> accessed 04/03/2012. p. 108
[16] ibid, per Gleeson CJ et al, para 31-35
[17] WL Prosser, 'Inbterstate Publications' (1953) 51(7) Michigan Law Review 959.
[18] ibid. p.962

and highlighted this as a problem. For example where defamatory material was communicated in California and then subsequently in Texas – there would be two delicts. Where there was a communication in San Francisco and Los Angeles there would only be one delict. It can be contended that the USA has had the impetus for a much longer time to develop a law to regulate State – State defamation. It is now the case that the USA has a single publication rule for interstate defamation, they have also developed the law so that whichever state is chosen to bring the action, the action is settled there for all jurisdictions.[19] One might then be forgiven for supposing that this is a very generous, claimant friendly rule which must lend itself to "libel tourism" between the various states, which have varying defamation laws.[20] There are rules which govern whether an action is well founded in a particular state. The judges in *Dow Jones* criticised the way in which the single publication rule in the USA '…broken free of its roots to govern choice of law'.[21] Yet it may have been a necessary extension.

The law in the USA is not at all claimant friendly; it is mostly the same as the UK when the two litigants are private individuals.[22] However the USA free speech trumps truth that if defamatory speech is directed at public figures. There are a number of rules which limit the jurisdiction of courts in interstate actions. The case *Young v New Haven Advocate* was a case where the target of the communication of internet material was discussed. It was held in that case that internet publication did make information accessible everywhere but'…something more than posting and accessibility is needed…The newspaper must, through the internet postings, manifest an intent to target and focus on Virginia readers.'[23] It should be observed that there are those who "forum shop" between states for more favourable laws for their particular needs and due to the single publication rule the entire distribution to all the states are decided in that forum.[24]

Where the USA adopted the single publication rule to regulate choice of law and jurisdiction this was entirely necessary. As Scotland now has both a differing limitation period and does not have a single publication rule, the inevitable consequence is that litigants will be open to bring their claim to Scotland. This is especially true if the publication is on the internet as there is potentially greater circulation. Being that the Defamation Act 2013 was wholly concerned with reform of English law, its effect could be to shift their "problem" to another jurisdiction, namely Scotland. To not address the choice of law/jurisdictional implications which the USA are already equipped to manage is vexatious and should be a material consideration in the Commission's consideration for reform This is whether the Commission chooses to opt for adopt a single publication rule or whether they consider alternative provisions, such as suggested below as a preferable alternative.

40. Alternatively, if you favour retention of the multiple publication rule, but with modification, should it be modified by: (a) introduction of a defence of non-culpable

[19] J Hörnle, 'See you in Court – but where?' (2005) 10(2) Comms L. 44.
[20] M Collins, *The Law of Defamation and the Internet* (3rd edn, Oxford University Press, Oxford 2010).
[21] A Briggs 'The Duke of Brunswick and Defamation by Internet' (2003) 119(April) LQR 210. p.211
[22] M Collins, *The Law of Defamation and the Internet* (3rd edn Oxford University Press, Oxford 2010).
[23] *Young v New Haven Advocate* 315 F.3d 256 (4th Cir. 2002). p.263
[24] J Hörnle, 'See you in Court – but where?' (2005) 10(2) Comms L. 44.

republication; or (b) reliance on a threshold test; or (c) another defence? (We would be interested to hear suggested options if choosing (c)).

(Paragraph 10.20)

Comments on Question 40

An alternative to a single publication rule:

- to create a defence regime where archivists would be obliged to amend the material or append a notice indicating that the imputation is not the truth upon complaint from the defamed.
- It has been argued that there are some defamatory statements made on the internet which have no weight and therefore are not to be considered as defamatory.[25] It therefore could be argued if this is right, that some defamatory material on the internet may merit being awarded some qualified privilege.
- Originally a defamation action was split into two claims and what Norrie observes is that culpa was the basis of economic injuries and animus iniuriandi the basis of solatium. Today if one establishes the latter then one establishes liability for the former. The animus or malice, is presumed (irrebuttably) upon establishing the words are defamatory. Thus, fault for economic loss is based on the mere fact the words are said by the defender. Actual fault or negligence is not regarded at all. The two heads coalesced a long time ago and Norrie has argued that these separate heads should be reaffirmed.[26] This in effect would mean:
    - Solatium would be the head for hurt feelings, and one would have to show malice in order to be successful under this head of claim.
    - Patrimonial loss would be based on negligence instead. A claimant would have to show that there was negligence in their statement. The only reason we have the law with the irrebuttable presumption is because our law of negligence was not at all equipped to cope with complex *culpa* when the dawn of newspapers arose in the 18th Century. Now that it is, it could be reformed to put the law back into this state.

With regards to the internet, this could solve a lot of the problems detailed in your other questions. However this may be considered, too radical a change in the law. It has to be said though, that a Common Law basis of Defamation law is very dominant in the world, this would represent a fresh and very Civilian take on the law of defamation.

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[25] Y Karniel, 'A New proposal for the definition of defamation in cyberspace' (2008) 13(2) Communications Law 38.

[26] K Norrie, 'The Scots Law of Defamation is There a Need For Reform' in NR Whitty and R Zimmermann (eds) in *Rights in Personality in Scots Law* (Dundee University Press 2009)

41. Should the limitation period applicable to defamation actions be reduced to less than three years?

(Paragraph 10.20)

Comments on Question 41
I would suggest meeting this in the middle. Perhaps reduce it to 2 years rather than just one. This will neither force potential litigants to take court action but also does not give an inordinate amount of time to bring a claim.

42. Should the limitation period run from the date of original publication, subject to the court's discretionary power to override it under section 19A of the 1973 Act?

(Paragraph 10.20)

Comments on Question 42
The case law which has developed around this section would not be equipped to deal with this specific case, and it may be more appropriate to create a specific test for this in legislation, if this is to be the approach.

43. Subject to the outcome of the Commission's project on aspects of the law of prescription, should the long-stop prescriptive period be reduced to less than 20 years, in so far as it applies to defamation actions?

(Paragraph 10.20)

Comments on Question 43
«InsertTextHere»

44. Would you favour alteration of either or both of the time periods discussed in questions 41 and 43 above even if the multiple publication rule is to be retained?

(Paragraph 10.20)

Comments on Question 44
«InsertTextHere»

45. We would welcome views on whether it would be desirable for a rule creating a new threshold test for establishing jurisdiction in defamation actions, equivalent to section 9 of the 2013 Act, to be introduced in Scots law.

(Paragraph 11.4)

Comments on Question 45
«InsertTextHere»

46. We would welcome views on whether the existing rules on jury trial in Scotland should be modified and if so, in what respects.

(Paragraph 11.13)

Comments on Question 46
«InsertTextHere»

47. Should consideration be given to the possibility of statutory provision to allow an action for defamation to be brought on behalf of someone who has died, in respect of statements made after their death?

(Paragraph 12.26)

Comments on Question 47
«InsertTextHere»

48. Do you agree that there should be a restriction on the parties who may competently bring an action for defamation on behalf of a person who has died?

(Paragraph 12.30)

Comments on Question 48
«InsertTextHere»

49. If so, should the restriction on the parties be to people falling into the category of "relative" for the purposes of section 14 of the Damages (Scotland) Act 2011?

(Paragraph 12.30)

Comments on Question 49
«InsertTextHere»

50. Do you consider that there should be a limit as to how long after the death of a person an action for defamation on their behalf may competently be brought? If so, do you have any suggestions as to approximately what that time limit should be?

(Paragraph 12.32)

Comments on Question 50
«InsertTextHere»

51. Do you agree that any provision to bring an action for defamation on behalf of a person who has died should not be restricted according to:

(a) the circumstances in which the death occurred or;

(b) whether the alleged defamer was the perpetrator of the death?

(Paragraph 12.36)

Comments on Question 51
«InsertTextHere»

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.

(Paragraph 13.40)

Comments on Question 52
«InsertTextHere»

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.

(Paragraph 13.40)

Comments on Question 53

«InsertTextHere»

General Comments

«InsertTextHere»

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.