Response to Draft Bill

Consultation on Draft Defamation and Malicious Publications (Scotland) Bill

Dear Sirs

I had previously submitted a response during the Consultation period raising various issues and concerns in relation to the proposed reform of the law of defamation in Scotland. The response that was submitted was framed almost entirely based on the representation of Pursuers in respect of defamation litigation. That was because it was apparent that most of the consultees and those in the Working/Advisory Group (including myself) have a preponderance of Defender clients and there seemed a significant lack of input from those who were seeking remedy rather than defending. Those lobbying for reform were doing so on the strength of the advancement of freedom of expression but there was an imbalance in respect of input concerning the effect that the proposed changes would have on those to whom damage had been occasioned. In short, the position which I advanced to the Commission was "what was in it for the Pursuer?". On reviewing the draft Bill the answer to that, appears to be "nothing".

For the purposes of this response, I shall simply deal with the issue of "serious harm" which is perhaps the most significant aspect of the draft Bill so far as a Pursuer and those representing Pursuers are concerned.

The adoption of the serious harm test is for all intents and purposes an incorporation of the test from the English statute. By introducing a serious harm test the draft Bill creates an additional hurdle for the Pursuer than that which currently exists. The introduction of a serious harm threshold will have considerable consequences for those who consider litigating in Scotland.

When addressed on the proposals for reform, the position that was advanced by the Commission, was that the law of defamation in Scotland (because of the lack of cases judicially decided in Scotland) was adopting many of the English decided cases into Scots Law on a piecemeal basis. There is no doubt that position is correct but it somewhat ironic that by adopting the same test (serious harm) that exists in English legislation, the Scottish courts will again be asked to adopt decisions in English cases.

In particular, given that there is no definition or interpretation provided within the draft Bill of what the threshold requirement is, so far as serious harm is concerned, then the Scottish courts will continue to do just what the Commission indicated was in need of reform, namely taking English judgements and adopting them into Scotland.

That is because the English courts have already an established bank of case law in relation to the serious harm test. Whilst the English case law is not binding on any Scottish court, it is submitted that it would be extraordinary for the Scottish courts to follow a different line of reasoning from higher courts in England, in respect of serious harm. Indeed, if the Scottish courts were to do so, this would create greater confusion than currently is perceived to exist. If the Commission anticipates that a Scottish court would do so, then the Commission should set out the limits and thresholds of serious harm in the interpretation section to the draft Bill.

The consequence of adopting the same test as in England will be to drive litigation from Scotland to England. There are various reasons for this.

1. As a consequence of the serious harm test already being in force in England, the English courts already have judicial authorities as to the interpretation and likely parameters of the serious harm test. It is expensive to make law. It is a lot cheaper to follow existing principles

2. The English courts have dedicated judges who deal exclusively with defamation in a timetabled manner. Such a procedure is not envisaged under the draft Bill where the vast majority of litigation in Scotland would be at Sheriff Court level. One of the important factors in any defamation case is the rush to restore one's reputation. It is difficult to see how that would be achieved.

3. The awards for damages in England tend to be higher than in Scotland (notwithstanding the decision in Sheridan v Newsgroup Newspapers Limited, albeit that this was jury decision which will no longer be possible under the proposed new Bill which remove the right to jury trials).

4. The availability of Conditional Fee Agreements in England and after the event insurance which are not permitted or recoverable under Scots Law.

In short, by mirroring and adopting the English serious harm test, one is left with the enquiry of why any Pursuer would choose to raise defamation proceedings in Scotland with slower recourse to restoring reputation, the hurdles and costs involved in creating law, smaller awards and no conditional fee arrangements.

To harmonise the test in the two jurisdictions will result in work which would have been carried out by Scottish practitioners transferring to the English jurisdiction. One irony of this is that those lobbying for change on the basis of freedom of expression will ultimately end up being pursued in a jurisdiction (England) where end costs are significantly higher, damages greater and where the overall likelihood of settlement is lesser than in Scotland. The extent of the disparity between English costs and Scottish costs cannot be overstated.

On one view, from a practitioner's perspective, it may indeed be bordering on professional negligence not to advise a potential Pursuer of the perspective rights of remedy under English Law (and indeed the benefits of pursuing in England) particularly in respect of online publication where the publication holds a UK audience and where the Pursuer holds any reputation in England.

At present, one of the main advantages from the Pursuer's perspective in pursuing and engaging in litigation in Scotland, is the revere side of the coin above. In short, that the cost of proceeding and instigating litigation in Scotland is considerably less than doing so in England. The introduction of a further hurdle, namely the serious harm test will result in further cost and expense being required to be met by the Pursuer at the earliest stage in the litigation to establish that serious harm exists.

The cost of recovery in relation to those pre-litigation enquiries would not be a recoverable expense, notwithstanding that Pursuer and their agents will require to obtain significant precognition evidence from the Pursuer and those known to the Pursuer as to the serious harm occasioned by the publication.

In summary, the harmonisation of the serious harm test across the UK will result in parties within Scotland seeking remedies in England rather than in Scotland. By harmonising the test, the draft Bill will effectively encourage the movement of litigation from Scotland to the English courts.

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