Beyond Sticks and Stones:
The Protection Against Verbal Injury in Scots Private Law

Kiera Z. Rennie
G.J. Bell Scholarship 2024

Contents

‘While we are indebted to counsel for their painstaking research and admirable presentation,
I do not propose to follow them into the labyrinth.’

Lord Wheatley, *Steele v Scottish Daily Mail & Sunday Mail*[1]

Introduction

This research takes on the labyrinth Lord Wheatley was so reluctant to enter. In doing so, it seeks to examine the extent to which Scots private law does, and should, provide protection from emotional hurt where the weapon deployed is neither sticks nor stones, but words alone.

Bell maintained that in Scotland, the courts ‘protect not property merely, but reputation, and even private feelings, from outrage and invasion’[2]. Whilst verbal injury once addressed such ‘private feelings’ as worthy of protection against the weapon of words, the Defamation and Malicious Publications (Scotland) Act 2021 swiftly disposed of the common law action.[3] In comparison to the seams of literature espoused on the reform of defamation, academic interest in the elimination of this action seemed relatively muted, the silence symptomatic of the labyrinth so few are willing to enter. Amid the silence, however, appears a notable retreat in the civil law protection for ‘private feelings’ attacked by the weapon of words.

In tracking this retreat, this research adopts Blackie’s tripartite strategy to legal analysis.[4] It firstly looks back to the doctrinal history of verbal injury – from ‘the main manifestation’[5] of the Roman *iniuria* to ‘an untidy postscript to the law of defamation’[6], ‘obscure and little used’[7] - with the object of determining the nature and extent of loss to the protection of ‘private feelings’ under the Act. The question then becomes whether this loss has been offset by other areas of the law, looking elsewhere to the protections afforded against harmful speech in actions for harassment, assault, and the intentional infliction of mental harm. In its last phase, the discussion briefly looks forwards, engaging in a more normative assessment of the issues and options that come with protecting ‘private feelings’ against the weapon of words.

This research comes as the relevance of verbal injury gains traction alongside an expanding awareness of the contexts in which harassment and bullying arise; the growing platforms on which the weapon of words can be drawn and inflicted, received and wound; the irrelevance of the ‘reputation’ of the person subject to ridicule and insult. It thus seeks to depart from the reputation-based focus of the law of defamation and sit within the broader discussion pursuing a substantive and cohesive body of personality law in Scotland protecting ‘who a person is, not what a person has’[8]; guarding us from the weaponry that attacks our ‘being’ rather than our ‘having’.

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[1] 1970 SLT 53, 60 (Lord Wheatley)
[2] Bell, *Commentaries I*, (7th edn., 1870) pp.111-112
[3] Defamation and Malicious Publication (Scotland) Act 2021, s.27 (henceforth, DMP(S)A 2021).
[4] J Blackie and N Whitty, ‘Scots Law and the New Ius Commune’ in H MacQueen (ed), *Scots Law into the 21st Century* (1996) 65 at p 67.
[5] WJ Stewart, *Delict and Related Obligations* (3rd edn, W. Green, 1998) 159
[6] E Reid, ‘Making Law for Scotland: The Defamation and Malicious Publication (Scotland) Act 2021’ (2024), 58-59
[7] Scottish Law Commission, *Report on Defamation* (Scot Law Com No 248, 2017) 85
[8] N Whitty and R Zimmermann, ‘Rights of Personality in Scots Law: Issues and Options’, in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (EUP, 2009) 3

A Note on Terminology

Verbal injury is one of 'few areas in the law in which the same words have been used with so many different meanings by different writers'[9]; its consideration appearing under the titles of 'defamation'[10], 'verbal injuries'[11], 'defamation and verbal injury'[12] and 'slander, defamation and verbal injury'[13]. For a science of the 'most verbal' sorts, the law's struggle to discern an appropriate heading for an actionable wrong constituted by words has long appeared an ironic puzzle in need of urgent deciphering.[14] The etymological complexities of verbal injury are meticulously tracked elsewhere (to which this work is indebted), and this research does not seek to add to nor divide the plethora of academic discourse further.[15] But with pedantry necessary for the purpose of legal certainty (and not just an obsession of the strict legal formalist), the terminology used in this research requires a brief outline here.

Verbal injury is used in this paper to refer to a category sitting analogous to, but nonetheless distinct from, defamation. In other words, it encompasses non-defamatory statements causing injury for which damages are due. Whilst Walker envisioned a much broader definition grounded in Institutional writings – where verbal injury referred to the title of the *genus*, under which actions of defamation, malicious falsehood and other verbal injury fell as species – the adopted approach here, as the one espoused by Norrie and taken on by the Scottish Law Commission, rather reflects the terminological use in the 'modern era'.[16] It is further reflective of the understanding most recently evinced in the 2021 Act (the abolition of 'verbal injury' logically referring to an action other than defamation, which was retained and reformed separately under its own head)[17]. It therefore appears the most appropriate approach to take in this paper.

[9] K McK Norrie, 'Hurts to Character, Honour and Reputation: A Reappraisal' (1984) 12 JR 163, 164
[10] WM Gloag and R C Henderson, *Introduction to the Law of Scotland* (8th edn, W. Green, 1981) 536-551
[11] DM Walker, *The Law of Delict in Scotland* (2nd edn, W. Green, 1981) 729
[12] FT Cooper, *The Law of Defamation and Verbal Injury* (2nd edn, W. Green, 1906)
[13] TB Smith, *A Short Commentary on the Laws of Scotland* (W. Green, 1962) 724-738
[14] K McK Norrie, 'Hurts to Character, Honour and Reputation: A Reappraisal' (1984) 12 JR 163
[15] See e.g., DM Walker, *The Law of Delict in Scotland* (2nd edn, W. Green, 1981) 730-740; K McK Norrie, *Defamation and Related Action in Scots Law* (Butterworths, 1995) 32-38. For overview, see E Reid, *Personality, Confidentiality and Privacy in Scots Law* (W. Green, 2010) ch 5
[16] Norrie, *ibid*, 33; Scottish Law Commission, *Report on Defamation* (Scot Law Com No 248, 2017) 82. Judges have distinguished 'an action for slander on the one hand and an action for damages for verbal injury… on the other', *Andrew v Macara* 1917 SC 247, 250 (Lord Justice-Clerk Dickson); legislators have likewise categorised rules for 'defamation' and 'verbal injury' under separate heads, see e.g., The Defamation Act 1952, s 3 (as it applies to Scotland, s 14(b)) and The Legal Aid (Scotland) Act 1986, sh 2(2)(1). For Walker's position, see DM Walker, *The Law of Delict in Scotland* (2nd edn, W. Green, 1981) 732, using Erskine, *Institute IV*, 4, 80; Hume, *Lectures III*, 133; Bankton, *Institute* I, 10, 24
[17] DMP(S)A 2021, pt 1

I. Looking Back:
LossUunder the Defamation and Malicious Publication (Scotland) Act 2021

The Defamation and Malicious Publication (Scotland) Act 2021 eliminated the common law of verbal injuries with one hand and devised three statutory delicts under the heading of 'malicious publication' with the other. In this process, the Law Commission was assured 'little would be lost'.[18] However, in the removal of an existing common-law remedy for individuals, what precisely was lost, and the extent of any lacuna left in the law, requires a more exacting analysis beyond the estimation offered by the Law Commission.

1. Loss of a Category

Any formalist would conclude what was ultimately lost under the Act was a taxonomic category, representing a retreat in the protection afforded to 'feelings' against harmful words. By the time the Scottish Law Commission embarked on their project of reform, verbal injury was referred to as 'analogous' to defamation, but nonetheless 'distinct' in the sense that unlike defamation, cases on verbal injury turned on the proof (rather than presumption) of three conditions: '(1) that the statement was false; (2) that the statement was made with a design to injure; and (3) that injury resulted'[19]. The cases broadly fell into two categories depending on the injury claimed - either 'verbal injury to economic interests' or 'verbal injury to feelings' – with damages for economic loss in the instance of the former, and in *solatium* for 'hurt feelings' in the instance of the later.

Under this taxonomy, looking in on the remains of the Act, the 'verbal injury to economic interests' category appears to have been broadly retained under the pseudonym of 'malicious publication'[20]. As before, each new statutory delict requires (1) falsity; (2) intention to injure; and (3) resultant injury, where this is actual or likely financial loss.[21] The net loss in the elimination of the common law verbal injuries was, therefore, the category of 'verbal injury to feelings'. In other words, the common law no longer protects 'feelings' in an action for verbal injury; it no longer recognises injury in the verbal attack to one's 'self', as opposed to one's wealth.

However, this loss may be more formally, as opposed to practically, significant. By the 19th century, the category of 'verbal injury to feelings' had become so narrowed in its scope and so marginally litigated, its elimination may appear more an exercise of rationalisation and clarification under the Law Commission's stated aims of 'modernisation' and 'simplification'[22].

The territory of 'verbal injury to feelings' had been tapered to a limited set of circumstances by the courts. Some cases limited recovery to proof of pecuniary loss, although this restriction was later

[18] Scottish Law Commission, *Report on Defamation* (Scot Law Com No 248, 2017) 83
[19] *Steele v Scottish Daily Record* (1970 SLT 53) 60 (Lord Wheatley), referring to dicta in *Paterson v Welch* (1893) 20 R 744, 749 (Robertson LP). See also Scottish Law Commission, *Report on Defamation* (Scot Law Com No 248, 2017) 83
[20] DMP(S)A 2021, pt 2. Slander of business became 'statements causing harm to business interests' (s 21); slander of title became 'statements causing doubt as to title to property' (s 22); and slander of property became 'statements criticising assets' (s 23).
[21] DMP(S)A 2021, ss 21, 22, 23. Statement also must be published to a person other than P.
[22] Scottish Law Commission, *Report on Defamation* (Scot Law Com No 248, 2017) 1

disregarded in *Steele v Scottish Daily Record* and indeed lacked proper grounding in Scots law.[23] Recovery of injury to feelings, however, had nonetheless become so obstructed that such an award was practically, if not legally, impossible. Typical 'verbal injury to feelings cases', such as those involving public hatred, ridicule, and contempt, required proof of 'something more than public disapproval, adverse comment or criticism', envisioning 'something of the order of condemn or despise'[24]: hence, press portrayal of a car-dealer as 'hard-hearted' was insufficient in the absence of evidence exhibiting social ostracisation,[25] whereas evidence of a pursuer's burning in effigy was deemed enough elsewhere.[26] With the required threshold seemingly high and difficulty leading evidence to the required standard, the cases largely fell from the law reports, its abolition thus appearing more an act of rationalisation and simplification than a significant withdrawal from protection in practice. Indeed, the emphasis on the 'public' dimension of 'hatred, contempt and ridicule' appeared to limit the action to the high-profile, public figures (the governor in *Paterson*) – whose societal standing made it easier to lead evidence of widespread condemnation than the regular car-dealer (as in *Steele*, who was said to endure nothing more than a worsening of opinion among the narrow base of his friends and clientele). Any retreat in protection was perhaps, then, only felt by the few.

The high bar required for an award in *solatium* not only narrowed the scope of the action but rendered litigation somewhat illogical. If a pursuer could aver evidence of the required severity of social exclusion, it is likely the statement crossed the line into defamation in terms of 'lowering the plaintiff in the estimation of right-thinking members of society generally'[27]. With the benefits provided by the presumptions operative in an action for defamation,[28] and the rule prohibiting simultaneous claims in both,[29] it is perhaps unsurprising 'verbal injury to feelings' remained out of the case law from the 19th century onwards.[30] With barriers to recovering *solatium* 'effectively chok[ing] off litigations of this type in[to] the twentieth century'[31], by 2021, then, its removal appeared to simply formalise this reality.

2. Loss of an Opportunity

Pragmatism, however, cannot come at the cost of principle. On a much broader view, in starting with what had become of the law of verbal injury – narrow and marginalised - the Law Commission lost sight of what this body once was, marking an opportunity missed to revisit the historical texts and reaffirm the principles underpinning its conception.

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[23] *Paterson v Welch* (1893) 20 R 744; *Waddell v Roxburgh* (1894) 21 R 883, cf. Hume, *Lectures*, vol III, 156. See also E Reid, *Personality, Confidentiality and Privacy in Scots Law* (W. Green, 2010) para 8.21

[24] *Steele v Scottish Daily Record* (1970) SLT 53, 62 (Lord Wheatley)

[25] *Ibid,* 66 (Lord Fraser)

[26] *Paterson v Welch* (1893) 20 R 744

[27] *Sim v Stretch* [1936] 2 All ER 1237, 1242 (Lord Atkin). See also E Reid, *Personality, Confidentiality and Privacy in Scots Law* (W. Green, 2010) para 8.24

[28] Once a statement is established as defamatory, it will be presumed false and to have been made with the intention of harming P.

[29] *Lever Brothers Ltd v The Daily Record, Glasgow, Ltd* 1909 SC 1004; *Griffin v Divers* 1922 SC 605; *Steele v Scottish Daily Record* (1970 SLT 53) 61 (Lord Wheatley)

[30] E Reid, 'Protection of Personality Rights in the Modern Scots Law' in N Whitty and R Zimmermann, 'Rights of Personality in Scots Law: Issues and Options', in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (EUP, 2009) 270. Of the few public hatred, ridicule and contempt cases that succeeded (see e.g., *Lamond v Daily Record (Glasgow) Ltd* 1923 SLT 512), there is strong reason to see these as de facto actions for defamation. See K McK Norrie, 'The actio iniuriarum in Scots Law: Romantic Romanism or Tool for Today' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013).

[31] J Blackie, 'Defamation' in K Reid and R Zimmerman (eds), *A History of Private Law in Scotland: Volume 2: Obligations* (OUP, 2000) 700

Verbal injury was once doctrinally one of the clearest 'manifestations' of *iniuria* – a construct of the Roman Law, received in Scotland during the institutional period.[32] This multifaceted delict centred on the protection of one's 'personhood'[33] – the innate, non-patrimonial aspects of a person's existence, famously distilled to the titles *corpus*, *fama* and *dignitas* - recognising the affront (*contumelia*) to such interests as an injury demanding redress.[34] Its operation under the *actio iniuriarum,* focussed on the recognition of these 'personality' interests as the starting point and the 'affront' to such interests forming the basis of liability thereafter, hence offered for a much broader, more comprehensive protection against verbal attacks. *Inuiria verbalis*[35] encompassed all forms of injurious statements and insults attacking the dignity of a person – the truth or falsity of the statements being irrelevant.

From this position, looking in on the remains of the Act, the extent of loss appears much greater. The core, dignitary interests at the centre of *iniuria verbalis* in Roman law have been completely uprooted, entirely replaced with purely economic interests under the new statutory delicts. Whilst damages for malicious publication may 'take into account any distress and anxiety caused', this is conditional on actual or likely financial loss flowing from the statement.[36] The requirement that the 'malicious publication' be circulated to a person other than the pursuer further removes the focus on affront or insult towards reputation as an economic, legally protected interest. Thus, the framework of personality (as opposed to proprietary) protection provided by *iniuria* and underpinning verbal injury's genesis in the Roman law has vanished from verbal injury's reincarnated form.

It is perhaps, however, ambitious to argue this entire superstructure was set alight on the enforcement of the Act. The narrowing scope of verbal injury is evidence of the law having already began divorcing itself from *iniuria*. Where the dignity of the person is the starting point in *iniuria*, the falsity of the statement is somewhat beside the point - yet it emerged a requirement by the 19th century. Likewise, the 'public hatred, ridicule and contempt' requirement further departs from the notion of affront forming the basis of liability. What is clear, however, is 'the survival of the verbal injuries until 2021… was a reminder that historically this area of law had much more to offer than simply protection against false statements'[37], the broad basis of protection it once offered and the opportunity to revive its underlying principles finally lost in the whirr of 'modernisation' and 'simplification' pursued by the Act.

[32] WJ Stewart, *Delict and Related Obligations* (3rd edn, W. Green, 1998) 159. For reception in Scots law, see Bankton, *Institute* I, 10, 21; 'Actio iniuriarum and human organ retention (case comment)' [2007] Edin LR 2007 5
[33] P Birks, 'Harassment and Hubris: The Right to An Equality of Respect' (1997) 32 Irish Jurist 1
[34] D 47.10.2; R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP, 1990) 1064-1083. 'Injury according to Stair, Bankton, Erskine and other writers on the law of Scotland, who in that respect adopt the language of the civil law, "is an offence maliciously committed to the reproach and grievance of another, whereby his fame, dignity or reputation is hurt"', *Newton v Fleming* (1846) 8 D 677, 694 (Lord Murray)
[35] i.e., verbal injury (in its broadest sense, encapsulating what we would now call defamation).
[36] DMP(S)A 2021, s 26(1)
[37] E Reid, 'Making Law for Scotland: The Defamation and Malicious Publication (Scotland) Act 2021' (2024) 58-59

II. Looking Elsewhere:
Protection Against Harmful Speech in Scots Private Law.

In this broad retreat from the protection of 'private feelings' against the weapon of words, the question then becomes the extent to which Scots law has subsumed this role of verbal injury in protecting 'private feelings' elsewhere, such that nothing in substance has indeed been lost and the Law Commission truly was simplifying the law.

1. Harassment

The Protection from Harassment Act 1997 provides for the right to be free from harassment and the requisite civil action in the event of infringement.[38] Although undefined by the legislation, 'harassment' 'includes causing the person alarm or distress', where conduct encompasses 'speech',[39] and damages are available for anxiety.[40]

The legislation's deliberately non-exhaustive definition of harassment and the conduct it catches clearly expands its remit beyond the physical dimension in which it is most readily recognisable, enabling the common law to respond to a range of 'alarming and distressing' behaviour - including speech.[41] It would appear, then, that just as verbal injury offered reparation for emotional distress caused by the infliction of harmful speech, so too harassment. Indeed, relevant conduct for the purposes of the latter marks a striking resemblance to that previously caught by the former: newspaper articles, for example, 'written in an indignant tone' and 'designed to elicit a reaction' have been found capable of amounting to harassment,[42] much like attacks in articles, 'calculated to render [the pursuer] and his conduct ludicrous' and present 'him as a person in the habit of indulging in the use of exhilarating beverages, and given to gluttony', were previously actionable under the law of verbal injury.[43]

However, the requirement a 'course of conduct' be conduct 'on at least two occasions'[44] restricts the scope of this action: even under the narrow and obscure law of verbal injury, a single statement could amount to a wrong.[45] Of course, Parliament was simply giving 'harassment' its natural meaning - the continuous subjecting to intolerable behaviour - in providing for this requirement;[46] the difficulty, as always, arises in attempting to squeeze verbal injury inappropriately into the policy considerations that govern harassment.[47] Verbal injury, as initially conceived, recognised the inalienable dignity of the person as a legally protected interest at the centre of the delict, so that infringement gave rise to civil liability; it would hardly be appropriate for such an inalienable interest to have been infringed twice before the law were to respond (we do not require proprietary interest to be infringed twice before granting redress). However, the availability of damages for emotional harm (short of a recognised

[38] Protection from Harassment Act 1997, s 8(1), (2) (henceforth, PHA 1997)
[39] *Ibid,* s 8(3)
[40] *Ibid*, s 8(6), as well as any resultant financial loss.
[41] H MacQueen, 'A Hitchhiker's Guide to Personality Rights in Scots Law, Mainly with Regard to Privacy', in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (EUP, 2009) 568
[42] *Thomas v News Group Newspaper Ltd* [2001] EWCA Civ 1233 [11]. See also *Fulton v Sunday Newspapers Ltd* [2017] NICA 45
[43] *Sheriff v Wilson* (1855) 17 D 528, 529
[44] PHA 1997, s 8(3). Exception is made for harassment amounting to domestic abuse, s 8A(1), (2)
[45] *Paterson v Welch* (1893) 20 R 744; *Steele v Scottish Daily Record* (1970) SLT 53
[46] *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123 [41] (Rix LJ)
[47] K McK Norrie, 'The actio iniuriarum in Scots Law: Romantic Romanism or Tool for Today' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)

psychiatric illness) is an underlying value akin to that under verbal injury; it is evidence of a willingness to broaden the availability of damages beyond the physical or patrimonial scope. It is this strand of protection that the common law can pick up on in developing any future protection against the weapon of words beyond the self-imposed limits contained in the statutes.[48]

2. Assault

Without an equivalent 'course of conduct' requirement, the broader reach of assault may offer a better basis of protection. Assault encompasses the intentional and unwarranted interference with the person without lawful justification. Whilst most clearly perceived as the remedy for injury by 'sticks and stones', its historical basis in the *actio iniuriarum* means reparation is available not only for patrimonial loss, but like verbal injury, in *solatium* for the 'trouble and distress'[49] suffered as a result of the 'affront and insult' to dignity.[50]

However, it is the physical dimension of the affront in assault that has been emphasised by the courts. Even in the absence of direct (or indirect) contact, the conduct element involves the 'bringing of a person into fear of them by any threat or menace'[51] so as to put them 'in dread or apparent danger of bodily harm'[52]. Indeed, there has been no reported case awarding damages for affront alone, without actual or threatened physical injury.[53] So far, something must have been 'done' as opposed to 'said' in order to produce such a threat: 'words, or coming forward, or furious looks'[54] are insufficient to ground an action on their own, without, for example, an accompanying physical blow.[55] However, recognition of the role of words (or indeed lack of) in inducing the requisite threat of physical harm has taken hold in the criminal courts, where a campaign of silent telephone calls was held 'just as capable…of causing an apprehension of immediate and unlawful violence' as physical gestures.[56] The emphasis was nevertheless on the threat of 'immediate personal violence', a physical dimension absent in verbal injury which tends much less to the safety in which one considers their (tangible) self and more to do with the esteem in which one holds their (intangible) self. So, whilst assault likely captures violent verbal threats, there remains a gap in protection against non-violent but nonetheless harmful verbal attacks on a person's character or self-esteem.

3. Intentional Infliction of Mental Harm

[48] H MacQueen, 'A Hitchhiker's Guide to Personality Rights in Scots Law, Mainly with Regard to Privacy', in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (EUP, 2009) 582
[49] Hume, *Lectures* III, 120
[50] Bell, *Principles* §2032
[51] Smith, *Lectures on Jurisprudence* 119
[52] *Hyslop v Staig* (1816) 1 Mur 15, 22 (Lord Commissioner Adam)
[53] or some other representation being present, in which case this was dealt with under the law of verbal injury/defamation. J Blackie, 'Defamation' in K Reid and R Zimmerman (eds), *A History of Private Law in Scotland: Volume 2: Obligations* (OUP, 2000) 666.
[54] *Lang v Lillie* (1826) 4 Mur 82, 86 (Lord Chief Commissioner Adam)
[55] *Anderson v Marshall* (1835) 13 S 1130, 1131
[56] *R v Ireland* [1998] AC 147, 166 (Lord Hope)

In the absence of a physical dimension, however, Walker observed, 'it is as much actionable deliberately to shock a person as to affront or insult him physically'[57]. Indeed, the Supreme Court in *O v Rhodes* recently formulated this wrong as requiring the following:[58]

> (a) the conduct element requiring words or conduct directed at the claimant for which there is no justification or excuse, (b) the mental element requiring an intention to cause at least severe mental or emotional distress, and (c) the consequence element requiring physical harm or recognised psychiatric illness.

The Court made clear the 'words or conduct' attracting liability needed to be something 'outrageous', 'flagrant' or 'extreme'[59] to ensure the law 'does not interfere with the give and take of ordinary human discourse'[60]. The defender must show actual intention to cause 'at least severe mental or emotional distress'[61], although it is 'common ground' liability will only arise if physical harm or a recognised psychiatric illness is the result of their conduct.[62]

To the extent this protects our 'being' from verbal attacks, it is worth noting from the outset that there is sparse authority in Scotland on the scope of this wrong, with no recorded case decided soley on the basis of the intentional infliction of emotional distress at common law.[63] Cases have nonetheless cited the leading English case of *Wilkinson v Downton* with approval,[64] and in the absence of any guidance following *O v Rhodes*, it has been assumed the Supreme Court's formulation above will be accepted by the Scottish courts.[65] Aside from its dubious foundations, the most significant drawback is its reference to a recognised psychological illness as a necessary consequence to the pursuer, narrowing the scope of the action in its ability to deal with emotional harm more generally. It appears to have taken such a limitation from the law of negligence, even though, as Lord Hoffman observed in *Wainright v Home Office*, 'the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention'[66]. Whilst his position may have more weight in Scots law, the courts have not since established liability for the intentional infliction of emotional harm falling short of a recognised psychiatric illness.[67] Such harm must instead be actioned under the PHA 1997, but, as outlined above, this requires a course of conduct being conduct on more than one action.[68]

4. Privacy

Breach of confidence is the primary mechanism with which to protect private, ultimately truthful, information.[69] Its initial conception within commercial relationships implies the interests it sought to guard were primarily economic in nature, although its subsequent expansion to non-economic contexts – such as in healthcare, legal advising and family or social relationships - indicates a much broader

[57] DM Walker, *The Law of Delict in Scotland* (2nd edn, W. Green, 1981) 670
[58] [2015] UKSC 32 [88] (Lady Hale)
[59] [2015] UKSC 32 [110] (Lord Neuberger)
[60] *Ibid,* [111] (Lord Neuberger)
[61] *Ibid*, [88] (Lord Neuberger)
[62] *Ibid*, [73] (Lady Hale)
[63] Although Lord Reed hinted to the existence of the wrong in *Ward v Scotrail Railways Ltd* 1999 SC 255, the case was ultimately pled on the grounds of negligence. In any case, it would likely today be dealt with instead under the PHA 1977, discussed above.
[64] [1897] QB 57. See e.g., *Janvier v Sweeney and Another* [1919] 2 KB 316
[65] Scottish Law Commission, *Report on Defamation* (Scot Law Com No 248, 2017) 9
[66] [2003] UKHL 53 [44]
[67] E Reid, *The Law of Delict in Scotland* (EUP, 2022) 553
[68] PHA 1997, s 8(3)
[69] *Lord Advocate* v. *The Scotsman Publications Ltd* 1989 SLT 705

basis of protection beyond pecuniary damage. At its core, however, the action imports and ultimately seeks to uphold a 'duty fixed by law'[70] between parties - requiring a confider and a confident, and some form of passing of information between the two. Such a duty has never been considered necessary in an action for verbal injury.

Misuse of private information, on the other hand, protects private information, whether or not there is a confidential relationship between two parties.[71] It may, therefore, be the appropriate remedy for verbal affronts of the kind envisioned by Hume, suffered where 'some secret matter, known only to the defender, has been officiously and unnecessarily circulated to the world'[72]. Although the truth or falsity of the information is an 'irrelevant enquiry in deciding whether the information is entitled to be protected'[73], the delict thus far appears limited to the protection of informational privacy, thus unlikely to cover the unrevealing (words not circulating new information), but nonetheless degrading and harmful, insults or slurs that a comprehensive law of verbal injury would seek to redress.

[70] AT Glegg, *The Law of Reparation in Scotland* (3rd edn, W. Green, 1939)
[71] The basis on which this delict exists in Scotland is beyond the scope of this research, but it will be assumed in the absence of judicial consideration since *Campbell v MGN Ltd* [2004] UKHL 22 the courts will likely follow the House of Lords in recognising misuse of private information as an actionable wrong. See E Reid, *The Law of Delict in Scotland* (EUP, 2022) 738
[72] Hume, *Lectures III*, 160
[73] *McKennitt v Ash* [2008] QB 73 [86] (Longmore LJ)

III. Looking Forward:
Issues and Options

In the absence of sufficient protection, this paper turns to a more normative assessment of whether this retreat in the protection of 'private feelings' from the weapon of words is in any way desirable.

On one view, private law is a wholly unsuitable mechanism for dealing with the 'high level'[74] concepts of dignity. The taxonomic instability and disease of conceptual confusion in verbal injury is perhaps testament to this: the narrowing scope of the action for verbal injury to feelings suggests an inherent struggle in the law's dealing with such intangible concepts. Indeed, legislators have more recently elected the criminal courts in the sanctioning of harmful speech, indicating a willingness to publicly condemn the conduct as reprehensible without going as far as to recognise a civil wrong against the person warranting redress in every circumstance.[75]

Part of the problem with the concept of dignity is conceptualising the loss resulting from its attack. Although *solatium* is broadly understood as the correct award for damages resulting from any attack on a person's dignity, the difficulty encountered is its frequent equation to 'reparation for feelings'[76]. Whereas the affront to the interests in *corpus*, *fama* or *dignitas* was the injury warranting redress under the Roman law, the above equation would rather suggest hurt feelings as the loss or injury, and thus something akin to 'emotional tranquillity' the legally protected interest.[77] Whilst Norrie argues this shift from affront to hurt feelings has given 'the action its potential in the modern age'[78], this expression of the loss suffered is problematic. 'Feelings' are, quite obviously, an unsuitable object for direct legal protection, the sheer degree of arbitrariness bred by any attempt to compensate injured feelings immediately apparent; it is an expression that has therefore, quite understandably, 'done much to stifle the emergence of a coherent body of law pertaining to the protection of "being"'[79].

That is not to say, however, that emotional tranquillity is not important enough to warrant protection as a legal interest: wounded feelings are rather the consequence of all injuries. As such, they ought not to be brought down to the operational tier but remain protected indirectly, through the strengthening of rights and interests more readily receptable to legal protection. The alternative to conceptualising the loss, then, is to treat dignity, as under the *actio iniuriarum*, as the legally protected interest, affront to which is an injury demanding redress; emotional harm is an inevitable consequence – 'the illness following the disease'[80] – to which the law treats, albeit indirectly, in its award of *solatium*. Being an injury not immediately susceptible to monetary valuation and compensation, 'such a theory would be novel and might be controversial in Scotland'[81]. It is not however, impossibly at odds with principle: Holt CJ recognised this over three centuries ago, opining that 'every injury imports a damage, though it does not cost the party one farthing…for a damage is not merely pecuniary but an injury imports a damage, when a man is thereby hindered of his rights'. More recently, the Outer House in *Henderson v*

[74] *Wainwright v Home Office* [2003] UKHL 53
[75] See e.g., the Hate Crime and Public Order (Scotland) Act 2021 and the Communications Act 2003.
[76] *Black v North British Railway Co* 1908 SC 440 at 453
[77] E Descheemaeker, 'Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)
[78] K McK Norrie, 'The actio iniuriarum in Scots Law: Romantic Romanism or Tool for Today' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)
[79] E Descheemaeker, 'Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)
[80] *Ibid.*
[81] N Whitty, 'Overview of Rights of Personality in Scots Law' in in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (EUP, 2009) 207

Chief Constable of Fife recognised the requirement of a woman arrested to remove her bra upon being placed in a police cell 'was in interference with her liberty which was not justified in law, from which it follows that she has a remedy in damages'[82]. Without making explicit reference to the *actio iniuriarum*, the loss in both cases is clearly the affront to a right protected under the law without justification. If it is accepted these interests in 'being' are of a same nature as interests in 'having' – their violation being a real wrong causing real loss – conceptualising the loss, though it is intangible, becomes much easier.

However, the scope and content of such personality interests are not without their own conceptual difficulties, and the reaffirmation of dignitary interests at the centre of civil wrongdoing is not without its controversy, too. In its heyday under the *actio iniuriarum*, *dignitas* meant social rank and status; it necessitated a social hierarchy and inherent inequality between the pursuer and defender.[83] Whilst 'honour' might be used as a modern alternative, that too is entirely self-defined, burdened with notions of privilege and distinction. As such, Norrie warned 'the very concept of "honour" as a personal interest needs to be regarded with deep suspicion'[84]. But in a society deeply committed to the existence of fundamental human rights, surely underpinned by a concept of human dignity recognising the equal intrinsic worth of all, there would be 'few people [who] would want to deny… it is or ought to be given at least a degree of protection'[85] – perhaps just in a different form to that under the *actio iniuriarum*. Nevertheless, if dignity is common to humanity, and thus a body of wrongs ought to be geared at protecting it, it is perhaps best protected, like 'feelings', indirectly through the recognition of various sub-interests: it cannot become a 'small coin… devalued if it is brought down to the operational level'. The question then becomes of the scope and content of such sub-interests - a question yet to produce a coherent answer.[86] The actions explored in the previous section may be considered protecting such sub-interests to dignity: privacy, bodily and mental integrity all speak to the autonomy of the individual. Further taxonomic development is required to fully map this interest further in order for a comprehensive delict of verbal injury to fully flourish.

In accepting there is some underlying interest worthy of protection in the law against harmful speech, consideration turns briefly to the most effective mechanism to achieve this. The *actio iniuriarum* is often cited as the primary tool available to Scots lawyers in the realising of a broad framework of personality rights in the law, much like the one obtained in South Africa.[87] However, whilst the concept of *iniuria* seems 'strikingly modern' in terms of its ability to identify damage not just to one's wealth but to one's being, the underlying assumptions on which it rests, outlined above, are profoundly 'anti-modern' at the same time.[88] The action simultaneously arose in a cultural and social framework in which the concept of free speech held little to no recognised position. The wrongfulness of a true but harmful

[82] *Henderson v Chief Constable of Fife* 1988 SLT 361, 367 (Lord Jauncey)
[83] E Descheemaeker and H Scott, 'Iniuria and the Common Law' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)
[84] K McK Norrie, 'The actio iniuriarum in Scots Law: Romantic Romanism or Tool for Today' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)
[85] E Descheemaeker and H Scott, 'Iniuria and the Common Law' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)
[86] Compare e.g., N Whitty, 'Overview of Rights of Personality in Scots Law' in in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (EUP, 2009) 147-148 with J Neething, JM Potgieter and PJ Visser, *Neething's Law of Personality* (Butterworths, 1996) vii-viii
[87] See e.g., J Burchell, 'Personality Rights in South Africa: Reaffirming Dignity' in Whitty, N. R. and Zimmermann, R. (eds.) *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: Dundee University Press, 2009). The South African Constitution affords everyone 'the right to have their dignity respected and protected'.
[88] E Descheemaeker and H Scott, 'Iniuria and the Common Law' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)

statement must now be considered and analysed according to protections for freedom of speech under the European Convention on Human Rights.

The courts have nonetheless developed safeguards to freedom of expression in actions for the intentional infliction of mental harm and misuse of private information, balancing the 'lawful but contradictory interests'[89] according to the ECHR and ECHR jurisprudence. Such tools would inevitably have a role in the redevelopment of an action protecting against verbal injury where the *actio iniuriarum* falls silent. Any development will further be driven by the need and desire to protect individuals from their growing exposure to abuse online and in the workplace – both mediums unimagined by the Roman and Institutional writers – as opposed to accommodating any 'ghosts of the past'[90].

[89] Lord Kilbrandon, 'The Law of Privacy in Scotland' (1971) 2 Cambrian L Rev 35
[90] K McK Norrie, 'The actio iniuriarum in Scots Law: Romantic Romanism or Tool for Today' in E Descheemaeker and H Scott (eds), *Iniuria and the Common Law* (Hart Publishing, 2013)

Conclusion

This discussion has sought to engage in the 'painstaking research', 'admirably presented' but nonetheless underdeveloped in *Steele*,[91] entering the labyrinth of verbal injury that appeared so uninviting to Lord Wheatley. In doing so, it has traced a broad retreat in the protection of one's 'private feelings' against the weapon of words in Scots private law – leaving a residual protection that is neither wholly satisfactory nor easily solvable.

Loss under the Defamation and Malicious Publication (Scotland) Act 2021 depends on the starting point adopted. A narrow category has been lost if verbal injury is simply the marginal 'other' to defamation; much more has been lost from the standpoint of the Roman jurist, however, the law of verbal injury being a distinct action committed under the *actio injuriarum* to the protection of dignity. Looking back, what is ultimately left is a residual law of verbal injury concerned with purely economic interests, unrecognisable to the principles founding its conception; what was lost, then, perhaps an opportunity to review such principles in the interest of protecting against the weapon of words in the modern age. Looking elsewhere, while other areas may overlap with or cover a subset of situations that a fully comprehensive delict of verbal injury would indeed seek to encompass, neither one nor the sum of all of them constitute an adequate replacement.

The evolution of such disparate sub-interests, however, may be as close as the law can get to generating a sufficiently broad protection against emotional hurt inflicted by harmful words. Nevertheless, attempts to squeeze verbal injury into other wrongs risk overlooking the broader interest of dignity which ought to unite them all. Further taxonomic work is required to enable a fully-fledged, coherent concept of dignity – embracing its new meaning in the age of human rights - to grow in Scots law, within which a comprehensive law of verbal injury could bloom. The final product will inevitably engage new tools to respond to the emerging contexts and growing needs unforeseen by Roman law. Perhaps, then, the Act did not 'dam[m] the flow of the common law' but rather 'divert[ed] it into fresh course…creating new possibilities for exploitation of existing resources more consonant with current legal policy and social need'[92].

[91] *Steele v Scottish Daily Record* (1970 SLT 53) 60 (Lord Wheatley)
[92] H MacQueen, 'A Hitchhiker's Guide to Personality Rights in Scots Law, Mainly with Regard to Privacy', in N Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (EUP, 2009) 566

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