

Beyond Sticks and Stones

The Protection Against Verbal Injury in Scots Private Law

Bell assured his comparative lawyers that '[i]n Scotland, the Court of Session is held to have jurisdiction, by interdict, to protect not property merely, but reputation, and even private feelings, from outrage and invasion'¹. This research seeks to examine the extent to which Scots private law does, and should, provide protection for 'private feelings' and against verbal injury, where the weapon of choice is neither sticks nor stones, but words alone.

The Defamation and Malicious Publications (Scotland) Act 2021 abolished the law of verbal injury as it existed in Scots common law.² In comparison to the seams of academic literature espoused on the reform of defamation, the Act's disposal of the previously recognised verbal injury to feelings (by exposure to public hatred, contempt, or ridicule, *convicium*, and slander on a third party) appears to have been relatively neglected. The primary justification afforded to the change was that 'little would be lost'³: indeed, statutory equivalents to business-related categories of verbal injury historically recognised at common law were arranged under the new heading of 'malicious publication'⁴. However, where the newly reconfigured delicts demand falsity and financial loss (actual or potential), protection for non-patrimonial loss as a result of injury to 'feelings' appears to have vanished, a disposable by-product to a 'modified' and 'clarified' law of verbal injury.⁵

Whilst the dearth of academic commentary on this apparent lacuna may on the one hand indicate little has indeed been 'lost', the silence may on the other hand rather be symptomatic of the difficulties caused by the 'shred and patches' existence of the law of personality rights in Scotland.⁶ Hence, this proposed research is necessary as part of a broader potential pursuit towards a substantive and cohesive body of personality law in Scotland.

In addition to the sparsity of research, the relevance of verbal injury has gained traction alongside an expanding appreciation and awareness of the contexts in which harassment and bullying arise. This debate follows a recent trend in the criminal sanctioning of objectionable expressions which, even if potentially true, are nonetheless harmful to a particular person.⁷ Whether there should be an equivalent action in Scots private law, or is already in the realm of verbal injury, falls to be examined. Discussion of this area will provide a departure from the reputation-based focus of the law of defamation: where an individual is subject to relentless ridicule or bullying, a concern of the 'reputation' of the person in the 'estimation of ordinary persons'⁸ may risk overlooking particular protected characteristics or the protection required by minority groups, and the truth or otherwise of the statements is irrelevant. Indeed, in a broader context, the framework of rights provided by the European Convention on Human Rights and the related gaps exposed in Scots private law raises the pertinent question as to whether a modern, revitalised law of verbal injury could or should ever exist as a panacea for comprehensive protection of personality rights in Scots private law.

¹ G J Bell, *Commentaries on the Law of Scotland*, vol 1, (7th edn., 1870) pp.111-112

² Defamation and Malicious Publication (Scotland) Act 2021, s.27

³ Report on Defamation (Scot Law Com No 248, 2017) para 9.9

⁴ Defamation and Malicious Publication (Scotland) Act 2021, Pt.2, ss.21-23

⁵ Report on Defamation (Scot Law Com No 248, 2017) para 9.9

⁶ E C Reid *Personality, Confidentiality and Privacy in Scots Law* (2010), para 1.02

⁷ See, e.g. the most recent and controversial Hate Crime and Public Order (Scotland) Act 2021

⁸ Defamation and Malicious Publication (Scotland) Act 2021, s.1(4)(a)

The scope of the research proposed falls broadly into three parts.

The first concerns the extent to which the Defamation and Malicious Publications (Scotland) Act 2021 abolished the law of verbal injury in Scots law, examining the nature of the new delicts under ‘malicious publication’ and the scope of their protection.

To the extent a ‘residual’ law of verbal injury exists, the question then turns to whether this protection is adequate. Such an evaluation naturally attracts a comparison to the protection afforded under Scots common law and Roman law prior to the 2021 Act, and the extent to which our civil law foundations provide for a broader or narrower protection against verbal injury and for ‘private feelings’.

Discussion will finally turn to a more normative assessment of whether – to the extent the current protection under the Scots private law is sufficiently adequate – this position is desirable. A comparative approach to South Africa’s comprehensive law of personality rights would naturally aid this assessment. Whilst the strengthening of the recognition of verbal injury to ‘private feelings’ through the reaffirmation of Roman law’s *dignitas* could promote synergy between the protection of personality rights under Scots private law and the ECHR,⁹ whether Scots private law should and could take on this position is contentious.¹⁰ The answer to this section will ultimately determine the extent to which Scots private law ought to protect against the weapon of words, and suggest the most appropriate route to achieving this.

Having achieved the top mark in my year in delict, this programme of research aligns seamlessly both with my extensive interest in this area of law and my fascination with the past, with an examination of the latter required for a fuller sense of the ways in which the former can address right-based protection. Indeed, whilst I was remarkably adamant within the first week of my law degree that I had made the biggest mistake of my life and should instead be pursuing studies in history, I quickly became aware – to my satisfaction – of the fundamental relationship between the two disciplines. The demands of research allow me to explore the interdisciplinary aspects of law further - something I hope to continue to do beyond an undergraduate level.

⁹ 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)

¹⁰ E C Reid, ‘Protection of Personality Rights in the Modern Scots Law of Delict’ Whitty, N. R. and Zimmermann, R. (eds.) *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: Dundee University Press, 2009)

Reading List

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