



Scottish Law Commission
promoting law reform

| (DISCUSSION PAPER No 161)

Discussion Paper on Defamation

discussion
paper



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March 2016

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The Commission would be grateful if comments on this Discussion Paper were submitted by 17 June 2016.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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Chapter 1 Introduction

Background to the project

1.1 In May 2014 the Scottish Law Commission launched a public consultation exercise seeking ideas and suggestions for law reform projects thought to be suitable for inclusion in our Ninth Programme of Law Reform, on which we were due to begin work in January 2015. We received a substantial number of responses proposing that we should examine the law of defamation in Scotland. Amongst those supporting a project in this area were the Law Society of Scotland, the Faculty of Advocates, BBC Scotland and the Libel Reform Campaign. Respondents drew particular attention to the fact that the law in England and Wales had recently been the subject of major reform in the Defamation Act 2013 (“the 2013 Act”).¹

1.2 With the exception of a small number of provisions relating to privilege in academic and scientific activities, the Scottish Government decided not to move to extend the 2013 Act to Scotland. The Cabinet Secretary for Justice told the Justice Committee of the Scottish Parliament that the Scottish Government considered the law here to be “relatively robust” and that there had not been the same issues as had arisen in England and Wales.² However, a number of respondents to our consultation on the Ninth Programme took the view that there was a need to ensure that Scots law kept pace with England and Wales, particularly in view of the development of information technology, the internet and social media.³

1.3 In the course of the project so far the project team has held meetings with some of those who expressed support for a project on defamation. The team also made contact with other individuals and organisations they identified as having interest and expertise in this area. An advisory group was formed representing a spread of interests. The team is grateful for all the contributions which have been made so far and looks forward to developing this engagement with those interested in defamation law during the consultation period on the present paper.

1.4 The impetus for our project may be traced back to the reforms in England and Wales in the 2013 Act and indirectly to the civil society campaign for reform of defamation law; this gathered force over the course of a decade or more in the years following the start of the millennium. Three charities – English PEN, Index on Censorship and Sense about Science – coalesced around what became known as the Libel Reform Campaign. The campaign was fuelled by increasing disquiet over the phenomenon of “libel tourism”⁴; this involved foreign, often American, defendants being sued in the courts in England and Wales, in circumstances where there had been only modest publication of the defamatory statement in that jurisdiction. The effect was said to be to deter publication and to stifle public debate and criticism. At the same time, campaigners became concerned about what they saw as an

¹ http://www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpga_20130026_en.pdf.

² The Scottish Parliament, *Official Report*, 18 September 2012, column 1738.

³ See ch 7 below for more detail on liability for online publications.

⁴ Discussed in more detail in ch 11, in paras 11.3 and 11.4 below.

emerging trend towards defamation actions being raised in England and Wales against non-governmental organisations, scientists, academics and online commentators with the perceived objective of suppressing legitimate criticism of authority and alleged abuses of power.⁵

1.5 The other main motivation behind the 2013 Act lay in the decisions by various US legislatures to pass statutes preventing enforcement of foreign libel judgements, particularly those emanating from courts in England and Wales.⁶

1.6 The civil society campaign and the consequent public interest in reform of defamation law led to all three of the main UK political parties committing to reform of libel law in their manifestos for the General Election held in May 2010.

1.7 There was substantial pre-legislative scrutiny of the proposed reform of defamation law in England and Wales. Lord Lester of Herne Hill QC introduced a Private Member's Bill⁷ in the House of Lords in late May 2010, this being a precursor to the Defamation Bill later published by the Ministry of Justice in March 2011 as part of a consultation exercise.⁸ In April 2011 a Joint Parliamentary Committee on the Draft Defamation Bill was established.⁹ The Joint Committee reported on 19 October 2011.¹⁰ In February 2012, the UK Government issued a response to the Joint Committee and published the responses to its Consultation Paper and draft Bill.¹¹

1.8 The Defamation Bill was introduced into the House of Commons on 10 May 2012 and progressed to the House of Lords on 8 October 2012. It received Royal Assent on 25 April 2013. The Defamation Act 2013 came into force, for the most part, on 1 January 2014.

1.9 In view of the strength of representations made to us about the need for reform of defamation law in Scotland, we resolved to recommend to the Scottish Government that we should examine this area of the law in the light of the 2013 Act as part of our Ninth Programme of Law Reform. The Scottish Government accepted this recommendation.

1.10 We note that in November 2014 the Northern Ireland Law Commission issued a valuable consultation paper on defamation law in Northern Ireland.¹² The primary purpose of the paper was to consider the 2013 Act and to consult on whether the reforms reflected in the Act should be extended to Northern Ireland, in whole or in part. The consultation period

⁵ An example often cited is *British Chiropractic Association v Singh* [2011] 1 WLR 133.

⁶ See, for example, the Libel Terrorism Prevention Act 2008 (New York), and the Securing the Protection of our Enduring and Established Constitutional Heritage Act 2010 (US - SPEECH Act).

⁷ <http://www.publications.parliament.uk/pa/ld201011/ldbills/003/11003.i-ii.html>.

⁸ Ministry of Justice, *Draft Defamation Bill: Consultation*, Consultation Paper CP3/11, March 2011. https://consult.justice.gov.uk/digital-communications/draft_defamation_bill.

⁹ <http://www.parliament.uk/business/committees/committees-a-z/former-committees/joint-select/draft-defamation-bill1/>.

¹⁰ HL Paper 203, HC 930-I, 19 October, 2011,

<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>.

¹¹ Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Defamation Bill* (Cm 8295, February 2012). https://consult.justice.gov.uk/digital-communications/draft_defamation_bill.

¹² NILC 19 (2014).

ended in February 2015. There has not as yet been any amendment to defamation law in Northern Ireland.¹³

The piecemeal nature of Scots defamation law

1.11 The law of defamation in Scotland is mainly based on the common law¹⁴, although it is also affected by some statutory provisions. There are, for instance, the provisions of the Parliamentary Papers Act 1840 on privilege, a few miscellaneous provisions of the Defamation Act 1952 and the provisions of the Defamation Act 1996 on offer of amends, secondary publishers and privileges (amongst other provisions). The Defamation Act 2013 applies to Scotland only in relation to extended privilege for certain academic and scientific activities.¹⁵

1.12 While the common law sets out the main principles, there has been a shortage of modern Scottish case law¹⁶ with the result that in some areas the law has not had the opportunity to develop in line with other systems¹⁷. The most prolific period for defamation actions in Scotland was in the late nineteenth and early twentieth centuries. In the preface to the second edition of a leading textbook, Cooper on Defamation and Verbal Injury, published in 1906,¹⁸ it was noted that since the publication of the first edition in 1894 there had been more than one hundred and twenty cases on the subject decided in the Court of Session. To the modern practitioner that seems an astonishingly high volume of work in what is now regarded as a niche area. After the First World War the number of such actions declined rapidly. Professor Norrie attributes this to a number of factors:¹⁹ the demise of the late Victorian ideal of honour, the unavailability of legal aid, the increasing unpopularity of jury trials and the modest levels of damages awarded by Scottish judges. Since the end of the Second World War there have been no more than a few reported cases a year in the Court of Session and even fewer in the Sheriff Court. The lack of modern Scots case law has sometimes given rise to a tendency for Scottish courts and practitioners simply to adopt decisions by the English courts. Given that the law north and south of the border has different conceptual origins,²⁰ the English jurisprudence is not always a perfect fit.

1.13 Added to this already fragmented picture is the influence of the European Court of Human Rights with its jurisprudence on the rights to freedom of speech and private life. The balancing exercise inherent in safeguarding these rights has become particularly relevant for online statements and activities.²¹

The Defamation Act 2013 and its implications for reform of Scots law

1.14 The Defamation Act 2013 has restated in statutory form for England and Wales many of the most important principles of defamation law. It has also made a number of significant

¹³ The Northern Ireland Law Commission has provided to the Department of Finance and Personnel a summary of the responses who will take it forward as appropriate. http://www.nilawcommission.gov.uk/nilc_a_r_2014_15_-_read_only_for_nilc_webseite_business_office.pdf.

¹⁴ The common law consists principally of case law and juristic writings.

¹⁵ See ch 8 below for more detail.

¹⁶ This is a difficulty in many areas of Scots private law.

¹⁷ For example on public interest privilege – see ch 6.

¹⁸ F T Cooper, *The Law of Defamation and Verbal Injury* (2nd edn, 1906).

¹⁹ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 4.

²⁰ See ch 2 below for more detail.

²¹ See ch 7 below for more detail.

substantive changes to the law. The defences of truth, honest opinion and publication on a matter of public interest are now encapsulated in statute. There are statutory provisions on a requirement to show serious harm, on an extended defence for website operators and on a single publication rule. Broadly speaking, although not uniformly, the changes in the 2013 Act may be said to tilt the balance in favour of freedom of expression.

1.15 The changes recently brought about by the Defamation Act 2013 present Scots law with a difficult dilemma. On the one hand, there is an understandable reluctance simply to follow what has been done in a different legal system, especially in an area of the common law with different conceptual roots. The issues and concerns that led to the Defamation Act 2013 may not apply (at least with the same force) in Scotland; for instance, there has been little evidence of libel tourism here, and the extent to which there is evidence that publication of information has been restricted is open to question. Perhaps more importantly, a number of possible weaknesses in the 2013 Act have been identified, particularly in relation to the threshold test, the defence of honest opinion and the defence for operators of websites. While it is perhaps too early to come to a final view on the validity of these issues – the courts have had only limited opportunity to consider them – we consider that we must take account of them in approaching possible reform.

1.16 On the other hand, it can be said that major practical disadvantages are likely to arise if defamation law is formulated differently in the several jurisdictions making up the United Kingdom. Proponents of this view point to the fact that the principles and values reflected in the law do not (or at least should not) vary depending on which of the UK systems happens to apply to a particular set of circumstances; this is especially so in the context of the key defences of fair comment and public interest privilege, for instance. Publishers operate across the United Kingdom and do not welcome having to deal with rules that differ as between England/Wales and Scotland; this may be a particularly acute problem in the case of material published on the internet and where decisions about news broadcasting have to be taken quickly. Of interest in this context is that in Australia Uniform Defamation Laws came into effect in 2006.²² The previously separate laws of defamation which had operated in the various states and territories of Australia were thought to create complexity, confusion, increased costs and delays in litigation.²³ It is, therefore, possible that one effect of a decision not to extend all of the provisions in the Defamation Act 2013 to Scotland might be to limit the availability of information in this country because of a perception that the law is more restrictive than in England and Wales; this is known as the chilling effect. A further consideration is that the law in England and Wales is, in the future, increasingly likely to develop in the light of judicial interpretation and application of the provisions contained in the 2013 Act. There is an argument that it would be unfortunate for Scots law, with its much smaller number of cases, not to have the opportunity to benefit fully from such modern jurisprudence.

Our approach

1.17 There is, we think, force in each of the positions just summarised. In the circumstances, we have decided not to limit our initial examination of the options for reform to considering whether Scots law should merely adopt those parts of the 2013 Act that do

²² Each of the Australian States and the two largest Territories now have defamation statutes which operate broadly to the same substantive effect. These are referred to collectively as the Uniform Defamation Laws.

²³ See *Carter-Ruck on Libel and Privacy* (6th edn, 2010), para 37.11.

not already apply here; in other words, to examining whether a straight lift of the provisions (subject only to minor modifications on terminology etc.) would be appropriate. We think that such an approach would be unduly narrow and would amount to a missed opportunity to consider possible wider reform of Scots defamation law. On the basis of our preliminary examination, we do not think that the 2013 Act would always fit easily with Scots law. We must take account of the criticisms of some of the provisions of the 2013 Act.

1.18 In an ideal world one might aim to have a new statute setting out the whole of Scots defamation law. We do not, however, believe that codification of the entire Scots law on defamation - in other words, all of the common law principles as well as the statutory provisions scattered among various pieces of legislation - would be practical. We would stress that such an exercise would be greatly beyond our present resources and would substantially prolong this project. The priority should be substantive reform of Scots defamation law.

1.19 In each area covered by this Discussion Paper we look at the common law and, where appropriate, the statutory law applicable to Scotland. In so far as the topics are covered by the 2013 Act, we are not generally seeking to determine whether that Act would provide a suitable model for reform. Rather, we think it more helpful at this stage to provide a flavour of the main lines of comment and criticism of the relevant sections so far, in an attempt to inform the expression of views in principle on the reform of the equivalent area of Scots law. We depart from this approach only to the extent that we are of the view that provision modelled on that in the 2013 Act could usefully fill a current gap in Scots law, or, conversely, that there are particular reasons why the 2013 Act approach should not be followed. Where there are particular differences between Scots and English law which may in themselves impact on the suitability of making provision modelled on that in England and Wales, we highlight those.

1.20 We intend to look at all of this with a view to avoiding being left behind by the developments in England and Wales. We aim to have a statute which lays down a clear new law for everyone (including the media, bloggers and internet intermediaries). We also wish to make the law accessible and easy to use. Moreover, we are keen to allow the courts in Scotland the opportunity to look across the border for guidance when defamation cases arise here.

1.21 Beyond the areas covered by the 2013 Act, we have looked for other aspects of Scots defamation law that may be in need of reform and would be suitable for inclusion in the project. In this connection we have so far identified: possible abolition of the rule that publication to a third party is not an essential ingredient of an action for defamation,²⁴ defamation of deceased persons²⁵ and reform of remedies.²⁶ Added to the piecemeal framework of Scots defamation law there are fairly nebulous rules on verbal injury, the categories of which are not clearly defined; we are aiming to look at that too.²⁷ Subject to the views of consultees we are of the provisional view that the line should be drawn there. We would, however, be grateful for the views of consultees as to whether the project should extend any further. We therefore ask the following question:

²⁴ See ch 3 below for more detail.

²⁵ See ch 12 below for more detail.

²⁶ See ch 9 below for more detail.

²⁷ See ch 13 below for more detail.

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.**

Legislative competence

1.22 The areas of law covered by this Discussion Paper fall largely within the legislative competence of the Scottish Parliament. However, a provision regulating responsibility for and defences in relation to defamatory material communicated by an internet intermediary but created by a third party may be considered to relate to a reserved matter.²⁸ Whether or not such a provision relates to a reserved matter is to be determined by reference to the purposes of the provision having regard to its effect in all the circumstances.²⁹ Internet services are a reserved matter under section C 10 of Schedule 5 to the Scotland Act 1998 and in our view the purpose of a provision determining the responsibility of and defences available to internet intermediaries is related to internet services. The Scottish Parliament can make changes to Scots private law (which includes the law of delict³⁰) if the purpose is to make the law apply consistently to reserved matters and otherwise.³¹ A provision focussing on the liability of internet intermediaries for publication online of defamatory material would not be a provision, in our opinion, which applies consistently to reserved matters and devolved matters. It would seem that such a provision relates to reserved matters insofar as it is aimed at the regulation of the liability of those providing an internet service. In our view such legislation would therefore have to be passed by the United Kingdom Parliament.³²

1.23 In doing so the United Kingdom Parliament would have to have due regard to Article 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services,³³ in particular electronic commerce, in the Internal Market. Article 15 prohibits member states from imposing a general obligation on internet intermediaries to monitor information which they transmit or store or a general obligation actively to seek facts or circumstances indicating illegal activity.

1.24 We are of the view that the tentative proposals outlined in this Discussion Paper would not breach the European Convention on Human Rights or European Union law.

Impact assessment

1.25 As part of this project the team is carrying out an assessment of the probable economic impact of our eventual recommendations. We will be most grateful for any responses to this paper which are able to provide evidence on, or otherwise address, the economic impact of the anticipated impact of changes to the law as a result of the issues raised in this Discussion Paper.

²⁸ See ch 7 below for more detail.

²⁹ Section 29(3) of the Scotland Act 1998.

³⁰ Section 126(4) of the Scotland Act 1998.

³¹ Section 29 (4) of the Scotland Act 1998.

³² The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) which provide for defences for internet intermediaries were made by the Secretary of State under section 2(2) of the European Communities Act 1972 and extend to Scotland. Conversely, section 5 of the Defamation Act 2013 which provides for a defence for operators of websites does not extend to Scotland.

³³ Such services are defined as meaning any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services – see article 1.2 of Directive 1998/34/EC.

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.**

Chapter 2 Requisites and key principles of defamation law

Background

2.1 We include this chapter to assist the reader by setting the scene for later discussion. It is intended to contain only an outline of some of the key features of Scots defamation law.¹

Origins of the Scots law of defamation

2.2 In Roman law there were two separate delicts: (i) *injuria* for recovery of damages for insult or damage to reputation and (ii) the action under the *lex Aquilia* for recovery of patrimonial loss. This division was adopted to an extent in Scots law but not completely.²

2.3 Scots law of defamation is traceable from around the turn of the fifteenth to the sixteenth century.³ It has co-existed alongside verbal injury, an analogous though distinct form of wrong involving imputations which, although not necessarily defamatory in terms of lowering of reputation, are nonetheless actionable as being damaging to the position of a private individual or other party in some way. It seems that the law of defamation originated as an offshoot of the general law of verbal injury.⁴ It was not until during the course of the nineteenth century that a distinction between verbal injury and defamation properly began to be drawn.⁵ Towards the end of the nineteenth century, case law seemed to narrow the scope of verbal injury such that it was to be taken to involve only provable business losses, or “special damage”, akin to malicious falsehood in English law.⁶ At this point, there was, on one view, a complete separation between verbal injury on the one hand, as relating only to imputations against business or professional standing, and defamation and *convicium* on the other,⁷ as protecting one’s reputation or esteem as an individual. It has, though, been suggested that this restricted approach to what amounts to verbal injury never had a proper foundation in Scots law.⁸ This may be taken to be confirmed by one of the few examples of twentieth century authority available on the point, in the form of *Steele v Scottish Daily Record and Sunday Mail Ltd*,⁹ discussed further in chapter 13 below.

¹ For general treatments of the law see: Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), ch 29 and Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995).

² Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), pp 1-2.

³ See the introduction to the chapter entitled “Defamation” by John Blackie in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (vol 2, Obligations) (2000), p 633.

⁴ Elspeth Christie Reid, “English defamation reform: a Scots perspective”, 2012 SLT (News), 111, 114.

⁵ See Elspeth Reid, “Protection of Personality Rights in the Modern Scots Law of Delict” in *Rights of Personality in Scots Law: A comparative perspective* (2009) Niall Whitty and Reinhard Zimmerman (eds), pp 265-266.

⁶ See *Epril (Glasgow) Ltd v E & F Richardson Ltd* 1950 SLT (Notes) 35 (OH) and *Moffatt and Others v London Express Newspaper Ltd* 1950 SLT (Notes) 46 (OH).

⁷ For *convicium* see further para 13.22 below.

⁸ See John Blackie “Defamation” in *A History of Private Law in Scotland* (vol 2, Obligations) (2000), pp 679-681. The case of *Sheriff v Wilson* (1855) 17 D 528 is also of significance in this connection, given that it involved injury to feelings being held to give rise to verbal injury, with damages for *solatium* awarded as a result.

⁹ 1970 SLT 53.

Interests protected by the law of defamation

2.4 It is possible to group into categories the type of imputation which the hypothetical right-thinking member of society would be likely to find derogatory or demeaning of the pursuer, albeit that any such categorisation is of no legal consequence. Imputations typically included are criminality, immorality, lack of professional competence, professional misconduct and financial unsoundness.¹⁰ It follows from this that in Scots law a successful claim for defamation may be brought where patrimonial¹¹ loss has been suffered as a result of damage to business or professional standing. Moreover, claims in defamation may, in appropriate circumstances, be brought by a company, partnership, unincorporated association, or a sole trader, rather than an individual in his or her private capacity. Defamation law is not, therefore, confined in its application to cases involving injury to the personal reputation of individuals, resulting in claims for *solatium*.¹² This marks a departure from early Scots law concerning protection of reputation.

What amounts to defamation?

2.5 In one of the most commonly quoted passages relating to what amounts to defamation, Cooper described it as follows:

“the wrong or delict which is committed when a person makes an injurious and false imputation, conveyed by words or signs, against the character or reputation of another. Character or reputation must be here understood in the widest sense to include moral and social reputation and financial credit.”¹³

2.6 This description was predated by one of Sheriff Guthrie Smith, which suggests that defamation may be committed in one or other of two ways:

“Directly, by the application to a particular individual of particular words or epithets tending to make him mean, disreputable, ridiculous or contemptible; [or] indirectly, by the false imputation of such acts as may lower him in the estimation of the public, or make his society shunned by those with whom he is accustomed to associate.”¹⁴

2.7 The second way has formed the basis of the classic test for deciding whether a statement is defamatory as a result of the decision of the House of Lords in *Sim v Stretch*.¹⁵ Lord Atkins articulated the test as follows:

“Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”¹⁶

2.8 That test continues to be applied in those or similar terms today; in modern practice it is sometimes explained to juries as being whether the words would tend to make ordinary readers think the worse of the pursuer. It has been held in the Scottish courts to represent the law in Scotland.¹⁷

¹⁰ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), pp 17-27.

¹¹ ie financial.

¹² ie injury to feelings.

¹³ FT Cooper, *The Law of Defamation and Verbal Injury* (2nd edn, 1906), p 1.

¹⁴ J Guthrie Smith, *A Treatise on the Law of Reparation* (1864), p 188.

¹⁵ [1936] 2 All ER 1237.

¹⁶ At p 1240.

¹⁷ *Steele v Scottish Daily Record and Sunday Mail Ltd* 1970 SLT 52.

2.9 As will be evident, the test turns on whether the reputation of the pursuer would be lowered, or would tend to be lowered, not in the opinion of people generally, but of *right-thinking* people. In other words, as much as the court will take account of what people do in fact regard as demeaning, the starting point will be to consider what the hypothetical reasonable person would make of the imputation in question.¹⁸ If believed, would it cause them to think significantly less of the pursuer, or possibly even shun him or her? The test is, therefore, largely an objective one, based upon the court's view of how members of society *ought to* regard a particular imputation. There is, however, a subjective element. In applying the test the court may take into account surrounding circumstances – including the type of person likely to hear or read the statement in question and the particular circumstances of the pursuer. For example, it is unlikely to tarnish the professional reputation of a lawyer to say that he or she knows nothing about medicine; the situation may be very different if the same is said of a doctor.¹⁹

Other requisites

2.10 True words can be defamatory but in order to found an action in defamation a defamatory statement must also be false. Where a defamatory statement is made, the law presumes it to be false. If the maker of a defamatory statement contends that the statement is true then he or she must prove the truth of the statement.²⁰ In order to found an action in defamation a statement must also be made with malice – in other words, it must be intended to cause injury. Where a statement is defamatory and false, malice will usually be presumed,²¹ unless absolute or qualified privilege is established, including the so-called *Reynolds* defence relating to publication on a matter of public interest.²² The *Reynolds* defence is based on the seminal decision of the House of Lords in *Reynolds v Times Newspapers Ltd*²³ where recognition was given to the existence of a general obligation on the media and other publishers to communicate important information on matters of general public interest and a corresponding general interest of the public to receive such information. This is subject to the condition that it is the product of journalism which can be described as “responsible.”

2.11 From the principles just discussed it can be seen that the actual intention of the maker of a defamatory statement is largely irrelevant, and unintentional defamation can be actionable just as intentional defamation can, albeit that there may be greater scope for reliance on the offer of amends²⁴ route where defamation was unintentional. It is the nature of the statement in itself which is said to demonstrate malice, rather than what the defender thought.²⁵ Liability to pay damages will arise, however, only where the pursuer is able to aver and prove two elements. The first is that the statement is ‘defamatory’ of him or her. The second is that the statement has been ‘communicated,’ either to a third party or to the pursuer alone.²⁶ As regards the first element, the question of whether the statement is in fact

¹⁸ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), pp 9-10.

¹⁹ See again *Defamation and Related Actions in Scots Law* (1995), pp 11-12.

²⁰ On the defence of truth, see ch 4 below.

²¹ Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), paras 29.02-29.04.

²² *Morrison v Ritchie* (1902) SC 4 F 645, at 650. For further explanation of the *Reynolds* defence, and of absolute and qualified privilege more generally, see chs 6 and 8 below.

²³ [2001] 2 AC 127.

²⁴ See paras 9.9-9.12 below.

²⁵ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 79.

²⁶ The Scots law rule that actionable defamation may arise where an imputation is communicated only to the person who is the subject of it, and the merits, or otherwise, of that rule, are discussed in ch 3 below.

defamatory of the pursuer will be judged by reference to whether the statement was understood as carrying a defamatory meaning by the person(s) to whom it was communicated. If it was not so understood, there will be no defamation as a matter of fact.²⁷ If it was so understood, damage to reputation will be presumed.

The determination of meaning attributable to the statement – as a matter of law and of fact

2.12 The task of the court is to determine whether, as a matter of *law*, the words on which the action is based are capable of bearing the defamatory meaning which the pursuer seeks to ascribe to them, based upon a reasonable, natural or necessary interpretation of them.²⁸ In determining what is a reasonable or natural interpretation the court is bound to consider what meaning they would be expected to impart to the ordinary reasonable reader who is neither naïve nor unduly suspicious.²⁹ In Scotland such a determination falls to be made before the questions (known as the issue and counter-issue) which the jury has to answer in delivering its verdict have been approved by the court or before the case is sent to proof before a judge sitting without a jury. Unless the words complained of are of themselves defamatory on their face, in which case it is not necessary to elaborate as to the meaning to be attributed, it is for the pursuer to set out in the pleadings what meaning he or she wishes to be ascribed to them. In other words, the pursuer must set out the innuendo or secondary meaning which he or she considers should be inferred.³⁰ The pursuer should also make averments about any circumstances surrounding the publication of the words which are said to cast light upon their meaning.³¹

2.13 The court must decide whether the facts pleaded are such as to entitle the pursuer to have the case remitted to a jury or to a proof to determine whether, as a matter of *fact*, the statement has defamed the pursuer.³² If the factual averments are insufficient, the action will fall to be dismissed as irrelevant at this stage. If the statement complained of is ambiguous in the sense that a reasonable person could read it as conveying two or more possible meanings, one defamatory in the manner alleged by the pursuer and the other(s) inoffensive, the initial task of the jury or judge at a proof is to determine which is the true meaning to be ascribed to the statement in the circumstances of the case.³³ In other words, the task is to determine, first of all, the single meaning which the words bore as a matter of fact. The single meaning rule is discussed in greater detail below.³⁴

2.14 On the other hand, if the primary meaning of the words used in a statement is clearly defamatory on its face, without the drawing of an innuendo or secondary meaning, the issue for the jury or the judge at a proof will be whether the statement in question is about the pursuer, whether it is false and whether it is defamatory of the pursuer in all the circumstances of the case. This may be subject to any successful attempt by the defender

²⁷ See Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 15.

²⁸ This was confirmed by the House of Lords in *Russell v Stubbs Ltd* 1913 SC (HL) 14, at 20 per Lord Kinnear and 24 per Lord Shaw of Dunfermline.

²⁹ Rosalind McInnes, *Scots Law for Journalists* (8th edn, 2010), para 26.42.

³⁰ Further explanation as to innuendo can be found at para 2.15 below.

³¹ The duty on the pursuer to provide evidence of relevant circumstances was highlighted in *Gollan v Thomson Wyles Co* 1930 SC 599, at 602-603 per Lord President Clyde.

³² *Sexton v Ritchie & Co* (1890) 17 R 680, at 696 per Lord M'Laren.

³³ See again *Russell v Stubbs*, at 20 per Lord Kinnear.

³⁴ See para 2.16 below.

to persuade the jury that the statement was, for example, understood as a joke.³⁵ In cases of both innuendo and defamation based on the primary meaning of a statement, the jury must be satisfied that some form of loss or damage has been caused to the pursuer as a result of the defamatory statement, or at least that the words used would have a tendency to cause such. Owing to the rule that communication to a third party is not necessarily required, hurt feelings are, however, enough; there need not necessarily be evidence of actual damage to reputation.³⁶

Innuendo

2.15 An innuendo is averred where a pursuer claims that, due to the context or circumstances surrounding publication of particular words, a defamatory meaning which is not apparent on the face of the words is nevertheless the appropriate meaning to be ascribed to them. In other words, it involves attributing a meaning other than the obvious one, owing to the overall circumstances. The test to be applied by the court in determining whether an innuendo should be inferred is that of the approach of the reasonable person: would the reasonable person be expected to draw the meaning averred and so hold the pursuer in less high regard as a result? Similarly, would the reasonable person in the circumstances of the pursuer regard the words as offensive of him or her?³⁷ The words are to be judged in the context of the publication as a whole.³⁸ Examples of situations in which innuendo has been held to have been properly averred include an implication that the pursuer was attempting to defraud the defenders, it being put to him that he had travelled twice on the same ticket,³⁹ and an implication of dishonourable conduct by a person who had been found liable in damages for slander.⁴⁰

Single meaning rule

2.16 This rule applies where, aside from the meaning averred by the pursuer, there are other meanings which could reasonably be attributed to a statement. The function of the rule is to provide a mechanism by which the jury or judge at a proof can determine which of the meanings is the true meaning to be ascribed to the statement in the circumstances of the case.⁴¹ That meaning should then be considered from the point of view of determining whether it has been defamatory of the pursuer as a matter of fact.⁴² The single meaning rule may be said to be less well developed in Scotland than in England and Wales. In England and Wales damages for defamation may be recovered in respect of whatever meaning is thought to be the one that the statement did in fact bear, even if that is not the meaning averred by the claimant.⁴³ In Scotland a defamation claim can only be successful where, as a starting point, the meaning identified as the one which the statement did in fact bear is the meaning averred by the pursuer in the pleadings. If the statement is found to bear a different meaning, no damages will be payable even if that other meaning would be

³⁵ See again *Sexton v Ritchie*, at 696 per Lord M'Laren.

³⁶ See Rosalind McInnes, *Scots Law for Journalists* (8th edn, 2010), para 43.13.

³⁷ See Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), pp 14–16.

³⁸ See, for example, *Charleston v News Group Newspapers* [1995] 2 AC 65.

³⁹ *Cumming v Great North of Scotland Railway Co* 1916 1 SLT 181, at 189.

⁴⁰ *Lyal v Henderson* 1916 SC (HL) 167.

⁴¹ See *Russell v Stubbs Ltd* 1913 SC (HL) 14, at 20 per Lord Kinnear.

⁴² The rule does not apply where the public interest defence developed in *Reynolds v Times Newspapers Ltd* is raised – see further para 6.4 below.

⁴³ *Lucas-Box v News Group Newspapers* [1986] 1 WLR 147, at 153.

defamatory. The thinking underlying this is that the alternative meaning is not the one which has been alleged against the defender.⁴⁴

Defences

2.17 The most common defences in defamation actions appear to be truth,⁴⁵ fair comment, absolute and qualified privilege and *Reynolds* privilege relating to matters of public interest. In a jury trial these would be raised in a counter-issue; at a proof they would be set out simply in the written defences. The defences of innocent dissemination and fair retort are also available, but seem to be less commonly used, at least at present. In so far as we can ascertain fair retort operates satisfactorily in practice.⁴⁶ Subject to any relevant comments of consultees in response to question one above, we do not intend to consider it in detail as part of the current project.⁴⁷ Innocent dissemination is discussed further in chapter 7 below, in connection with its potential relevance in relation to certain forms of online publication.

Defamation v libel and slander – the position in Scots and English law

2.18 English law recognises a distinction between libel and slander. In short libel is a defamation which is expressed in written or other permanent form while slander is a defamation which is spoken or communicated in some other transitory form. The distinction is not of significance as a matter of principle in Scots law; old case law uses the terms 'libel' and 'slander' interchangeably, both simply meaning 'defamation.' In England and Wales, by contrast, the distinction between libel and slander is one of principle, the difference being that no action for slander will lie unless the claimant proves that the words complained of have caused 'special damage', in other words actual pecuniary damage.⁴⁸ There is no requirement for proof of special damage in alleged cases of libel.

⁴⁴ See Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 15.

⁴⁵ Often referred to in Scots practice by the Latin word, *veritas*.

⁴⁶ Notwithstanding that it is a less commonly used defence, we note that it was relied upon, successfully, in the case of *Curran v Scottish Daily Record, Sunday Mail Ltd* [2011] CSIH 86.

⁴⁷ A person against whom an imputation is made is entitled to make a fair retort to the imputation. If the retort is in some way defamatory of the person who made the original imputation, this will not be actionable unless the pursuer can show that the defender acted maliciously, or with intent to injure. See further *Gray v Scottish Society for the Prevention of Cruelty to Animals* (1890) 17 R 1185.

⁴⁸ See Rosalind McInnes, *Scots Law for Journalists* (8th edn, 2010), paras 31.04 -07.

Chapter 3 Publication and threshold test

How far must a statement be communicated in order to be actionable?

3.1 Any reform in relation to the notion of a threshold of actionable claims in defamation will be governed in part by whether communication of an allegedly defamatory imputation to a third party becomes a requisite of defamation. We deal with this point first. In Scots law defamation can arise if an imputation is communicated merely to the person who is the subject of it; in other words if it is seen, read or heard only by its subject and no one else. It is therefore possible to have defamation without what would typically be regarded as publication, though that term is not used in Scots law in this context; only 'communication' is used. The leading case is *Mackay v M'Cankie*,¹ which continues to hold good, paving the way at least for claims for *solatium*, albeit that claims for patrimonial loss would seem difficult to prove in this context.² At its heart is the fact that defamation in Scotland is not a delict exclusively about social relations; rather, as matters stand, it continues to encompass protection against injury to self-esteem. This seems difficult to reconcile with any focus exclusively on reputation, as per the approach of section 1 of the 2013 Act, discussed in greater detail below.³

3.2 Cases involving the application of *Mackay v M'Cankie* have been rare in practice; there are no examples from the last century. It has been suggested that the survival of the principle may be traceable to the origins of the law of defamation as an offshoot of the general law of verbal injury which, up until around the mid-nineteenth century, encompassed insult as well as falsehood.⁴ In other words, it was enough that an imputation, though not necessarily false, was insulting of a person. As regards the law of defamation, it may be argued that communication to a third party is an analytical necessity of a form of wrong concerned with damage to reputation. In applying the *Sim v Stretch* test where there has been no third party communication, the view has been expressed that it is artificial to focus on a third-party reaction that is purely hypothetical, albeit that the test seems to accommodate this. Moreover, some may think that it takes an unusually high degree of mental fragility to be injured in one's own self-esteem by words which one knows to be untrue and which have not been communicated to others. One approach may be to depart from *Sim v Stretch*, adopting a test based on whether the reasonable person would have suffered affront as a result of the words of the defender. This would leave aside the actual reaction of the pursuer.⁵ However, this may again be said to sit awkwardly alongside the fact that defamation revolves around injury to *reputation*.

3.3 We are not aware of any other jurisdiction in which defamation is taken to arise as a matter of law without an allegedly defamatory imputation being communicated to a third party. It is, however, interesting to note the position in South Africa. Although damages in

¹ (1883) 10 R 537.

² Elspeth Christie Reid *Personality, Confidentiality and Privacy in Scots Law* (2010), para 10.35.

³ See further Elspeth Christie Reid, "English defamation reform: a Scots perspective", 2012 SLT (News), 111, 114.

⁴ See again "English defamation reform: a Scots perspective", 114.

⁵ See again *Personality, Confidentiality and Privacy in Scots Law*, para 10.36.

defamation can be recovered there as a result of injury to feelings, this is possible only where the imputation has been published or otherwise made known to a third party.⁶

3.4 We have considered whether the *Mackay v M'Cankie* principle may perhaps have a useful function in the context of online communication. It seems reasonable to expect that a number of cases of defamation online will arise from comments on Twitter; these will always be published, (or, as a matter of Scots law, 'communicated') to a greater or lesser extent.⁷ In such circumstances there is no scope for application of the *Mackay v M'Cankie* principle. By contrast, the principle could potentially fulfil a function where remarks are made about a person in an e-mail, text or similar message, simply sent from the person making the remarks to the person who is the subject of them and not made available to any other party. However, other areas of law, including the law of harassment, might conceivably offer a degree of protection here in appropriate circumstances. Section 8 of the Protection from Harassment Act 1997 provides protection from the pursuit of a course of conduct which amounts to harassment of another person. "Conduct" includes speech and "harassment" is defined to include causing a person alarm or distress. An obstacle may, however, arise because the section 8 right to be free from harassment depends on there having been a course of conduct. This means that conduct amounting to harassment must have taken place on at least two occasions. In practice, injury may, though, be caused by a single statement. Also of potential relevance in this context is the offence under section 127 of the Communications Act 2003 of sending a grossly offensive, indecent, obscene or menacing message by means of a public electronic communications network. Taking all of these factors into account, our preliminary thinking is towards the idea that there is no longer a place in Scots law for the principle that an imputation may be defamatory even if communicated only to the person who is the subject of it. However, we would welcome views on the following question:

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

Threshold test

Introduction

3.5 In order to manage the large number of defamation cases brought in the English courts the Defamation Act 2013 has introduced a new threshold for determination of whether a statement gives rise to an actionable claim in defamation.⁸ We consider this first of all from the point of view of individuals acting in their private capacity. Section 1(1) of the 2013 Act provides that:

"A statement is not defamatory unless its publication has caused, or is likely to cause serious harm to the reputation of the claimant".

⁶ See further Elspeth Christie Reid *Personality, Confidentiality and Privacy in Scots Law* (2010), para 10.36.

⁷ We note that it is possible to restrict access to Twitter pages. This may be said to restrict the extent of publication.

⁸ For further discussion of the concept of 'actionability', see *Duncan and Neill on Defamation* (4th edn, 2015), para 4.06 and Professor Alastair Mullis and Richard Parkes, QC (eds), *Gatley on Libel and Slander* (12th edn, 2013), para 2.5.

3.6 The threshold test in section 1(1) takes as its starting point the common law threshold test as developed by the courts in *Jameel (Yousef) v Dow Jones & Co Inc.*⁹ This introduced an abuse of process jurisdiction, allowing defamation actions to be struck out in certain circumstances, on the basis that they would not serve a legitimate purpose. The Court recognised the need to balance the right to protection of individual reputation against the right to freedom of expression, as found in Article 10 of the European Convention on Human Rights (“ECHR”). This, it concluded, required it to bring to a stop as an abuse of process defamation proceedings that were not properly serving the purpose of protecting the claimant’s reputation, given that so little was at stake, and instead involved a disproportionate interference with freedom of expression.¹⁰ *Jameel* lays down the need for a “real and substantial tort”, to enable an action in defamation to be brought.¹¹ In the subsequent case of *Thornton v Telegraph Media Group Ltd*,¹² Tugendhat J developed a further threshold test, which has come to be regarded as a particular version of the *Jameel* jurisdiction, though focussed on determining whether an imputation was defamatory in the first place.¹³ This is the “threshold of seriousness” test in relation to harm to reputation. It has been paraphrased as follows:

“A statement is to be regarded as defamatory if it substantially affects in an adverse manner the attitude of other people towards the claimant, or has a tendency to do so.”¹⁴

3.7 It is claimed that this requirement under common law is a lower hurdle than that of serious harm.¹⁵ The Explanatory Notes to the 2013 Act state that section 1 raises the bar for bringing a claim so that only claims involving serious harm to a claimant’s reputation can competently be brought.¹⁶

A new threshold test in Scots law?

3.8 In Scotland there is no statutory threshold test at present. The common law situation is not entirely clear, partly because of a lack of Scottish cases on the issue of threshold. *Jameel*¹⁷ was referred to in *Ewing v Times Newspapers Limited*.¹⁸ It was observed that any merit in the claim would be disproportionate to the costs involved in the action. The pursuer was ordered to find caution (ie security) for expenses. The pursuer having failed to do so, the action was dismissed. The facts of this case were somewhat unusual. The action had arisen because the pursuer had come to Scotland to acquire a cause of action. He had no apparent connection with Scotland and no apparent reputation to defend in Scotland.

⁹ [2005] EWCA Civ 75.

¹⁰ At paras 40 and 55.

¹¹ See especially para 70 of the judgement.

¹² [2010] EWHC 1414. See in particular para 90.

¹³ See further the analysis of *Jameel* and *Thornton* by Sharp J in *Daniels v British Broadcasting Corporation* [2010] EWHC 3057 (QB), paras 43-51.

¹⁴ *Duncan and Neill on Defamation* (4th edn, 2015), para 4.04. (The paraphrase derives from paras 30 and 96 of the *Thornton* judgement).

¹⁵ The draft defamation Bill as initially published by the Government included a test of “substantial harm to reputation” in clause 1. An outline of the background to its ultimate replacement with a test of serious harm can be found in the Government’s Response to the Report of the Joint Committee on the Draft Defamation Bill, February 2012, at paras 8–10. <http://www.parliament.uk/documents/joint-committees/Draft-Defamation-Bill/Government%20Response%20CM%208295.pdf>.

¹⁶ See para 11 of the Notes.

¹⁷ *Jameel (Yousef) v Dow Jones & Co Inc.* [2005] QB 946; 2005 EWCA Civ 75.

¹⁸ [2010] CSIH 67.

Against this background any hurt he had suffered in Scotland was described by the court as being self-inflicted.¹⁹

3.9 The argument has been advanced that, taking into account differences between Scots and English law as to what constitutes defamation, it is possible that the Scottish courts would have taken a different view in the *Jameel* case, had it arisen here. This is a possibility primarily because of the rule that defamation may arise where an imputation is conveyed only to the person who is the subject of it. Defamation may, therefore, in appropriate circumstances be found to take place where there is evidence of hurt feelings for the pursuer, or if a tendency towards those would be expected, but no evidence of actual harm to reputation.²⁰ In *Jameel*, the claim was dismissed as an abuse of process because the article in question had attracted only a very limited readership. In Scotland, this would not necessarily give rise to dismissal, depending on the natural and anticipated impact of the statement upon the pursuer.

3.10 Even if the Scottish courts were minded to follow what the English courts said in *Jameel* and *Thornton* about when it is competent to bring a defamation action, there is a question as to how such a test would fit into the current procedure in the Scottish courts. In England and Wales determination of the subsistence, or otherwise, of serious harm in terms of section 1(1) of the 2013 Act is thought to be dealt with most appropriately as a preliminary issue decided at an early stage, in the majority of cases.²¹ The idea that there are exceptions to the rule was highlighted by Warby J in *Lachaux v AOL (UK) Ltd.*²² Unless the circumstances of the case are such as to allow an inference of serious harm to be drawn, the onus falls on the claimant to prove as a fact on the balance of probabilities that serious reputational harm has been caused by, or is likely to result in the future from, the publication complained of. This may have to be done by leading evidence as to the relevant facts and circumstances. The nearest equivalent in current Scots practice would be to advance a challenge to the relevancy of the pursuer's pleaded case at a hearing before the action is remitted to probation²³ (ie appointed to an evidential hearing). Evidence cannot be led at such a hearing and it cannot take place until the pleadings on all sides have been finalised. Where evidence is needed there could be a preliminary proof, but this does not usually take place until the written pleading phase has ended.

3.11 Members of our advisory group mentioned that in practice a threshold test would provide a useful mechanism for enabling practitioners to advise clients when to stop short of raising a defamation action, even though the individuals may feel that they have been aggrieved in some way.

3.12 The lack of authority at common law and the absence of a procedure in the Scottish courts to dispose of trivial claims at an early stage where little is at stake may tend to suggest that this is an area where there are particular shortcomings in Scots law which may be addressed by the introduction of a threshold test. Failure to introduce such a test may

¹⁹ At 17, per Lord Justice Clerk Gill.

²⁰ See further Rosalind McInnes, *Scots Law for Journalists* (8th edn, 2010), para 43.13.

²¹ See in particular *Ames v Spamhaus* [2015] EWHC 127 (QB), at para 101 (Warby J). The same approach to the determination of serious harm was taken by Davies J in *Lachaux v AOL (UK) Ltd* [2015] EWHC 915, at para 21, and in *Theedom v Nourish Training Ltd* [2015] EWHC 3769 (QB), albeit with a warning that this should not become a routine practice, without criticism or proper consideration (see para 31(g)).

²² [2015] EWHC 2242 (QB).

²³ In the Court of Session a hearing on the Procedure Roll; in the Sheriff Court a debate.

have an impact on those seeking to rely on freedom of expression; some say its absence has a chilling effect in Scotland at present.²⁴ Added to this, the overall argument set out in chapter 1 about loss of benefit of developments from English case law seems to be of particular importance here. Against the background of the existence of the threshold test in section 1(1) of the 2013 Act, there would be no reason for English courts to focus any attention in future on development of a threshold at common law.

3.13 For these reasons we think it worthwhile to examine whether or not there would be merit in introducing a threshold test in Scots law.²⁵ We do so bearing in mind that current Scots practice does not make it easy for such issues to be dealt with at an early stage in a litigation. A new procedure might require to be introduced to allow the threshold test to work effectively.

Operation of the threshold test in section 1(1)

3.14 The question whether a new threshold test should be introduced into Scots law is one which requires careful consideration partly because of the unique features of Scots law on defamation. The threshold test in section 1(1) is linked to harm to the reputation of a person. Reputation can only be affected if the defamatory statement has been communicated to a third party. Therefore only if this reform exercise is going to recommend that communication to a third party become a necessity²⁶ would it make any sense to introduce in Scotland a similar threshold test linked to the reputation of a person.

3.15 The new threshold test in section 1(1) of the Defamation Act 2013 has raised some issues, and in some respects attracted criticism, which we think is also relevant to formulation of any proposals for a new threshold test in Scots law.

3.16 The position in England and Wales is that it is no longer enough to demonstrate a tendency to harm reputation, as a result of the nature of a statement in itself.²⁷ The court must now look at all the circumstances of the publication, not just the words themselves, to determine if a statement has given rise or is likely to give rise to harm that makes the statement defamatory for section 1(1) purposes. Since defamation is no longer actionable without proof of damage, the common law presumption of damage will cease to play a significant role.²⁸

3.17 The facts to be considered may include the gravity of the allegation, the nature and status of the publisher and likely reader, and the nature of the claimant's current reputation and financial position.²⁹ It may also be relevant to consider what has actually happened since publication.³⁰ The case of *Cooke v MGN Ltd*,³¹ the first in which the threshold test was applied, has been said to highlight such questions as what type of evidence must be

²⁴ See para 1.16 above. We note, too, The Herald's "Freedom of Speech" Campaign, a campaign launched by more than 100 Scottish writers with the backing of The Herald. At the time of the launch the writers warned of a chilling effect on what they were able to say:

http://www.heraldscotland.com/news/14037974.Scots_writers_demand_reform_of_antiquated_defamation_laws_that_threaten_freedom_of_speech/.

²⁵ See further the discussion of our approach at paras 1.17-1.20 above.

²⁶ This depends on the outcome of the consultation on question 3 above.

²⁷ This change is highlighted in *Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB), at para 86 per Warby J.

²⁸ *Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB), at para 60.

²⁹ See *Gatley on Libel and Slander* (12th edn, 2013), para 2.6.

³⁰ *Lachaux v AOL (UK) Ltd*, [2015] EWHC 2242 (QB), at para 65.

³¹ [2015] 1 WLR 895.

adduced to satisfy the section 1(1) test and what role an apology will have on the assessment of the risk of harm. Although the judgement acknowledges that an inference of serious harm will at times be capable of being drawn from the gravity of allegations,³² alleviating the need to adduce evidence, there is no clear indication as to what the limits of that category should be.³³

3.18 Since *Cooke*, however, some further clarification as to the circumstances in which an inference of harm may be drawn has been offered in the judgement of Warby J in *Lachaux*. This lays down as a starting point the general principle that the serious harm requirement is capable of being satisfied by inference, depending on the gravity of the imputation and the extent and nature of its readership or audience.³⁴ In *Lachaux*, Warby J drew the inference on the basis of published allegations that the claimant had subjected his wife to domestic abuse, falsely accused her of kidnapping their son, thereby subjecting her to the risk of being imprisoned, and abducted their son. It seems clear that, serious as these allegations are, they fall short of the most serious type of allegations, such as those of murder or serious sexual assault to take just two examples. The result of this would seem to be that, as much as an allegation must be of a certain degree of gravity to allow an inference of serious harm to be drawn, the field is not restricted, as *Cooke* may tend to suggest, to a small pool of the most serious category of allegations. This conclusion would seem to be further supported by the case of *Theedom v Nourish Training Ltd.*³⁵ Here an inference of serious harm was drawn in circumstances emanating from termination of the claimant's employment at a recruitment consultancy. Harm was inferred on the basis of an e-mail sent by the claimant's line manager to a number of different recipients, all of whom worked for companies that were actual or potential customers of the recruitment consultancy in question. The e-mail was headed "Dismissed for gross misconduct". It stated that the claimant had been passing confidential information to former employees of the recruitment agency and that criminal proceedings were being considered.

3.19 The view has been expressed that if the common law test of *Jameel and Thornton*³⁶ was capable of being met in any given scenario, it is probable that the threshold test in section 1(1) would be met, too. This is on the basis that it is difficult to envisage cases involving an imputation which has the tendency adversely to affect a person's reputation to a substantial degree, but is not likely also to cause serious harm to reputation.³⁷ Conversely, it is unclear to what extent claims which could have proceeded, notwithstanding *Jameel*, would now be barred. It has been suggested that *Jameel* is itself likely to prevent even claims revolving around mere ridicule of the claimant, perhaps as a result of an accident or other unfortunate incident, and in relation to which moral responsibility cannot be attributed.³⁸ This

³² Para 43 of the judgement gives two examples of criminal activity, an allegation of which could give rise to an inference of serious harm, namely terrorism and paedophilia.

³³ See further the discussion of *Cooke* in the Northern Ireland Law Commission Consultation Paper "Defamation Law in Northern Ireland", NILC 19 (2014), pp 73-74. As noted there, there is no general discussion in the judgement of the level of severity of the allegations that must be made; must they always be in relation to crimes of equivalent seriousness to those mentioned? Would and should the crimes mentioned always meet the threshold? How should it be determined whether the adducing of evidence is, or is not, required?

³⁴ See para 57.

³⁵ [2015] EWHC 3769 (QB).

³⁶ See para 3.6 above.

³⁷ Sir John Gillen, "Defamation Act 2013: More to Admire than to Despise?", (2014) 23 Journal of the Commonwealth Lawyers' Association, 25. See also *Gatley on Libel and Slander* (12th edn, 2013), para 2.7. Alastair Mullis and Andrew Scott, "Worth the Candle? The Government's Draft Defamation Bill", (2011) 3 Journal of Media Law 1, 4.

³⁸ Alastair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77 MLR 87, 105.

may otherwise have been an area in which the section 1(1) test would have come into its own.

3.20 On the other hand it has been argued that it is possible that serious harm could be alleged and appropriate evidence adduced in circumstances where claims are based on the actual but wholly unreasonable reactions to published material of some readers who are looking to attract attention or in some way to ventilate their own prejudices. That could lead to defendants being forced to defend claims which would not have survived the objective test at common law of being likely adversely to affect the attitude of the average person towards an individual.³⁹ But it seems that the argument about letting in spurious claims may have been seen off by *Lachaux*. There it is suggested that the starting point of the court should be to undertake an objective determination of the single meaning of the words and whether the statement is to be regarded as capable of founding an action of defamation because it substantially affects in an adverse manner the attitude of other people towards the claimant, or has a tendency to do so (the *Thornton* test). The next step should then be to consider whether it has been proved that serious harm has been or is likely to be caused by the publication.⁴⁰

3.21 A further criticism relates to the possibility of compensation being awarded for an injury that never actually comes to fruition because the threshold test only requires the publication to be “likely” to cause serious harm.⁴¹ In *Lachaux* Warby J confirmed the view expressed around the time of enactment of the 2013 Act that the notion of “likelihood” (as opposed to tendency) suggests that harm will arise as a result of a specific future event,⁴² in contrast with the common law position where the test is essentially whether the nature of the statement itself is such that harm could naturally be expected. In answer to a question at Committee stage in the House of Commons as to why ‘likelihood’ and not ‘tendency’ had been used in the Defamation Bill, Jonathan Djanogly MP, Parliamentary Under Secretary of State for Justice, indicated it was thought that use of a more abstract term might make it less likely that trivial claims would be able to proceed.⁴³ Some commentators have taken the view that the threshold test in section 1(1) does not lend itself easily to reconciliation with the common law presumption in favour of loss or damage in some form arising from defamatory imputations.⁴⁴

3.22 Concern has also been expressed that the section 1(1) threshold test has increased the complexity and costs associated with defamation litigation in England and Wales, largely as a result of the possible need to adduce evidence focussed on satisfying the test, thereby potentially preventing the bringing of claims that do have merit and that would otherwise have been brought. Indeed, the *Cooke* case seemed (to some commentators) to heighten

³⁹ Adrienne Page QC, “Defamation Act 2013: Does section 1 replace the test of the hypothetical reader by that of the twitter troll?” Part 2: <https://inform.wordpress.com/2015/02/18/defamation-act-2013-does-section-1-replace-the-test-of-the-hypothetical-reasonable-reader-by-that-of-the-twitter-troll-adrienne-page-qc-2/>.

⁴⁰ *Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB), at para 58.

⁴¹ Eric Descheemaeker, “Three Errors in the Defamation Act 2013”, (2015) 6 Journal of European Tort Law 24, 32-33.

⁴² See James Price QC and Felicity McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (2013), at para 2.34, together with para 45 of the judgement in *Lachaux*.

⁴³ See James Price QC and Felicity McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (2013), para 2.34.

⁴⁴ Eric Descheemaeker, “Three Errors in the Defamation Act 2013”, (2015) 6 Journal of European Tort Law 24, 32-33; *Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB), at paras 41, 44 and 45.

that fear.⁴⁵ On the other hand the judgement of Warby J in *Lachaux* may tend to suggest that the possibility of complexities, and therefore increased costs, associated with the section 1 test may not be as real as might at first appear.

3.23 Aside from these points, the question has been raised as to whether it is satisfactory, as a matter of principle, that the law of defamation should be framed in such a way that non-serious injuries to reputation are completely excluded from its ambit. The approach of the threshold test in section 1(1) is said to represent a considerable departure from previous law and practice, where the leading of evidence as to the response of readers to the statement was not permitted and the position rested entirely on an objective assessment of the statement itself and whether the words would have a tendency to lower a person in the estimation of the majority of others.⁴⁶ It has been suggested that the process of “filtering out” would be better left to rules external to the cause of action, such as the rules of civil procedure.⁴⁷

Discussion

3.24 Taking account of the criticism of the 2013 Act that has so far been expressed, we incline to the view that there may in principle be scope for the introduction in Scots law of a threshold test. Nevertheless, the criticism that has been expressed of the threshold test in England and Wales should not, of course, be lost to sight. For present purposes we do not attempt to consider in detail how that may be addressed in any provision for a threshold test for Scotland that is to be introduced. This is a matter primarily for the Report stage of the project, if appropriate, and we may by that point have the benefit of further judicial consideration of the English provisions. Of more immediate concern is whether a test based on harm to reputation would “fit” with substantive Scots law as it currently stands. This may depend primarily on whether communication of an allegedly defamatory imputation to a third party is to become a requisite of defamation in Scots law. Against the background of the above we ask the following questions:

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

Application of a threshold test to parties other than private individuals

3.25 Thus far we have considered the question of “threshold” from the point of view of the position of individuals in their private capacity. We now turn to consider the position of other parties.

3.26 There is no express restriction in current statutory provisions applicable to Scotland on the ability of sole traders and bodies such as companies, partnerships and

⁴⁵ See the Northern Ireland Law Commission Consultation Paper on Defamation Law in Northern Ireland, NILC 19 (2014), at para 4.21.

⁴⁶ See *Blackstone's Guide to the Defamation Act 2013* (2013), para 2.33.

⁴⁷ See again “Three Errors in the Defamation Act 2013”, 27.

unincorporated associations, including any such bodies not formed for the purpose of profit⁴⁸, to bring an action for defamation.⁴⁹ At common law an action for defamation may competently be brought by such a party only where the pursuer has a reputation, an attack on which can give rise to patrimonial loss; there is no scope to recover *solatium* because there are no feelings to be hurt.⁵⁰ The courts have tended to accept in defamation actions averments of patrimonial loss that are more speculative than may be accepted in other areas.⁵¹ This may be seen in case law which has involved loss of goodwill.⁵² This position gives rise to a number of competing arguments. On the one hand, it could be said that the good name of, for example, a company is in fact of greater value than the reputation of an individual. A damaging defamation may make a company less attractive to investors, employees and, ultimately, customers.⁵³ On the other hand, it is unclear whether anything other than a natural person in his or her private capacity as an individual has a “reputation” for the purposes of the protection of Article 8 ECHR.⁵⁴ The decision of the European Court of Human Rights in *Karakó v Hungary*⁵⁵ may tend to point against this, certainly as regards profit-making bodies. Here the Court suggested that a distinction could be drawn between interests in reputation that concern only business interests on the one hand, and interests that concern personal integrity on the other.

3.27 In Scotland it has been held expressly that a voluntary association which nonetheless has a reputation that is valuable in economic terms has title to bring an action for defamation in appropriate circumstances.⁵⁶ The same seems to be true of a company in so far as it is not acting to boost its own profits, for example where it is supporting charitable or community causes. In so far as companies are acting otherwise than to make profit for their own business, it has been suggested that they may have a reputation which is to be regarded as a form of honour rather than property.⁵⁷ There seems little reason why wholly not-for-profit organisations should not also be regarded as having a reputation as a form of honour.

⁴⁸ We are concerned here with bodies such as charities, which may at times trade for profit, but only in pursuit of their own non-business purposes.

⁴⁹ The question of whether voluntary associations include trade unions for these purposes seems to remain open for debate, given the outcome in the English case of *EETPU v Times Newspapers Ltd* [1980] QB 585, involving the interpretation of a statute which applies on a UK wide basis. There is limited authority in Scots law as to whether a public authority, such as a local authority or a non-departmental public body, can competently sue for defamation, although it is likely that the position in England and Wales would be followed; there is a bar against governmental and similar bodies suing for defamation in that jurisdiction. See further Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), pp 69–71.

⁵⁰ *North of Scotland Banking Co v Duncan* (1857) 19 D 881 at 885. It is to be noted that the common law position in Scotland seems to be that even bodies without legal personality may bring actions in defamation, providing there is economic value at stake.

⁵¹ See again *Defamation and Related Actions in Scots Law*, p 66.

⁵² Relevant cases include *Lewis v Daily Telegraph Ltd* [1964] AC 234 and *Waverley Housing Management Ltd v BBC* 1993 GWD 17-117.

⁵³ Alastair Mullis and Andrew Scott, “Something Rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation”, (2009) 14 Communications Law 173; see in particular the section headed “Denying corporations the right to sue” at p 180.

⁵⁴ The case of *Axel Springer v Germany* (2012) 55 EHRR 6 established that protection of reputation falls within Article 8 ECHR. See in particular para 83. The case was, however, concerned entirely with comments made against a natural person; there was no involvement of any party which was not a private individual.

⁵⁵ (2011) 52 EHRR 36. See in particular para 22. On the other hand in *Ärztelkammer für Wien and Dörner v Austria* [2016] ECHR 179, application No 8895/10 the Court proceeded on the basis that the company in relation to which certain statements were made had a right to reputation for the purposes of Article 8 ECHR. It did not, however, examine the matter in detail.

⁵⁶ *Highland Dancing Board v Alloa Printing Co Ltd* 1971 SLT (Sh Ct) 50.

⁵⁷ Peter Coe, “The value of corporate reputation and the Defamation Act 2013: a brave new world or road to ruin?”, (2013) 18 Communications Law Review 113, 119.

3.28 Typical examples of defamatory statements against a company include allegations of fraud or corruption.⁵⁸ In relation to England and Wales, case law suggests that aspersions against a company's employment practices⁵⁹ or business methods⁶⁰ may also give rise to actionable defamation at common law; there is nothing to suggest the same approach would not be taken in the Scottish courts. In short the category seems to cover any allegation that would make a reasonable person less inclined to associate or deal with the company.⁶¹ Notably, these matters would seem to fall more into the category of goodwill than special damage. In all of these cases, establishment of a causal link between inability to attract quality staff and/or support, and fall in income or effectiveness, may be extremely difficult.⁶²

The position under the 2013 Act

3.29 Section 1(2) of the 2013 Act makes clear that any body that trades for profit must have suffered serious financial loss, or be likely to do so, in order to have an actionable claim in defamation. Only where this is the case can such a body be said to have suffered or be likely to suffer the "serious harm" required by section 1(1). It can be seen that the effect of this provision is to separate out bodies that trade for profit, placing an additional onus upon them than applies under section 1(1). They must go further than demonstrating serious harm to reputation, namely by showing that it has manifested itself in the occurrence of financial loss which is not insignificant. As to the reach of this onus, although the point has not yet been settled by a decision of the courts, we incline to the view that section 1(2) applies only in so far as any allegedly defamatory imputation relates to activities of the body which are designed to make a profit; in so far as non-profit making activities are concerned, the test to be applied is that in section 1(1).⁶³ The effect of this would be that, taking the example of a charity, section 1(2) may apply for limited purposes, in so far as the charity is engaging in trade with a view to raising funds. For most purposes, however, section 1(1) will apply in relation to the charity.

3.30 There is a question as to precisely what is needed to satisfy the requirement of "serious harm" in relation to a body that trades for profit. On the one hand arguments have been raised that the need to establish serious financial loss, or likelihood of serious financial loss, brings with it an inevitability of more complex and protracted litigation that could discourage some (particularly smaller) bodies from bringing defamation actions in the first place. It has been described as a reverse chilling effect; a new inequality of arms, particularly against corporate entities.⁶⁴ On the other hand some commentators take the view that satisfaction of this requirement may not, in itself, be as onerous as it might at first appear. It is not specified in the provision whether the 'serious financial loss' required by subsection (2) must necessarily be in the form of a claim for special damage, ie loss of profit, that has arisen from the publication under consideration. In other words, it is not entirely clear whether this is needed, or whether it is enough to demonstrate that a reduction in the value of the goodwill of a business has arisen or is likely to arise as a result of the

⁵⁸ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 65.

⁵⁹ *Derbyshire County Council v Times Newspapers* [1993] 1 All ER 1011, at 1017 per Lord Keith.

⁶⁰ *Gulf Oil (GB) Ltd v Page* [1987] 3 All ER 14.

⁶¹ See again *Defamation and Related Actions in Scots Law*, p 65.

⁶² Peter Coe, "The value of corporate reputation and the Defamation Act 2013: a brave new world or road to ruin?", (2013) 18 Communications Law Review 113, 119-120.

⁶³ See James Price QC and Felicity McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (2013), para 2.39 and *Gatley on Libel and Slander* (12th edn, 2013), para 2.8.

⁶⁴ Peter Coe, "The value of corporate reputation and the Defamation Act 2013: a brave new world or road to ruin?" (2013) 18 Communications Law Review 113, 120.

publication of a damaging statement about it. At the time of enactment of the 2013 Act it was suggested that it was possible that at the point of pleading its case, a company or other body falling within the Act need do no more than aver that its trading reputation has been damaged as a result of such a statement and that it has therefore suffered serious financial loss in the form of diminution of goodwill.⁶⁵ Satisfaction of the section 1(2) test may be further eased by the fact that it can be met where there is a *likelihood* of serious financial loss. This could be argued to mean a simple tendency to cause serious financial loss to a business if it is left uncorrected.⁶⁶ Relevant considerations in determining whether the “likelihood” requirement is met could include the nature and size of the claimant’s trading activities, the extent of publication of the statement and the identity of those likely to read the statement in question.⁶⁷

3.31 The question of what is needed to demonstrate “serious financial loss” for the purposes of section 1(2) was considered by the courts for the first time in the case of *Brett Wilson LLP v Persons Unknown – responsible for the operation and publication of the website www.solicitorsfrom hell.com*.⁶⁸ The outcome seems to indicate that while some statements of fact are needed to demonstrate actual or likely financial loss, rather than solely averments of a *belief* that financial loss has been suffered, the court will take a holistic approach to the question of whether the matters pleaded are, collectively, enough to found a claim.⁶⁹ In *Brett Wilson LLP* the considerations taken account of in determining that serious financial loss had been suffered included that the top five Google search results for the firm referred to its inclusion on a website which was a variant of the former website known as “solicitorsfromhell.co.uk”; the firm’s status as a boutique firm which attracted a significant amount of work from the internet; and the fact that the published allegations about the conduct of the firm had been referred to in correspondence from an opponent on the other side of a litigation action. Warby J took account, also, of the claimant’s expression of a belief that there had been a reduction in the rate at which initial enquiries about the firm’s services gave rise to instructions, albeit with an inference that this would not, in itself, have been enough to found a claim of serious financial loss.⁷⁰ In summarising his reasoning, Warby J referred to the fact that the words complained of had a clear tendency to put people off dealing with the claimant firm, as was their clear purpose. The allegations were serious and were likely to deter anybody who was unfamiliar with the firm from engaging its services. Furthermore, there was affirmative evidence of one prospective client having been deterred, with probable financial loss.

3.32 It seems that the *Brett Wilson* case supports the claim that satisfaction of the section 1(2) requirement is unlikely to be as onerous as it may first appear. As much as evidence of deterrence of a prospective client may be a reasonably unusual occurrence, it has been suggested that the other consequences pleaded were of a nature which many firms would be able to point towards, if in the position of the claimant.⁷¹ Moreover, the *Brett Wilson* case may tend to suggest that, consistently with the approach of Warby J in *Lachaux*, the court

⁶⁵ James Price QC and Felicity McMahon (eds.) *Blackstone’s Guide to the Defamation Act 2013* (2013), at para 2.51.

⁶⁶ See again James Price QC and Felicity McMahon (eds.), *Blackstone’s Guide to the Defamation Act 2013* (2013), paras 2.51-52.

⁶⁷ *Duncan and Neill on Defamation* (4th edn, 2015), para 4.24.

⁶⁸ [2015] EWHC 2628 (QB).

⁶⁹ See further the comment on the case by 5RB: <http://www.5rb.com/case/brett-wilson-llp-v-persons-unknown/>

⁷⁰ See para 30 of the judgement, as read with para 28.

⁷¹ See again the case comment by 5RB.

may, in appropriate circumstances, be prepared to draw an inference of serious financial loss without specific proof of actual damage to finances.⁷²

3.33 A further issue arises around the propriety of an award for special damage. There is a precedent for claims for special damage being struck out on the basis that a verdict in favour of the claimant would restore the damage to reputation which had caused a fall in share price, with the result that there would be no loss.⁷³ However, the view has been expressed that it is perverse to take the line that serious financial loss is unlikely because prompt issue and pursuit of proceedings is liable to forestall it.⁷⁴ Perhaps the better way of looking at matters is that, providing there is no unjustified delay in bringing proceedings, the claimant or pursuer is entitled to compensation for loss which occurs up until and during the course of the proceedings, before effective vindication is provided by the judgement. This may be said to guard against the possibility of businesses delaying the bringing of proceedings in order to enable a cause of action for recovery of special damage to accrue.⁷⁵ A further safeguard may be to read in the words “should the defamatory statement not be corrected” at the end of section 1(2).⁷⁶

Discussion

3.34 It has been suggested that, as at common law, issues of causation are likely to be a common feature of defamation actions by bodies trading for profit. They are likely to be the main obstacle to satisfaction of section 1(2). A claimant will require to establish a clear link between a defamatory statement and a serious financial loss or a likely serious financial loss. This may be a complex task in circumstances where a loss has been caused by a number of statements, only one of which is defamatory. It may not be straightforward for the claimant to prove that a particular statement had caused, or was likely to cause, “a” serious financial loss. In other words, how can one separate loss linked to the defamatory statement from loss linked to other, legitimate damage to its reputation? A further issue of note in relation to causation is that the reputation of a body that trades for profit may conceivably be damaged without it suffering *prima facie* financial loss. Where the loss to the body is purely reputational, the process of vindicating the reputation is likely to be a difficult and protracted one.⁷⁷ Moreover, the existence of the claim could expose the claimant to more negative publicity, and with it further damage to reputation.⁷⁸ Conversely, and more radically, various practical advantages to removing the rights of bodies that exist for the primary purpose of making a profit to sue for defamation have been highlighted. It could deal with many of the cases where manufacturers of products sue scientists or scientific journalists for publishing material that calls into question the efficacy of the claimant’s/pursuer’s product or profession. It could tackle, also, the issues of lack of equality of arms which are at times said to arise.

⁷² See further the article by Hugh Tomlinson QC on Infirm blog – “Case Law: Brett Wilson LLP v Persons Unknown, corporate damages and injunction against unknown operators of website”: <https://infirm.wordpress.com/2015/09/21/case-law-brett-wilson-llp-v-persons-unknown-corporate-damages-and-injunction-against-unknown-operators-of-website-hugh-tomlinson-qc/>

⁷³ *Collins Stewart Ltd v Financial Times Ltd (No 1)* [2004] EWHC 2337 (QB).

⁷⁴ See again *Blackstone’s Guide to the Defamation Act 2013* (2013), para 2.56.

⁷⁵ See again Alastair Mullis and Andrew Scott, “Something Rotten in the State of English libel law? A rejoinder to the clamour for reform of defamation”, (2009) 14 Communications Law 173, 179.

⁷⁶ See again *Blackstone’s Guide to the Defamation Act 2013* (2013), at para 2.57.

⁷⁷ See Peter Coe, “The Defamation Act 2013 and CPR 3.4 and 24: a sting in causation’s tail”, (2014) 25 Entertainment Law Review 93. Causation was a live issue in the case of *Tesla Motors Ltd v BBC* [2013] EWCA Civ 152, concerning comments made about the performance and functionality of a car during a review of it in an edition of Top Gear. [“CPR” = Court Procedure Rules].

⁷⁸ This point was noted by Moore-Bick LJ in the *Tesla Motors* case at para 44.

These considerations are to be viewed against the background that in many cases other forms of wrong can be relied upon to found an action, in the absence of the ability to rely on defamation law.⁷⁹ In relation to Scotland, it has been suggested that the various business-related categories of verbal injury may come into play.⁸⁰

3.35 There appears to be only one major jurisdiction that has made provision to prevent the bringing of defamation claims by bodies existing to make a profit. The Uniform Defamation Laws of Australia provide, in most cases in section 9 of the relevant statutes, that corporations with ten or more full-time or equivalent employees, formed with the object of obtaining financial gain, have no cause of action in defamation. There is limited empirical evidence as to the impact of the change so far; it has been in effect for less than 10 years. However, such evidence as there is has pointed towards a higher incidence of use of prior restraint by means of interim injunctions granted on the basis of causes of action other than defamation.⁸¹ The main alternative forms of action available are, at common law, injurious falsehood, and under statute, misleading or deceptive conduct.⁸² In both cases the plaintiff is required to prove that a false representation was made, underpinned by malice or other improper motive designed to mislead or deceive, and that actual damage was sustained as a result.⁸³

3.36 Our current thinking is that we do not wish to set Scotland apart as a jurisdiction in which bodies existing primarily to make a profit are not entitled to bring actions for defamation. Nevertheless, we can see advantages in imposing additional restrictions on the ability of bodies to do so where any such action would relate to alleged defamation in connection with their undertaking of trading activities.

3.37 We would be grateful for views on the following questions:

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?**
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?**

⁷⁹ See David Howarth, "Libel: Its Purpose and Reform", (2011) 74 MLR 845, 875, for development of these arguments.

⁸⁰ Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), ch 7. Further discussion of the nature and categorisation of verbal injury can also be found at paras 13.1-3 and 13.10-25 below.

⁸¹ David Rolph, "Corporations' right to sue for defamation: an Australian perspective", (2011) Entertainment Law Review 195, 200.

⁸² Competition and Consumer Act 2010, Sch 2, para 18.

⁸³ See again "Corporations' right to sue for defamation: an Australian perspective", 196.

Chapter 4 The defence of truth

4.1 In this chapter we consider whether there would be merit in introducing a statutory defence of truth in Scots law, to replace the current common law defence.

The defence as it currently applies in Scots law

4.2 A key element of a defamation action in Scots law is that the imputation which is the subject of the action must be untrue.¹ Where the common law defence of truth (or *veritas*, as it is perhaps more commonly known in Scotland) is successfully pleaded, an absolute defence exists, meaning that the question of whether the imputation was motivated by malice is irrelevant.² A defender may plead truth in relation to any meaning which the statement complained of is reasonably *capable* of bearing; in other words, any meaning which a jury could find to be the meaning of the statement. It does not matter if it is significantly different from the meaning on the basis of which the pursuer has brought proceedings. The scope of the defence will be determined ultimately by the meaning which would be expected to be attributed to the imputation by the ordinary, reasonable reader, in accordance with the single meaning rule. It is to that meaning that the defence of truth will be applied.

4.3 In order for the defence of truth to succeed, the statement must be proved to be true in fact. It is not enough that the defender should prove that they *believed* the statement to be true, or that they can show that a given allegation has been made by a third party, and that they have merely reported that allegation accurately. The latter principle is referred to as the repetition rule.³ Where a person repeats an allegation made by a third party, that person may be able to rely on a defence of reportage.⁴ At first sight the defence of reportage may appear difficult to reconcile with the repetition rule. However, in so far as it is accepted that reportage is a form of *Reynolds* qualified privilege, relating to the public interest, it has been suggested that it may more appropriately be regarded as a qualification of the repetition rule.⁵ In other words, if a journalist is simply reporting in a neutral fashion the fact that something has been said, without holding it out as representing the truth, the journalist does not need to take steps to verify its accuracy.⁶ The defence need focus only on demonstrating that the neutral reporting of the allegation was in the public interest. Nevertheless, there may, it seems, be some merit in the argument that the effect of the

¹ This is reflected in F T Cooper's definition of defamation, which refers to "... the wrong which is committed when a person makes an injurious and false imputation ... against the character or reputation of another." F T Cooper, *The Law of Defamation and Verbal Injury* (2nd edn, 1906), p 1.

² *Sarwar v News Group Newspapers Ltd* 1999 SLT 327. This is subject to a very limited exception under the Rehabilitation of Offenders Act 1974, see section 8(5). The essence of this provision, read with section 8(3), is that while a defence of truth can ordinarily be pled in a defamation action concerning an allegation that a person has been charged with, prosecuted for or convicted of a criminal offence, even if the conviction is spent, the defence is excluded if the publication is proved to have been made with malice.

³ *Fairbairn v Scottish National Party* 1980 SLT 149, at 153 per Lord Ross.

⁴ See for more detail paras 6.13-6.15 below.

⁵ For further discussion of the nature of *Reynolds*, see paras 6.2-6.4 below.

⁶ *Roberts v Gable* [2008] QB 502, at para 61(3).

repetition rule is weakened by the existence of reportage, given the absence of any need to prove truth.⁷

4.4 The question of *what* facts require to be proved to be true in order to establish a defence of truth is determined with reference to the nature of the allegation made and the general understanding of the words used. By way of illustration, certain accusations can be proved to be true by proof of only one incident. For example, one conviction for murder would be enough to found a defence of truth in relation to a description of a person as a murderer. However, where allegations relate to a person's character rather than a particular act, proof of a habit is required if a defence of truth is to succeed.⁸ This may be of relevance where a person is described, for example, as a drunkard.⁹

4.5 A presumption of falsity attaches to defamatory statements. Where a defence of truth is pleaded, the burden falls on the defender to prove the truth of the allegations.¹⁰ The defender must affirm the truth of his statement in his or her defences and, where there is to be a jury trial, put forward a counter- issue raising the defence of truth. The counter-issue must address the substance of the pursuer's complaint. Without a counter-issue evidence of the truth of the statement is not admissible.¹¹

4.6 Case law has established that a defender need not prove the truth of everything complained of. The defender must, though, prove the "sting" or gist of the publication; in other words, it must be proved that the substance of the publication is true.¹² The defence will not fail simply by reason of inaccuracies not affecting the gist, so long as they do not change the character of the imputation complained of or exaggerate or aggravate it. Any inaccuracies which produce such an effect must be proved to be true or the defence will fail.¹³ Statutory provision, in the form of section 5 of the Defamation Act 1952, deals with the situation where two or more imputations are made against the reputation of a pursuer. It provides that in that event a defence of truth will not automatically fail simply because the truth of each individual imputation is not proved. Rather, there will still be a complete defence, subject to the condition that, because of the truth of some of the imputations, the words not proved to be true do not materially injure the reputation of the pursuer. This may be seen to reflect the idea that the defence of truth exists to protect *deserved* reputation.¹⁴ Case law has made clear that the operation of section 5 is subject to two further conditions. The first condition is that the allegations are distinct and separable, rather than amounting in reality to one defamatory imputation.¹⁵ The second condition is that there is not a situation in which a number of allegations are made by the defender against the pursuer, but the pursuer is choosing only to sue in respect of one of them.¹⁶ In short, providing that each of

⁷ Eric Barendt, "Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and reportage", (2012) 63 Northern Ireland Legal Quarterly 59, 72. See also I Loveland "The ongoing evolution of *Reynolds* privilege in domestic law", (2003) Entertainment Law Review, 178, 179.

⁸ See Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 129.

⁹ *Hunter v MacNaughton* (1894) 21 R 850. Here there were a number of specific alleged instances of drunkenness.

¹⁰ *Mackellar v Duke of Sutherland* (1859) 21 D 222. See also the discussion in Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), para 29.03.

¹¹ *Browne v Macfarlane* (1889) 16 R 368.

¹² *Sarwar v News Group Newspapers Ltd* 1999 SLT 327.

¹³ See Walker, *The Law of Delict*, p 796.

¹⁴ See further the discussion in Eric Descheemaeker, "Mapping Defamation Defences", (2015) 78 MLR 641, 650-651.

¹⁵ See *Polly Peck (Holdings) plc. v Treford* [1986] QB 1000, at 1032 per O'Connor LJ.

¹⁶ See again *Fairbairn v Scottish National Party*, at p 153.

the conditions described in this paragraph is met, a defence of truth will succeed, notwithstanding that it is not possible to prove that every imputation complained of is true.

4.7 The truth of imputations may be difficult to prove, however justified they may seem. Moreover, given that failure to establish the defence of truth can aggravate damages, owing to the fact that the defamation is persisted in, there are risks attached to running it in a case where there is a significant risk of failure.¹⁷ The point is illustrated by the case of *Baigent v BBC*.¹⁸ Here aggravated damages were awarded where the defenders persisted in maintaining an unjustified defence of truth throughout the proof.

The statutory defence under section 2 of the 2013 Act

4.8 In England and Wales, section 2 of the 2013 Act now provides for a statutory defence of truth, though the section is intended to have the same effect substantively as the common law defence which immediately preceded it.¹⁹ Notably, there has been no expansion of the application of the defence, or altering of the incidence of the burden of proof. It has been suggested that the main change that is effected by the provision is in fact one of nomenclature – at common law the defence was known in England and Wales as “justification.”²⁰ The function of the new section is summed up in the Explanatory Notes to the 2013 Act as being broadly to reflect the current law while simplifying and clarifying certain elements of it.²¹

4.9 Section 2 also operates, in large part, to the same effect as section 5 of the 1952 Act, which has been repealed by the 2013 Act in relation to England and Wales. This may, though, be subject to one small but apparently notable point in relation to section 2(3) of the 2013 Act. Section 2(3) provides that the defence of truth will still succeed if the imputations not proved to be true do not “seriously harm” reputation, owing to the truth of those that are proved to be true. This represents a shift from the condition in section 5 of the 1952 Act that there be no “material injury” to reputation as a result of the unproved imputations. It is clearly more difficult, as a result, for a claimant to achieve success under the 2013 Act than at common law when some but not all of the imputations against him or her have been proved to be true.²² As the Explanatory Notes to the 2013 Act highlight, this is consistent with the higher threshold for liability in defamation, introduced by section 1 of the 2013 Act.²³

Some issues arising from section 2 of the 2013 Act

Burden of proof

4.10 The main criticism levelled at the defence of truth at common law (both in England and Wales and in Scotland) has been that the burden of proof rests on the defender.²⁴ This appears to be based on the argument that the claimant or pursuer will always be better

¹⁷ See further Rosalind McInnes, *Scots Law for Journalists* (8th edn, 2010), para 27.13.

¹⁸ 2001 SC 281.

¹⁹ Professor Alastair Mullis and Richard Parkes, QC (eds), *Gatley on Libel and Slander* (12th edn, 2013), p 392.

²⁰ Alastair Mullis and Andrew Scott, “Worth the Candle? The Government’s Draft Defamation Bill”, (2011) 3 *Journal of Media Law* 1, 7.

²¹ See para 13 of the Notes.

²² James Price QC and Felicity McMahon (eds.), *Blackstone’s Guide to the Defamation Act 2013* (2013), para 3.32.

²³ See para 17 of the Explanatory Notes.

²⁴ See again *Blackstone’s Guide to the Defamation Act 2013* (2013), para 3.18.

placed to demonstrate falsity than will the defender or defendant to prove truth. As has been pointed out, however, it seems that this must in fact depend on the nature of the imputation made, with imputations being judged on an individual basis.²⁵ Nevertheless, if the burden were to be placed on the claimant or pursuer, this could conceivably be interpreted as creating an assumption that the person concerning whom the statement is made is guilty of whatever imputation is made against them and so deserves the lowered reputation. It seems difficult to justify a measure effectively conferring on a media defendant the benefit of a presumption that a person deserves a bad reputation unless the contrary is proved.²⁶ Moreover, it could have an adverse effect on journalistic accuracy; there would be fewer restraints on making serious allegations, and possibly therefore less diligence in ensuring that any allegations made were not entirely lacking in foundation.²⁷

4.11 Case law of the European Court of Human Rights has confirmed that placing the burden of proof on defenders in defamation actions is not, in principle, incompatible with Article 10 ECHR.²⁸

4.12 Aside from England and Wales, there are a number of jurisdictions further afield of Scotland in which the burden of proof in cases involving a defence of truth rests on the defender. Examples include Australia, Canada, South Africa and New Zealand. For example, in Australia section 26 of the relevant statutes provides as follows, in terms of the Uniform Defamation Laws:

“26. Defence of contextual truth

It is a defence to the publication of defamatory matter if the defendant proves that –

(a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (“contextual imputations”) that are substantially true; and

(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.”

4.13 In New Zealand section 8 of the Defamation Act 1992 provides as follows:

“8 Truth

(1) ...

(2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.

²⁵ Alastair Mullis and Andrew Scott, “Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation”, (2009) 14 Communications Law 173, 177.

²⁶ See again Alastair Mullis and Andrew Scott, “Worth the Candle? The Government’s Draft Defamation Bill”, (2011) 3 Journal of Media Law 1, 7.

²⁷ See further the speech by Lord Justice Eady “Privacy and the Press: Where are we now?” delivered on 1 December 2009.

<http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/media/speeches/2009/speech-eady-j-01122009>.

²⁸ *Alithia Publishing Company and Constantinides v Cyprus* Application No 17750/03, ECHR 2008, at para 68. See also Alastair Mullis and Andrew Scott, “Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation”, (2009) 14 Communications Law 173, 177.

(3) In proceedings for defamation, a defence of truth shall succeed if—

(a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or

(b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.”

Codification

4.14 In England and Wales the defence of truth was said to be well-settled and uncontroversial at common law, and not in real need of being restated. However, some uncertainty arises now in relation to the codified defence of truth, for example with regard to section 2(4). It has been suggested that the approach of abolishing a specified part of the common law could harvest additional confusion, given that the boundaries of the defence of truth are not necessarily absolutely clear.²⁹ By way of example, it is *arguable* that the single meaning and repetition rules have survived the codification. These may be said to be more properly classed as common law rules connected with meaning than as rules of the defence of truth. However, the position remains unclear.³⁰

Discussion

4.15 Subject to the point made above about difficulty in proving the truth of imputations – a point unlikely to be addressed by placing the defence on a statutory footing – the defence of truth seems to be operating successfully in Scots common law. We are not aware of gaps or shortcomings in the defence that would lend themselves to be resolved via statutory provision. On the other hand, on the basis of our preliminary consideration of it, we do not believe that there are significant objections as a matter of principle to the placing of the defence of truth on a statutory footing. Against the background of the above, we would welcome views on the following preliminary question:

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

²⁹ See again *Blackstone's Guide to the Defamation Act 2013* (2013), para 3.35.

³⁰ See again *Blackstone's Guide to the Defamation Act 2013* (2013), para 3.40.

Chapter 5 The defence of fair comment

Introduction

5.1 The underlying theory of the defence of fair comment is that the law recognises a basic distinction between a comment on the one hand and a statement of fact on the other; even if it is defamatory, a comment is not actionable if the requirements of the defence of fair comment are made out. The law treats statements of fact and statements of opinion differently because defamatory comments (including opinions) can be recognised by readers or listeners as viewpoints, with which they are free to choose to agree or disagree and by which they are not liable to be misled; in the case of statements of fact, truth is asserted and readers or listeners are not invited to disagree. Another way of expressing this distinction is to say that statements intended to be authoritative are actionable, whereas statements that are not meant to be authoritative are not actionable.¹ Seen in this way, a comment is something which originates in the mind of the commentator: his own “take” on the matter rather than a “conclusionary” assertion about the pursuer.²

5.2 In this chapter we consider possible reform of the defence of fair comment in Scots law and, in particular, whether the defence should be put on a statutory footing. In doing so, we take account of the changes made by section 3 of the 2013 Act to the law of England and Wales; this abolished the common law defence of fair comment and replaced it with a new defence of honest opinion.

Fair comment in Scots law

5.3 In the recent case of *Massie v McCaig*³ the Inner House stated⁴ that for the purposes of Scots law it is sufficient to proceed on the basis that the law on fair comment, put succinctly, was correctly stated by Lord M'Laren in *Archer v Ritchie & Co*⁵ in the following terms: “The expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contumelious language.”

5.4 In order to make out the defence in Scots law the defender requires to aver and prove a number of points. First, it must be shown that the words complained of are properly to be understood as a comment rather than as a statement of fact.⁶ Comment in this context is not limited to an expression of opinion. In this connection, the Australian case of *Clarke v Norton* has often been cited for the observation that the type of statement protected by the fair comment defence is “something which is or can reasonably be inferred to be a deduction, inference, conclusion, remark, observation etc”.⁷ In practice, it can frequently be

¹ Eric Descheemaeker, “Three Errors in the Defamation Act 2013”, (2015) 6 JETL 24.

² Eric Descheemaeker, “Mapping Defamation Defences”, (2015) 78 MLR 641, 653.

³ 2013 SC 343; the judgment was issued at the stage of *interim* interdict.

⁴ Para 32.

⁵ (1891) 18 R 719, at 727.

⁶ *Broadway Approvals v Odams Press* [1964] 2 QB 683 cited in Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), para 29.21.

⁷ [1910] VLR 494, at 499.

difficult to disentangle fact from comment,⁸ and if this cannot be done the defence will necessarily fail. Secondly, the facts on which the comment is based must be stated or at least implicitly indicated in general terms.⁹ Thirdly, the comment must be based on facts which are either proved or admitted to be true, or are protected by privilege.¹⁰ The effect of section 6 of the Defamation Act 1952 is that it is no longer necessary to prove the truth of every such fact, providing that enough is proved to found the comment. Fourthly, the comment must be on a matter of public interest. This covers a wide field, including comments on public entertainments such as plays and films,¹¹ but not criticism of the character or private conduct of individuals holding public office¹² (perhaps unless fitness for office is being called into question).

5.5 If the defender can prove that these four requirements are met, there is authority in Scots law that the burden then shifts to the pursuer to show that the comment was not fair.¹³ This was the position at common law in England and Wales.¹⁴ The rule that the comment should be fair does not mean (as might be thought at first sight) that the comment has to be objectively reasonable; it means only that the defender has to have genuinely and honestly held the opinion reflected in the comment.¹⁵ In the event that there is proved to have been lack of fairness in this sense on the part of the defender, the defence will automatically fail. In practice, however, it will often be difficult for the pursuer to show that an opinion was not honestly held.¹⁶

How effective is the common law defence of fair comment in practice?

5.6 We have heard soundings from solicitors practising in defamation law that the defence of fair comment is less effective in practice and hence less frequently invoked than would be desirable. This is due in large measure to the technical complexity of applying the defence, not least because of the lack of clarity in the distinction between fact and comment. As highlighted in the Explanatory Notes to the 2013 Act, uncertainty seems to arise, too, in connection with the extent to which the facts on which a comment is based must be sufficiently true, and the extent to which the statement must explicitly or implicitly identify the facts on which it is based.¹⁷ The shortage of modern Scottish case law on the defence adds to the difficulties.

The changes made by section 3 of the 2013 Act to the defence in England and Wales

5.7 Section 3 of the 2013 Act is intended to replace the common law defence of fair comment (or 'honest comment', as it was sometimes referred to) with a new statutory

⁸ Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), para 29.21.

⁹ The law on this point was restated by the Supreme Court in *Spiller v Joseph* [2011] 1 AC 852, para 102. In its note of reasons refusing leave to appeal to the Supreme Court in *Massie v McCaig*, the Inner House stated that there was nothing in its decision that was inconsistent with *Spiller* [2013] CSIH 37, para 7.

¹⁰ *Wheatley v Anderson* 1927 SC 133, at 143.

¹¹ See Rosalind McInnes, *Scots Law for Journalists* (8th edn, 2010), para 27.32.

¹² *Gray v SPCA* (1890) 17 R 1185, at 1200.

¹³ *Wheatley v Anderson* 1927 SC 133, Lord Hunter at 145; Lord Anderson at 147; but see Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 149.

¹⁴ *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 31, Lord Nicholls at 79.

¹⁵ *Merivale v Carson* (1887) 20 QBD 275 at 281. This seemed to lay down a much used objective test, the effect of which is that the question to be addressed is whether any person, however prejudiced or obstinate, could honestly have held the view expressed by the defendant.

¹⁶ See further the comments of Eady J in *Branson v Bower* No 2 [2002] QB 737, at para 55.

¹⁷ See para 22.

defence, known as honest opinion. According to the Explanatory Notes to the 2013 Act,¹⁸ the section broadly reflects the [then] current law of England and Wales while simplifying and clarifying some elements of it. The section expressly abolishes the common law defence¹⁹ and replaces it with the new statutory one. It makes other important changes: it does not require the opinion to be on a matter of public interest; it expands the categories of privileged statement on which an honest opinion can be based (notably to include statements falling within the section 4 defence of publication on a matter of public interest); and it allows the defendant to rely on any fact that existed at the time of publication, whether or not known to him or her, providing, it seems, there is some link between the comment and the facts later relied on to support it.

5.8 The scheme of the section requires the defendant to satisfy three conditions: to show that the statement complained of was a statement of opinion;²⁰ to demonstrate that the factual basis of the opinion was sufficiently indicated; and to establish that an honest person could have held the opinion on the basis of an existing fact or a fact alleged in a privileged statement.²¹ If the defendant satisfies the three conditions, he or she will have a *prima facie* defence. The Explanatory Notes suggest that it is implicit in the requirement that the statement be recognisable as a comment that the assessment of its status be carried out on the basis of how the ordinary person would understand it. If that is accepted, it seems clear that the defence operates on the basis of the application of the single meaning rule.²²

5.9 If the defendant succeeds in establishing the three conditions, the burden then passes to the claimant in terms of subsection (5) to prove that the defendant did not in fact hold the opinion complained of. This is a subjective test.²³ Subsection (6) provides for the situation where the defendant is not the author of the opinion (for example, the publisher of a newspaper which prints a letter from a reader²⁴). In such circumstances, the defence is defeated if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion.

Discussion

5.10 In considering whether the defence of fair comment should be placed on a statutory footing in Scots law and, if so, what the broad outline of such a provision might be, we have identified a number of possible improvements to the existing defence. We discuss these below and would welcome views on our provisional thinking. We then address some aspects of the new defence of honest opinion raised by commentators on the 2013 Act. Finally, we consider whether the defence should be encapsulated in a statutory provision for the purposes of Scots law.

¹⁸ Para 19.

¹⁹ Subsection (8).

²⁰ The departure from use of the term “comment” has been criticised by some commentators on the grounds that the reference to opinion less accurately reflects what is being protected by the defence. See Eric Descheemaeker, “Mapping Defamation Defences”, (2015) 78 MLR 641, 651-652.

²¹ Section 3(2)-(4).

²² See para 21 of the Explanatory Notes, as contrasted with the discussion at para 4.41 of *Blackstone’s Guide to the Defamation Act 2013* (2013) edited by James Price QC and Felicity McMahon. Blackstone’s Guide suggests that the condition that the statement complained of was a statement of opinion could be seen to give rise to a subjective question, governed by the intention of the maker of the statement rather than the interpretation put upon it by the reader or hearer.

²³ See para 25 of the Explanatory Notes.

²⁴ The interpretation of subsection (6) is not free from difficulty: see *Duncan and Neill on Defamation* (4th edn, 2015), paras 13.36 and 13.37.

Abolition of the public interest criterion

5.11 The first possible improvement to the defence as it currently exists in Scots law concerns the possible abolition of the requirement that the comment be on a matter of public interest. As Professor Norrie has pointed out,²⁵ the requirement is today of minimal importance. The Joint Committee on the draft Defamation Bill took the view that the public interest dimension was an unnecessary complication.²⁶ The Northern Ireland Law Commission Consultation Paper on Defamation Law in Northern Ireland²⁷ stated that, in light of the shift in the common law defence over time, the abolition of the public interest criterion could be seen as essentially unproblematic.²⁸ In *Spiller v Joseph*²⁹ Lord Phillips acknowledged that the concept of public interest had been greatly extended and suggested that there might be a case for widening the scope of the defence of fair comment by removing the requirement that it must be on a matter of public interest. In the light of the clear direction of travel on the issue, we tend to the view that the need for the comment to be on a matter of public interest no longer serves any useful purpose. Under the modern law, the concept of public interest has become so broad as to be of no practical significance. Our provisional view is that it would simplify the defence and make it more straightforward to understand and apply if this particular requirement were now to be abolished. It makes little practical sense to retain the requirement for the purposes of Scots law when it has been swept away for England and Wales. We would welcome views on the following question:

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

Honest belief?

5.12 As mentioned above, there is some uncertainty in Scots law as to whether the comment requires to be one that the defender honestly believed in at the time it was made. Professor Norrie³⁰ acknowledges that since the decision of the Inner House in *Wheatley v Anderson & Miller*³¹ it has been assumed that this is the case, but he questions whether this particular requirement is justified or necessary. If the purpose of the defence is to safeguard free speech then the intention behind a comment is arguably irrelevant. On this approach, it should not matter, for example, if the true motive of a reviewer of a book was to enhance sales of his own competing book by a harsh review; readers can still make up their own minds as to whether the review was merited. It can also be said that the requirement has little practical relevance since it is difficult to show that the commentator did not genuinely hold the opinion expressed. On the other hand, it may be argued that the essence of the defence should be that the commentator has made an honest comment in the sense that it was one in which he or she genuinely believed; it may be thought to be contrary to sound policy for comments which are not honestly held in this sense to be protected. As Lord Nicholls observed in *Tse Wai Chun Paul v Albert Cheng*,³² honesty of belief is the touchstone of the defence. Section 3 of the 2013 Act has retained the requirement, whilst providing that

²⁵ See Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 145.

²⁶ Joint Committee on the Draft Defamation Bill, HL Paper 203 & HC 930 - I, para 69(a). <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>

²⁷ NILC 19 (2014).

²⁸ At para 3.31.

²⁹ *Spiller v Joseph* [2011] 1 AC 852, at para 113.

³⁰ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), pp 148-149.

³¹ 1927 SC 133.

³² [2001] EMLR 31, at 79.

where the comment was made by another person, the publisher is only liable if he or she knew or ought to have known that the original commentator did not hold the opinion.³³ It may be thought that this strikes an appropriate balance. In the circumstances, we would welcome views on the following question:

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?

Some issues and questions arising from section 3 of the 2013 Act

5.13 We turn now to consider some issues that have been raised in relation to section 3 of the 2013 Act. It has been suggested that, in applying section 3, the court is likely to continue to follow the common law approach, as laid down in the *Merivale* case, according to which an opinion may be taken to be one which an honest person could have held, even if based on exaggerated or obstinate views.³⁴ This would seem to be a realistic possibility, although the approach is not entirely easy to reconcile with the notion of honesty. This tension inevitably lies at the heart of the defence and is perhaps only capable of being resolved on a case by case basis.

5.14 The statutory defence may be of limited assistance in clarifying how fact and comment should be distinguished; this will continue to be a question of interpretation of the words used in the context of the particular circumstances of the case. Conversely, the new provision may afford some clarification as to the issues around the extent to which the facts must be true and the extent to which identification is needed of the facts on which a comment is based. Subsection (4)(a) paves the way for reliance on any fact which existed at the time the statement complained of was published (emphasis added). As the Explanatory Notes imply,³⁵ a fact must have been true at the time the statement was made; otherwise it can hardly have been a fact. At common law the defender must have known the fact or facts on which the opinion was based, at least in general terms, when he or she made the comment³⁶, but the language of the provision requires only that the fact relied on should have “existed” at the time the statement was made, not that it should have been known to the commentator.

5.15 If the reference in subsection (4)(a) to any fact which existed at the time the statement was made is read literally and in isolation, it would on one view appear to allow a defender who has published a statement based entirely on false facts to rely on the defence of honest opinion if he or she could later unearth some other fact (of which he or she was previously unaware) on which an honest person could have based the comment. It may be thought unlikely that the legislature intended to allow a comment to be based entirely on false facts, but later to be defended on the basis of some other fact not referred to or indicated in the comment. There is nothing in the parliamentary history of the provision to suggest that this was the intention. The more likely explanation for the use of the words “any

³³ Subsections (5) and (6).

³⁴ See again James Price QC and Felicity McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (2013), at para 4.48.

³⁵ See para 22.

³⁶ *Lowe v Associated Newspapers Ltd* [2007] QB 580, para 74.

fact” in subsection (4)(a) seems to be that the intention was to emphasise that not all of the facts on which the comment bore to be based would require to be shown to be true.³⁷

5.16 Subsection (4)(b) refers to anything asserted to be a fact in a privileged statement published before the statement complained of. On one view, this could be read as meaning that a defamatory opinion which is published on the same occasion as but, in terms of strict timing, before the relevant privileged statement, would not be within the ambit of the defence. A journalist or blogger who comments on facts that he or she has published in the same article might not be protected if that approach to the provision were to be taken. Such an interpretation of the provision might infringe the defender’s rights under Article 10 ECHR. For these reasons it is possible that the courts would tend to steer away from such a literal interpretation of the provision.³⁸

5.17 In the Northern Ireland Law Commission Consultation Paper the view was expressed that the interplay between section 3(4)(b) and section 3(7)(a) might mean that the defence was unavailable to some commentators.³⁹ The difficulty was said to arise particularly from the perspective of the social media commentator, who relies on facts published by someone else when commenting. In effect, the commentator would have to prove by proxy the section 4 defence of publication on a matter of public interest. Such an exercise would often be impossible in practice, for example in the case of someone who tweets a comment on a report in the mainstream media.

5.18 The solution proposed by the Northern Ireland Law Commission Consultation Paper was for section 4 to be reserved for the defence of statements of fact on matters of public interest, for the definition of “privileged statement” in section 3(7) to exclude reference to section 4, and instead for the justifications for comment in section 3(4) to include “any fact that the publisher reasonably believed to be true at the time the statement complained of was published”. The defence would then be available when the factual basis for opinion expressed was true, privileged, or reasonably believed to be true.⁴⁰

5.19 During the development of what is now the 2013 Act the UK Government of the time recognised that the introduction of such a further line of defence was an available option.⁴¹ Despite the existence of majority support for the change, the Government decided not to proceed with it on the basis that the circumstances could be catered for by the offer of amends procedure and that the amendment would make the law too complicated. It was said that the need for there to be a factual basis for the opinion would also be undermined. On the other hand, it can be argued that such an approach would have given rise to a more fully comprehensive defence, thereby simplifying the law and serving to deter litigation.

A statutory defence of fair comment in Scots law?

5.20 We acknowledge that commentaries on section 3 of the 2013 Act have raised a number of detailed issues about the interpretation and application of the new defence of honest opinion. It is possible that the courts in England and Wales will have an opportunity

³⁷ For further expansion of this discussion see *Duncan and Neill on Defamation* (4th edn, 2015), paras 13.24-26.

³⁸ See again *Duncan and Neill on Defamation* (4th edn, 2015), paras 13.27-13.30.

³⁹ NILC 19 (2014), para 3.38.

⁴⁰ NILC 19 (2014), para 3.39.

⁴¹ Ministry of Justice *Draft Defamation Bill: Consultation Paper CP3/11* (Cm 8020), para 46. https://consult.justice.gov.uk/digital-communications/draft_defamation_bill.

to consider some of these points in due course. That such questions should arise is hardly surprising in view of the complexity and sensitivity of this area of the law; they would have to be considered and addressed at the stage of drafting a Scottish statutory provision, particularly in the light of any case law decided by then on section 3.

5.21 That leaves the question of principle: should the defence of fair comment be incorporated in a statutory provision? It may be thought that there would be advantages in encapsulating the key elements of the defence in statutory form. We do not believe that there should be any insurmountable difficulty in doing so. The aim would be to reflect the core principles of the existing common law of Scotland in this area. This would be subject to decisions taken in response to our questions on whether the public interest criterion should be retained and whether the author of the comment should be required honestly to believe in it. Beyond those issues, our provisional view is that the existing common law should not be subject to substantive alteration, although we would welcome views on this. In the circumstances, we ask the following questions on the basis of the foregoing discussion and analysis:

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

Chapter 6 Publication on a matter of public interest

6.1 In this chapter we consider whether the common law public interest defence in relation to publication of defamatory material should be placed on a statutory footing in Scots law. In current Scots practice the public interest defence operates at common law, derived from the case of *Reynolds v Times Newspapers Ltd*.¹ That case was said to have marked a sea change in that it took greater account of freedom of expression than had earlier case law, which had been criticised as being overly focussed on reputational rights.² If the public interest defence is to be placed on a statutory footing, we consider to what extent section 4 of the 2013 Act may provide a suitable outline model for that.

The current position in Scots law

6.2 The case of *Reynolds v Times Newspapers Ltd*³ essentially involved the formulation by the House of Lords of a new variant of qualified privilege. At its heart is the idea that a publisher may have a defence if it has published defamatory allegations on a matter of public interest, providing that the publication has been “responsible.” To deal firstly with the availability of the defence in Scotland, the case of *Adams v Guardian Newspapers Ltd*⁴ proceeded on the basis that the *Reynolds* defence was available in Scotland. The same may be said of the more recent case of *Lyons v Chief Constable of Strathclyde*.⁵ We understand the accepted position amongst practitioners to be that the *Reynolds* defence is available in Scotland, albeit that this has never been held definitively.

6.3 Lord Nicholls identified in *Reynolds* a number of factors to be applied in determining whether the requirement of responsible journalism has been satisfied. These include the subject-matter of the publication and the extent to which it is a matter of public concern, whether there has been reliance on sources which are trustworthy and, where appropriate, whether the claimant/pursuer has been approached for a response before a decision has been made to publish the material.⁶ The task essentially involves applying the factors so as to weigh the importance of freedom of expression against the right to reputation in light of all the elements of the case. The weight to be given to the various factors will depend on the circumstances of each individual case. This is established by the case of *Jameel v Wall Street Journal Europe SPRL (No 3)*,⁷ in which the *Reynolds* factors were distilled into three broad categories, covering whether the subject matter of the article was a matter of public interest, whether the inclusion of the defamatory statement was justifiable and whether the steps taken to gather the material were responsible and fair. The court emphasised that the

¹ [2001] 2 AC 127 (HL).

² Eric Barendt, “Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and Reportage”, (2012) 63 Northern Ireland Legal Quarterly 59, 59-60.

³ [2001] 2 AC 127 (HL).

⁴ 2003 SC 425.

⁵ [2013] CSIH 46.

⁶ [2001] 2 AC 127 (HL), at 205.

⁷ [2007] 1 AC 359.

factors set out in *Reynolds* should not be regarded as laying down a strict test.⁸ Lord Hoffmann explained that the question of whether a publication was in the public interest required a two stage approach. The first question is whether the publication, taken as a whole, was a matter of public interest. The second question is whether the inclusion of the defamatory statement was justifiable; the defamatory allegations must make a real contribution to the public interest element in the publication.⁹ In *Yeo v Times Newspapers Ltd*¹⁰ Warby J held that the court had to examine the relevant parts of the journalistic process by which the defamatory imputation came to be published. The steps taken in the course of the investigation and in the preparation and publication of the story were relevant; that included the process of editorial oversight.¹¹

6.4 The single meaning rule¹² does not apply where the *Reynolds* defence is to be relied upon. Rather, the question of whether journalism is responsible is to be determined with reference to the full range of meanings which the statement might reasonably be taken to bear.¹³

Advantages and disadvantages of the *Reynolds* approach

6.5 We have become aware of a mixed evaluation of the merits of the *Reynolds* defence among solicitors practising in the area of defamation law. On the one hand there can be said to be benefit in having available a list of factors which can be applied, in a systematic fashion, to any scenario which arises. We understand that amongst journalists and media lawyers the factors are now well-known and that they tend to be taken into account in deciding whether to publish a story. On the other hand it can be difficult to predict in individual cases the likelihood, or otherwise, that a court will accept a *Reynolds* defence. Moreover, journalists are often faced with determining what steps they must take to meet the responsible journalism requirements at a time when they are under considerable pressure of deadlines in circumstances where news is an inherently perishable commodity. This is against the background that if the *Reynolds* defence is unsuccessful, damages must be paid, even if a story has real public interest. It may, as has been suggested, be regarded as an all-or-nothing solution.¹⁴ Taking these considerations into account, it seems that the prevailing view among journalists is that *Reynolds* does little to relieve a chilling effect.

6.6 Looking at matters from the perspective of the general public, questions have been raised as to whether responsible journalism is the correct point at which to strike a balance between right to reputation and freedom of expression. The public may at times have an interest in receiving information which the press considers, albeit wrongly, to be accurate; but the press may decide not to publish it for fear of falling foul of *Reynolds*. Indeed, the potential flaw of the responsible journalism approach is perhaps most clearly demonstrated if Article 10 ECHR is conceived of as guaranteeing the right of the public to be informed on

⁸ See in particular para 33 (Lord Bingham) and para 56 (Lord Hoffmann). The approach of *Jameel* in weighing up the relevant factors was endorsed by the Supreme Court in *Flood v Times Newspapers Ltd* [2012] 2 AC 273. Particular emphasis was placed on the need to make appropriate allowance for editorial discretion.

⁹ [2007] 1 AC 359, at paras 48 and 51.

¹⁰ [2015] EWHC 3375 (QB).

¹¹ *Ibid* at paras 134 and 135.

¹² See para 2.16 above.

¹³ James Price QC and Felicity McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (2013), para 5.16.

¹⁴ Eric Barendt, "Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and Reportage", (2012) 63 Northern Ireland Legal Quarterly 59, 69.

matters of legitimate public concern.¹⁵ For example, as much as the public clearly has no interest in being *misinformed*,¹⁶ it seems possible to envisage a situation in which it may be in the public interest to know that certain allegations have been made against a person holding an eminent public office, albeit that the allegations have ultimately been shown to be unfounded.

The statutory defence under section 4 of the 2013 Act

6.7 Section 4 of the 2013 Act makes provision for a public interest defence. In brief terms it provides a defence where a defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he or she reasonably believed that publication of the statement was in the public interest. The court is bound to look at all the circumstances of the case in establishing whether this requirement is satisfied.¹⁷ In relation to the requirement of *belief* in the public interest, the defence operates subjectively. The onus of proof rests on the defendant; evidence is likely to require to be led to discharge the onus.¹⁸ The potential need for the leading of evidence has been re-iterated in the case of *Pinard Byrne v Linton*.¹⁹ There it was not enough that the subject-matter of the statement in question be in the public interest; evidence required to be led to prove that its publication was in the public interest.²⁰ No evidence was led that the claimant was guilty of the kind of wrongdoing alleged. Express provision is made in subsection (4) for appropriate allowance for editorial judgement in determining the *reasonableness*, or otherwise, of a belief that publication was in the public interest. It seems, however, that the notion of reasonableness serves to retain an element of the *Reynolds* requirement of objectively responsible journalism. Indeed, the Explanatory Note to section 4 includes express reference to its being based on *Reynolds* and intended to reflect the principles laid down in that case and in subsequent cases.²¹

6.8 To an extent, therefore, section 4 places on a statutory footing the defence provided for in *Reynolds*. The final subsection provides expressly for the repeal of the common law defence known as the *Reynolds* defence, which backs up this position. Section 4 does not, however, represent a direct codification. Two main points are to be noted. Firstly, as already alluded to, it operates to all intents and purposes not on the basis of the responsibility of the journalism but rather on the reasonableness, or otherwise, of the belief held by the defendant in any given case that publication of the statement in question was in the public interest. Secondly, the section is applied expressly to statements based on expressions of opinion, as well as those based on fact.²² We deal below with both of these issues in turn.

¹⁵ See again Eric Barendt, "Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and Reportage", p 68.

¹⁶ See again *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL), Lord Hobhouse at para 237.

¹⁷ Section 4(1) and (2).

¹⁸ See again *Blackstone's Guide to the Defamation Act 2013* (2013), at para 5.53.

¹⁹ [2015] UKPC 41.

²⁰ See further the discussion of the case in a case report from 5 RB: <http://www.5rb.com/case/pinard-byrne-v-linton/>.

²¹ See para 29 of the Explanatory Notes, together with paras 5.54-5.56 of *Blackstone's Guide to the Defamation Act 2013* (2013).

²² See section 4(5).

Other jurisdictions

6.9 A number of other jurisdictions have developed rules for protecting publications on matters of public interest.²³ *Reynolds* has been applied in Hong Kong.²⁴ In Australia there is legislation bearing a considerable resemblance to the *Reynolds* factors. The Australian Uniform Defamation Laws provide, in most cases in section 30, for a defence where the defendant can establish that the material was published to a recipient with an interest (or an interest reasonably apparent to the defendant) in having information on some subject, that the information was published in the course of giving the recipient information on that subject, and that the conduct of the defendant in publishing that matter is reasonable in the circumstances. The Supreme Court of Canada has held that in deciding whether a publisher was diligent in trying to verify an allegation, a jury is to be guided by a list of factors resembling those in *Reynolds*.²⁵ In Ireland there is a statutory defence of fair and reasonable publication similar to *Reynolds*.²⁶ In South Africa the common law has been recast in respect of media publications in terms which are rather similar to *Reynolds*.²⁷

Discussion

Reasonableness of belief that publication is in the public interest

6.10 One of the main reasons for the change in approach from the common law focus on responsible journalism to “reasonable belief” in statute was to ensure greater recognition of editorial discretion. It is suggested there are two tenable interpretations of the “reasonable belief” requirement in the context of section 4. The first interpretation is that the “reasonable belief” test requires only a belief that is held on reasonable grounds. The result of this would be that the defence would fail only in the unusual circumstances that the belief was proven to be false, capricious or irrational. This could legitimately be seen, it is argued, as overly generous to the publisher, given that it would mean the concept of “reasonableness” differed little from good faith or honesty.

6.11 The second possible interpretation is that the test essentially involves the same analysis as that which would be applied under *Reynolds* privilege. The question would simply be how the belief was reasonable, rather than how the journalism was responsible. Nevertheless, the fact remains that a well-resourced journalist could not reach a reasonable belief that publication was in the public interest without first having done what an ethical journalist should do to ensure a story stands up.²⁸ This would essentially involve applying the factors identified in *Reynolds*. Indeed, application of those factors may be necessary to ensure that the section 4(2) requirement to have regard to “all the circumstances of the case” is satisfied.²⁹ It is said to be clear that the second interpretation reflects the intention of Parliament, given the terms of the Explanatory Notes to the 2013 Act.³⁰ Moreover, there

²³ See Professor Alastair Mullis and Richard Parkes, QC (eds.), *Gatley on Libel and Slander* (12th edn, 2013), paras 15.25-15.31.

²⁴ *Yaqoob v Asia Times Online Ltd* [2008] 3 HKC 589.

²⁵ *Grant v Torstar Corp, Toronto Star Newspapers Ltd* (2009) 314 DLR (4th), para 126.

²⁶ Section 26 of the Defamation Act 2009.

²⁷ *National Media Ltd v Bogoshi* 1998 (4) SA 1196.

²⁸ Both interpretations are discussed in the Northern Ireland Law Commission Consultation Paper on Defamation Law in Northern Ireland, NILC 19 (2014), para 3.50.

²⁹ See again James Price QC and Felicity McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (2013), para 5.60.

³⁰ Alastair Mullis and Andrew Scott, “Tilting at Windmills: the Defamation Act 2013”, (2014) 77 MLR 87, 89-91, read with paras 29 and 35 of the Explanatory Notes to the 2013 Act.

could be a question over the extent to which the first interpretation satisfies the requirements of Article 8 ECHR. It could pave the way for journalists to argue that they honestly and reasonably believed the publication of a statement to be in the public interest, notwithstanding that little attempt had been made to verify its truth.³¹ Assuming the second approach is adopted there is, it seems, comparatively little between *Reynolds* and the statutory public interest defence in terms of the process to be followed in determining whether the public interest requirement is met.

Fact v opinion

6.12 Section 4(5) of the 2013 Act makes clear that the section 4 defence can be relied upon irrespective of whether the statement in question is one of fact or is an expression of opinion. It has been suggested that this has introduced a lack of clarity which is unnecessary. The argument runs that a defamatory opinion which no honest-minded person could have held, and is based on stated (inaccurate) facts, may be subject to the protection of section 4, providing the other elements of the defence are satisfied. It is further pointed out that at common law, no defence would have been available in this scenario. The defence of fair comment would have been ruled out because the facts were not accurate; *Reynolds* privilege would not have been available because, at least in the view of some,³² it did not protect opinions.³³ On this basis it may be suggested that the statutory provision has brought about a widening of the public interest defence which is difficult to justify. This argument may be strengthened by the existence of the defence of honest opinion, as it is re-named in the Act. It could, it seems, legitimately be argued that this provides adequate protection in relation to expressions of opinion, without the need for the option to rely on the public interest defence.

Section 4 and reportage

6.13 Section 4(3) is intended to encapsulate the common law doctrine of reportage.³⁴ Reportage may be described as a special form of *Reynolds* privilege. It involves the raising of an argument that it is in the public interest that the media should report neutrally the allegations in a dispute between two parties. It operates on the condition that the publisher has taken proper steps to verify that the allegations have in fact been made, and that the publisher does not adopt the allegations. In the context of reportage the significant point is that the allegations have been made; whether or not they are true is incidental.³⁵ Importantly, however, reportage does not involve treating an allegation that has not been adopted by a publisher as one that is asserted to be true. In other words, the reportage defence is entirely detached from the defence of truth.³⁶ It is on this basis, too, that reportage can be distinguished from “mainstream” *Reynolds* privilege. *Reynolds* privilege generally

³¹ Gavin Phillipson, Memorandum to the Joint Committee on Human Rights: the Defamation Bill 2012, para 30. http://www.parliament.uk/documents/joint-committees/human-rights/Prof_Gavin_Phillipson.pdf.

³² It is to be noted that while the Court of Appeal in *British Chiropractic Association v Singh* [2010] EWCA Civ 350 regarded it as an open question whether *Reynolds* applied to expressions of opinion, both Lord Nicholls and Lord Hobhouse had expressed the view in *Reynolds* that statements of opinion were to be protected, if at all, only by the defence of fair comment (or honest comment, as it was referred to in the case). See further the Northern Ireland Law Commission Consultation Paper on Defamation Law, NILC 19 (2014), para 3.54.

³³ See again Alastair Mullis and Andrew Scott “Tilting at Windmills: the Defamation Act 2013” (2014) 77 MLR 87, 95.

³⁴ See para 32 of the Explanatory Notes to the 2013 Act.

³⁵ See the explanation by Lord Phillips in *Flood v Times Newspapers Ltd* [2012] 2 AC 273, para 77.

³⁶ *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2002] EMLR 13, at para 36.

cannot be invoked unless the journalist honestly and reasonably believed that the statement was true.³⁷ Nevertheless, reportage does not absolve the defendant of the need to satisfy the court that, in all the other circumstances of the case, it was reasonable to believe that publication of the statement was in the public interest.

6.14 The wording of section 4(3), and the explanatory note to it, tends to suggest that reportage under the 2013 Act is confined to the situation where there has been a neutral reporting of a dispute. However, the view has been expressed that, as much as this reflects the common law position, it may leave gaps. In other words, there may be cases not involving a dispute in which it would be in the public interest to report an unverified accusation made against another person.³⁸ On the other hand, some support has been expressed for the abolition of the defence of reportage, the argument being advanced that it is neither justified by authority nor required by Strasbourg jurisprudence.³⁹ It is to be noted, too, that the Defamation Bill introduced by Lord Lester included provision for a widening of the reportage defence, such that it would apply where a publication reported accurately and impartially on a pre-existing matter of public interest. This provision was not, however, included in the Bill published by the Ministry of Justice. Parliamentary debate on the Defamation Bill made clear, on a number of occasions, that clause 4 was intended to go no further than to encapsulate the key elements of the reportage defence as developed at common law.⁴⁰ This may not bode well for any further attempts to broaden the application of the doctrine. Conversely, it has been suggested that the defence of reportage should be omitted from any equivalent Scottish provision, enabling the courts to continue to develop it at common law.⁴¹

6.15 We are satisfied that Scots law, in line with most other modern legal systems, requires to have a defence of publication on a matter of public interest and that this should be based on *Reynolds* and the jurisprudence it has generated. Amongst practitioners this is already understood to be the position, although the matter has not been authoritatively settled by a Scottish court. We recognise that questions have been raised about the meaning and effect of some aspects of section 4 of the 2013 Act. The courts in England and Wales will no doubt address these points when an opportunity to do so arises. Our provisional view is that the criticisms do not outweigh the advantages of putting the *Reynolds* defence on a statutory basis for Scots law. It is difficult to see why there should be any substantive differences of approach between the two jurisdictions since the underlying policy of the law on the matter is essentially the same on both sides of the border. A modern statutory provision would make the law more accessible and easier to apply. If the defence were to follow the approach taken in section 4 of the 2013 Act, this would allow Scots law to develop in harmony with the law of England and Wales. In the circumstances, we would welcome views on the following questions:

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

³⁷ *Jameel (Mohammed) v Wall Street Journal Europe Sprl (No 3)* [2007] 1 AC 359, at para 62.

³⁸ See again *Blackstone's Guide to the Defamation Act 2013* (2013), para 5.66.

³⁹ See Alastair Mullis and Andrew Scott, "Worth the Candle? The Government's Draft Defamation Bill", (2011) 3 *Journal of Media Law* 1, 6-7.

⁴⁰ See, for example, the explanation of Lord McNally, then Minister of State for Justice, *Hansard* HL Col GC 563 (19 December 2012).

⁴¹ Eric Descheemaeker, "Mapping Defamation Defences", (2015) 78 *MLR* 641, 659-660.

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

Chapter 7 Responsibility and defences for publication by internet intermediaries

Introduction

7.1 Internet websites, forums, blogs, Wikis, search engines, aggregation services for producing feeds and social networks are all means by which individuals and organisations exercise their right of freedom of expression; but due to the anonymity which the internet may afford, users may be more likely to make defamatory comments online than they would face-to-face. The courts have been asked to consider statements made by one person about another, for example on Twitter,¹ in a review on Google Maps² or in a university news bulletin³ and it is perhaps no surprise that defamation law is held to apply to statements between the original author and the person allegedly defamed irrespective of whether the statement is made online or in other media such as newspapers or books.⁴ More complex is the liability of those who make available allegedly defamatory material and who have at their disposal the technology to delete, amend or edit the material, but from whom the material has not originated; we refer to them as “internet intermediaries”. In this chapter we use this term for any person who can be said to have provided the means by which material is published on the internet.

7.2 Internet intermediaries fulfil a socially important role by making publicly available material originating from other persons. This may be done via newsgroup messages, home pages, websites, hyperlinks, search engines, feeds or social media networks. If there is a complaint that online material contains defamatory statements, the internet intermediary may decide in many cases that the cheapest and quickest solution is to delete information, even where the posting is not obviously defamatory or otherwise in breach of the law or the operator’s terms and conditions.⁵ We consider here whether the law in this area is sufficiently clear and strikes the right balance between freedom of expression through the medium of intermediaries and of those who receive the material, and the protection of reputation of those who are the subject of allegedly defamatory comments.

¹ *Cairns v Modi* [2012] EWHC 756 (QB); *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB).

² *Bussey Law Firm v Page* [2015] EWHC 563 (QB).

³ See the statement in open court in *Segalov v University of Sussex*, 28 October 2015, <http://www.5rb.com/wp-content/uploads/2015/11/Segalov-SIOC.pdf>.

⁴ For more comments on these cases see Jennifer Agate, “McAlpine, the Attorney General and the Defamation Act – social media accountability in 2013”, (2013) 24 *Entertainment Law Review* 233; Julian Pike, “Defamation on social media”, *Law Society Gazette*, 17 June 2013.

⁵ See Ashley Hurst, “Defamation Act 2013: Section 5: it’s decision time for website operators” *Inform’s Blog*, 6 January 2014; the Law Commission, “Defamation and the Internet: A Preliminary Investigation”, *Scoping Study No 2*, December 2002, para 1.12; see also the policy background to the Defamation (Operators of Websites) Regulations 2013 in the Explanatory Memorandum, which laments that the law can lead to website operators automatically removing material on receipt of a complaint to avoid the risk of being sued; http://www.legislation.gov.uk/ukdsi/2013/9780111104620/pdfs/ukdsiem_9780111104620_en.pdf.

Responsibility and defences for publication by internet intermediaries under Scots law

Responsibility for online material under common law in Scotland

7.3 Each person who communicates, transmits or temporarily stores defamatory material online, or uses a hyperlink⁶ to, or aggregates⁷ such material, is potentially liable under defamation law. The position on where responsibility lies for publication of material online is hard to pinpoint in Scots common law; the position has not been developed in any detail by the Scottish courts. This is in contrast to the much more fully developed consideration of responsibility of internet intermediaries for online material by the courts in England and Wales.⁸ The responsibility of internet intermediaries as publisher of online material - which is sometimes referred to as primary liability - appears to have to be established before a court considers the defence of not having responsibility for publication of material under section 1 of the Defamation Act 1996 ("the 1996 Act").⁹ The same applies to the Information society service defences in regulations 17 to 19 of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013).¹⁰ The fact that "publication" is not a requirement in Scots law for a statement to be defamatory may complicate the matter.¹¹ However, the conceptual differences between Scots and English law on the point may not be significant in this context as material widely available on the internet is by its very nature published.

The defence of innocent dissemination in Scots law

7.4 The defence of innocent dissemination has been developed in England and Wales for magazines, newspapers and libraries but the defence, or at least something similar to it, is also part of Scots law. In *Morrison v Ritchie*¹² Lord Moncreiff applied the principles of English case law on innocent dissemination to the circumstances of that case. However, he emphasised that the defence does not cover those who have or ought to have some control, be it editorial or practical, over the material being published¹³ and held the newspaper responsible for publishing a notice placed by an unknown person that twins had been born to a couple who were married for only one month. This would at the time have been defamatory. It may be difficult to see how the newspaper could have protected themselves in the situation but Lord Moncreiff was reluctant to extend the defence to the newspaper given their editorial control.¹⁴ Lord Stormonth-Darling had opined earlier in *M'Lean v Bernstein* that both the person who placed an allegedly defamatory advertisement in a

⁶ This could be a simple hyperlink from one webpage to another or a hyperlink on a web page which causes content from some other webpage to be displayed within a "frame" on the original webpage.

⁷ Aggregation involves the display of content ("feeds") from different online sources, for example news aggregation services. The feeds can be provided by operators of websites or be selected by internet users.

⁸ See paras 7.22-7.25 below.

⁹ *Metropolitan International Schools Ltd v Designtecnica* [2009] EWHC 1765 (QB), para 80 (Eady J).

¹⁰ *Metropolitan*, paras 96 and 113.

¹¹ See for more detail in ch 3, paras 3.1 *et seq.* Crombie suggests that for the purposes of Scots law the word "publication" should be replaced by the word "communication"; Kevin F Crombie, "Scots Law Defamation on the Internet", (2000) Scottish Law Online, Scots Law Student Journal 39 (available at: <http://www.scottishlaw.org.uk/journal/oct2000/def.pdf>).

¹² (1902) 4 F 645.

¹³ *Ibid* at 652.

¹⁴ See also Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 89.

newspaper and the newspaper itself could be liable; the latter, however, would have to have acted with a certain degree of recklessness in inserting it.¹⁵

7.5 Whatever the exact scope of this defence might be in Scotland in relation to internet intermediaries, it can be assumed that, though not abolished, it has been rendered largely redundant by the defences in section 1 of the Defamation Act 1996 and regulations 17 to 19 of the Electronic Commerce (EC Directive) Regulations 2002. Where the statutory defences do not apply, the common law defence may apply, or at least its principles may provide a starting point for possible reforms in this area of law.¹⁶

The defence under section 1 of the Defamation Act 1996

7.6 Publications other than in books and newspapers – in other words, publications via avenues which use more modern technology - triggered the need for a defence for those who play a secondary role in the publication of defamatory material by such means. Under section 1 of the 1996 Act a person has a defence in defamation proceedings if he shows that he was not the author, editor or publisher of the statement complained of, that he took reasonable care in relation to its publication and that he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

7.7 In order for internet intermediaries to be able to rely on the defence, they have to show that they are not editors, authors or publishers of the material available online. The expressions “author”, “editor” and “publisher” are defined in section 1(2) of the 1996 Act. “Author” means the originator of the statement, but does not include a person who did not intend that his statement be published at all. “Editor” means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it. For example, an intermediary who has in place systems for monitoring and censoring the content of on-line material hosted on its servers might be said to be exercising editorial responsibility for the content of the statement or the decision to publish it.¹⁷ “Publisher” in this context means a commercial publisher; that is a person whose business it is to issue material to the public and who issues material containing the statement in the course of that business.¹⁸ In *McGrath v Dawkins, Amazon and others* it was held that Amazon is not a “commercial publisher” as its primary business is that of online bookselling; and so far as it is running a website which invites comments from users, Amazon does not “issue” material to the public.¹⁹

7.8 Section 1(3) of the 1996 Act stipulates when a person should not be considered to be the author, editor or publisher of a statement. Of interest to internet intermediaries is that a person is not the author, editor or publisher if the person is only involved “...in operating or providing any equipment, system or... service by means of which the statement is retrieved, copied, distributed or made available in electronic form”.²⁰ The activities of some internet intermediaries may fall in particular under the category of providing a system or service for

¹⁵ (1900) 8 SLT 42.

¹⁶ See para 7.45 below for more detail.

¹⁷ Matthew Collins, *The Law of Defamation and the Internet* (3rd edn, 2010), para 16.13.

¹⁸ “Publisher” attracts a different definition to “publication” which is defined in section 17 of the 1996 Act as having the meaning it has under common law. This dual usage of “publisher” was criticised by Eady J in *Metropolitan International Schools Limited v Designtecnica* [2009] EWHC 1765 (QB), para 73.

¹⁹ *McGrath v Dawkins, Amazon and others* [2012] EWHC B3 (QB), para 40.

²⁰ Section 1(3)(c) of the 1996 Act.

retrieval or making available of information, for example news aggregation services. In *Godfrey v Demon Internet Ltd*²¹ Morland J held that Demon Internet, an internet service provider which carried a Usenet “news group” accessible to its users, was clearly not a “publisher” in terms of section 1 and could avail itself of the defence in section 1(1)(a), even though it is clear from the facts of the case that Demon Internet carried the statement on their servers for a limited time.²² In *McGrath v Dawkins, Amazon and others* it was held that Amazon is not an editor because Amazon’s only role was as provider of the system or service through which the allegedly defamatory comments could be published.²³

7.9 Another possible route allowing for an internet intermediary to rely on the defence in section 1 is that they may be able to show that they are not the author, editor or publisher because they are only an “operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control”.²⁴ This is of relevance to those that provide platforms enabling others to set up their own blogs or websites, or websites that allow others to post comments. In *Tamiz v Google* the Court of Appeal held that Blogger.com, the blogger service provided by Google Inc, did not have “effective control” over bloggers or a person who posted defamatory comments on a blog just by having a contractual term about the permitted content of the blog.²⁵ The Court also questioned to what extent the blogger service “issued material to the public”. Therefore Blogger.com was not a publisher or editor of the statement for the purposes of the defence under section 1.

7.10 These are all English cases on the interpretation of the defence in section 1 of the 1996 Act but there appears to us to be no reason why the decisions would not be followed by a Scottish court if it was confronted with similar questions, particularly as section 1 applies throughout the United Kingdom.²⁶

7.11 After receiving a notice of complaint the intermediary must take “reasonable care”²⁷ when making enquiries about the complaint. In *Tamiz* the Court of Appeal accepted that a period of five weeks between notification and removal was “somewhat dilatory but not outside the bounds of a reasonable response”.²⁸ In that case Google Inc passed the complaint to the blogger, who removed the statement. It has been held that it is difficult to envisage how “reasonable care” could have been taken against the background that publication took place without any human input on the part of the intermediary.²⁹ There is no general duty for internet intermediaries to monitor the content of postings on websites; that would contravene Article 15 of Directive 2000/31/ EC.³⁰

²¹ *Godfrey v Demon Internet Ltd*. [2001] QB 201, 206.

²² See also para 7.12 on the effect of the notice.

²³ *McGrath v Dawkins, Amazon and others* [2012] EWHC B3 (QB), para 41.

²⁴ Section 1(3)(e) of the 1996 Act.

²⁵ *Payam Tamiz v Google* [2013] EWCA Civ 68, paras 39 and 40 (Richards LJ).

²⁶ Section 18(1), (2) and (3).

²⁷ See section 1(1)(b) and (5) of the 1996 Act.

²⁸ *Payam Tamiz v Google* [2013] EWCA Civ 68, paras 42 and 43 (Richards LJ).

²⁹ In relation to Google’s search engine see Eady J in *Metropolitan International Schools Ltd v Designtecnica Corporation* [2009] EWHC 1765 QB, para 75; in relation to the comment section on Amazon see *McGrath v Dawkins, Amazon and others* [2012] EWHC B3 (QB), para 44.

³⁰ Article 15 provides that member states shall not impose a general obligation on providers to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

7.12 The reconciliation of a notice of complaint with the condition that the person relying on the defence “.... did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement”³¹ is also an issue that has been considered by the English courts. In *Godfrey v Demon Internet Ltd* Morland J held that the internet service provider could not rely on the defence in section 1 because the defendant delayed removing the defamatory posting from its Usenet news servers for a period of 10 days, during which time it had knowledge of publication of the defamatory comments.³² In *Tamiz v Google* the Court of Appeal relied on principles developed in *Byrne v Deane*³³ and held that Google Inc became a publisher at common law after the notification because if the comments remain on a blog Google Inc might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of the defamatory statement.³⁴ The Court of Appeal held that Google Inc., following the notification, knew or had reason to believe that what it did caused or contributed to the continued presence of the defamatory material on the blog.³⁵ In *Metropolitan Eady J* emphasised that operators of search engines cannot take down offending words appearing in snippets generated by searches as easily as, for example, the internet service provider Demon Internet could have done in relation to offending words on their website.³⁶ That suggests that the effect of a notification in relation to results generated by a search engine may need to be considered carefully.³⁷

Protection under the Electronic Commerce (EC Directive) Regulations 2002

7.13 For material transmitted by intermediaries but not created by them the Electronic Commerce (EC Directive) Regulations 2002³⁸ confer protection for intermediaries by creating three defences, the availability of which depends on the level of involvement of the intermediary in the transmission, storage and modification of the information. When engaged, the defences protect against liability for damages, for any other pecuniary remedy or for any criminal sanction.

7.14 The defences of the 2002 Regulations apply to “information society services”. An “information society service” is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the services.³⁹ Services provided by commercial intermediaries such as web hosting services would satisfy that definition. It is not free from doubt whether or not search engines are such a provider given that they are not normally paid for their services by the user but through advertisements.⁴⁰

7.15 Where an intermediary satisfies the definition of “information society service”, the 2002 Regulations distinguish between “mere conduits”, intermediaries who “cache” information and intermediaries who “host” information. For intermediaries who act as mere

³¹ Section 1(1)(c) of the Defamation Act 1996.

³² *Godfrey v Demon Internet* [2001] QB 201, 206 E–F.

³³ [1937] 1 KB 818; the Court of Appeal held that the secretary of a golf club was taking part in the publication of a defamatory verse on the wall of the club because the secretary allowed it to remain there for some days.

³⁴ *Payam Tamiz v Google* [2013] EWCA Civ 68, para 34 (Richards LJ).

³⁵ *Payam Tamiz v Google* [2013] EWCA Civ 68, para 44 (Richards LJ).

³⁶ *Metropolitan International Schools Limited v Designtecnica* [2009] EWHC 1765 (QB), para 79.

³⁷ See paras 7.30 and 7.45 below.

³⁸ SI 2002/2013.

³⁹ See the definition in regulation 2(1) of the 2002 Regulations.

⁴⁰ See Eady J in *Metropolitan International Schools Ltd v Designtecnica Corporation* [2009] EWHC 1765 QB, para 84.

conduits, namely where the information simply passes through their system for purposes of carrying out the transmission in the communication network but not for storage for longer periods, regulation 17 provides a complete immunity. For example, it would apply to an intermediary's role in the transmission of a defamatory email provided that the email is deleted automatically by the intermediary's network after it has been forwarded to the intended recipient.⁴¹

7.16 For intermediaries who cache the information (a process by which information is stored temporarily in order to allow for more efficient onward transmission to other recipients) regulation 18 gives some protection so long as the intermediary does not interfere with the information or unduly restrict access by the originator of the information. For example, the intermediary may temporarily cache commonly visited web pages in the intermediary's system so that the content may be transmitted more efficiently to subscribers to their system. In this scenario the intermediary must act expeditiously to remove the information once he or she has knowledge that it has been removed at the original source of its transmission, that access to it has been disabled or that a court or an administrative authority has ordered it to be removed.⁴²

7.17 The activity of hosting, where information supplied by others is stored on a server, for example in the form of a website, attracts the lowest degree of protection of these three defences. If an intermediary displays user-generated content on their website without moderating it, the defence in regulation 19 may be available.⁴³ However, where the intermediary has provided assistance and has played an active role, for example in optimising the data for the user, the defence may not be available. The Court of Justice has laid down general criteria in relation to the results produced by a search engine which would allow the search engine to rely on the defence but, in accordance with the principle of subsidiarity, left the ultimate decision whether the search engine can invoke the defence to the assessment of the national court. According to the Court, the conduct of the intermediary must be "merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores". The Court held that it was relevant but not decisive that the search engine determines the order of display according to, *inter alia*, remuneration paid by advertisers.⁴⁴

7.18 Regulation 19 does not have a requirement of "reasonable care" and may therefore be more attractive for intermediaries in certain situations than the defence under section 1 of the 1996 Act. The focus of the defence in regulation 19 is on the particular hosted information about which a complaint is made; that means that the publisher of an article on a newspaper website cannot rely on the defence in relation to that article but could rely on it in relation to a "have your say" section at the end of an article.⁴⁵

7.19 The defences in relation to caching or hosting information will not be successful if the intermediary has actual knowledge of unlawful activity or information.⁴⁶ Where the

⁴¹ Matthew Collins, *The Law of Defamation and the Internet* (3rd edn, 2010), para 16.40.

⁴² Regulation 18(b)(v).

⁴³ Eady J held that for a search engine to be classified or deemed as a "host" for the purposes of relying on regulation 19, statutory intervention would be needed: *Metropolitan International Schools Limited v Designtecnica* [2009] EWHC 1765 (QB), para 112.

⁴⁴ C-236/08 *Google France v Louis Vitton* [2010] ECR I- 2417, paras 114-118. The Court of Justice has examined this also in relation to the role of eBay in C-324/09, *L'Oreal v eBay*, 12 July 2011, paras 106-117.

⁴⁵ *Kaschke v Gray* [2010] EWHC 690 (QB), para 75.

⁴⁶ Regulation 22.

intermediary has received a notice about allegedly unlawful activity or information, this will be relevant in determining whether or not the intermediary had knowledge of it.⁴⁷

Summary for responsibility and defences under Scots law

7.20 There has been little in the way of Scottish case law on the responsibility of internet intermediaries. The defences for intermediaries in section 1 of the Defamation Act 1996 and regulations 17, 18 and 19 of the Electronic Commerce (EC Directive) Regulations 2002 go some way to protect those who have taken part in a communication online by providing a platform or a system to transmit or make available online material or engage in a (temporary) storage of such material. However, thus far it is not certain that the defences will cover online activities such as linking (including framing), providing aggregation services or generating results by search engines.

Responsibility and defences for internet intermediaries in England and Wales

7.21 Some of the issues around online publication by intermediaries have been addressed in cases on the responsibility of intermediaries decided by the English courts, by the introduction of a new defence for website operators in the Defamation Act 2013 and the new statutory provisions on jurisdiction for cases against a secondary publisher.

Responsibility of internet intermediaries for publication – the common law

7.22 The responsibility of internet intermediaries for online material at common law has been the subject of several cases in the English courts. In *Godfrey v Demon Internet Ltd*⁴⁸ the defendant stored information posted by third parties, transmitted it to subscribers and had knowledge that the words complained of were defamatory. It also had the ability to take them down from the Web. Morland J held that Demon Internet could properly be regarded as publishers at common law whenever a defamatory posting was transmitted from their news server.⁴⁹

7.23 In *Bunt v Tilley*⁵⁰ Eady J held that an internet intermediary, if undertaking no more than a passive role, cannot be characterised as a publisher at common law and would not, therefore, need to invoke any defence. Unlike in *Godfrey* the defendant internet intermediary in this case had not hosted the websites on which the material appeared but had merely provided access to the internet services.

7.24 In *Metropolitan International Schools Ltd v Designtecnica and Google* Eady J held that a search engine such as Google would not be a publisher under the common law because they did not have an active role in the process of publication of the relevant words.⁵¹ He referred to automatic computer programmes which do not require human input to run individual searches. In any event, since the operator of a search engine was not able to take

⁴⁷ *Davison v Habeeb* [2011] EWHC 3031 (QB), paras 57–64. See also the Court of Justice in C-324/09, *L’Oreal v eBay*, 12 July 2011, para 122.

⁴⁸ *Godfrey v Demon Internet Ltd* [2001] QB 201.

⁴⁹ *Godfrey v Demon Internet Ltd* [2001] QB 201, pp 208 and 209; referred to in *Metropolitan International Schools Limited v Designtecnica* [2009] EWHC 1765 (QB), para 39.

⁵⁰ [2007] 1 WLR 1243, para 36.

⁵¹ *Metropolitan International Schools Limited v Designtecnica* [2009] EWHC 1765 (QB), para 51.

down the “snippet” after it has been notified of defamatory material, it could not become liable as a publisher of the material.⁵²

7.25 The question whether a person who includes a link to another website which contains a defamatory statement should be treated as a publisher under the common law has not been directly considered by an English court. In *McGrath v Dawkins* His Honour Judge Moloney QC (sitting as a High Court judge) observed that the law on liability for hyperlinks is in a state of some uncertainty at present. He referred to a decision by a Canadian court⁵³ which held that a hyperlink should not be seen as a “publication” of the content to which it leads but he pointed out that the decision may be fact sensitive.⁵⁴

The defence for website operators under section 5 of the Defamation Act 2013

7.26 Apart from the common law defence of innocent dissemination and the defences under section 1 of the 1996 Act and the 2002 Regulations, intermediaries in England and Wales may be able to rely on the defence for website operators under section 5 of the Defamation Act 2013.⁵⁵ Section 5 provides a defence for website operators in respect of defamatory statements posted on their websites by third parties if the operator can show that it was not the operator who posted the statement. The defence is defeated if the claimant shows that it was not possible for him to identify the person who posted the statement, that he gave the operator a notice of complaint in relation to the statement and that the operator failed to respond to it. The details of how and when to respond are contained in regulations.⁵⁶ Where the claimant can identify the author, the material can remain until the intermediary is directed by a court to remove it under section 13 of the Act. Section 5(4) provides that it is possible for a claimant to identify a person who posted a statement only if the claimant has sufficient information to bring proceedings against the person.⁵⁷ In order to rely on the defence the website operator must have acted without malice.⁵⁸ The protection of the defence is not lost by reason only that the operator of the website moderates the statements posted on it by others.⁵⁹

Jurisdiction for cases against a secondary publisher

7.27 Section 10 of the 2013 Act provides that a court has no jurisdiction to hear and determine an action for defamation if it was brought against a person who is not the author, editor or publisher of the statement complained of⁶⁰ unless the court is satisfied that it is not reasonably practicable to bring the action against the author, editor or publisher. This

⁵² *Metropolitan International Schools Limited v Designtecnica* [2009] EWHC 1765 (QB), paras 55-58.

⁵³ The Canadian Supreme Court in *Crookes v Newton* [2011] 3 SCR 269, para 14.

⁵⁴ *McGrath v Dawkins, Amazon and others* [2012] EWHC B3 (QB), para 26.

⁵⁵ The liability of internet service providers for distributing material emanating from third parties has been the focus of proposals for legislative reform in England and Wales for some time; see the Law Commission, “Defamation and the Internet”, Scoping Study No 2, December 2002.

⁵⁶ The Defamation (Operators of Websites) Regulations 2013 (SI 2013/3038).

⁵⁷ Questions may arise as to when a claimant bringing an action under section 5 has “sufficient information” to bring proceedings against the originator of the statement. In this context the case of *Clark v TripAdvisor* (2014) CSIH 110 which went to the Supreme Court, might be relevant if section 5 was enacted in Scotland. The two pursuers in that case were asking the Court to make an order against the defender to require release of the details of two persons who had posted an unfavourable review about the pursuers’ business. The jurisdiction of the UK courts was at issue in this case.

⁵⁸ Section 5(11).

⁵⁹ Section 5(12).

⁶⁰ Such a person is sometimes referred to as a “secondary publisher”.

provision applies to actions brought against all internet intermediaries, not just website operators.

7.28 Section 13 complements section 10 by providing that if a court finds that the claimant has been defamed (by a statement originating from someone other than the intermediary), then the court may order the intermediary to remove or to cease to distribute, sell or exhibit material containing the statement. This section may also be used to order a website operator to remove the statement.

The need for reform

7.29 Whatever the position in Scotland as regards responsibility for online publications at common law, it is fair to say that even in England and Wales the common law position on such responsibility appears not to be entirely settled.⁶¹ As discussed in *McGrath v Dawkins* responsibility for defamatory material remains unclear where material comes to be published by using a hyperlink to another webpage containing defamatory material.⁶² For the results produced by search engines the case law in England and Wales seems to suggest that they do not “publish” anything at common law and therefore do not need to rely on a defence.

7.30 However, it has been argued that Google creates new content by aggregating, structuring and making known information and should therefore be regarded as a publisher at common law.⁶³ The Court of Justice, albeit in a privacy case, held that Google’s activity can be distinguished from that carried out by publishers of websites loading data on an internet page; the aggregation of information facilitates users’ access to information and helps to establish a detailed profile of a person.⁶⁴ In *Duffy v Google Inc* the Supreme Court of South Australia found that Google was a publisher *after* the notification that allegedly defamatory website snippets and autocorrect suggestions had been generated by Google’s programme. The Court held that as Google personnel refused to remove the material, the continuing existence of the material was the result of human action or inaction for which Google is responsible.⁶⁵ The Court observed that there was no case in which it had been held that a search engine operator does not publish after the operator has been notified of defamatory material and has failed to remove it within a reasonable time.⁶⁶

7.31 In relation to the statutory defences, the various legislative provisions governing defences for internet intermediaries may give rise to inconsistent outcomes.⁶⁷ For example, internet intermediaries that cache material will usually not be “publishers” for the purposes of section 1; they do not “issue” material to the public because they do not bring it onto the market for the first time.⁶⁸ That means the intermediary can rely on the defence under section 1 but only until the intermediary has reason to believe (or is aware) that he or she

⁶¹ See Professor Alastair Mullis and Richard Parkes, QC (eds.), *Gatley on Libel and Slander* (12th edn, 2014), para 6.29.

⁶² *McGrath v Dawkins, Amazon and others* [2012] EWHC B3 (QB). See para 7.25 above.

⁶³ Jan Oster, “Communication, defamation and liability of intermediaries”, (2015) 35 *Legal Studies* 348, 359. See also Steve Hedley, “The Internet – making a difference?”, (2012) 63 *Northern Ireland Legal Quarterly* 75, 82-83.

⁶⁴ Case C-131/12 [2014] *Google Spain & Google Inc v Agencia Espanola de Proteccion de Datos & Mario Costeja Gonzalez*, paras 35–37. See also the criteria for establishing Google’s role as responsible service provider which the Court developed in *Google France v Louis Vitton* [2010] ECR I- 2417, at paras 114-118.

⁶⁵ *Duffy v Google Inc* [2015] SASC 170, para 207.

⁶⁶ *Ibid*, para 209.

⁶⁷ See Matthew Collins, *The Law of Defamation and the Internet* (3rd edn, 2010), paras 16.44 and 16.60. See also *Bunt v Tilley* [2007] 1 WLR 1243, para 58 (Lord Justice Eady).

⁶⁸ See also para 7.7 above.

caused or contributed to the publication of a defamatory statement. By contrast, in order to rely on regulation 18 of the 2002 Regulations the intermediary that caches material must act “expeditiously to remove the information” upon obtaining actual knowledge that the information is no longer available at its source. Where for example the intermediary received a notice, which includes details of the defamatory statement on its webpages, the section 1 defence would not be engaged but the availability of the defence in regulation 18 might be available depending on the content of the notice.⁶⁹

7.32 It is to be noted that the defence in regulation 19 of the 2002 Regulations for those who host information also uses different criteria from those in section 1 of the 1996 Act. Regulation 19 protects an intermediary who does not have actual knowledge of “unlawful activity or information” whereas section 1 requires that the intermediary took reasonable care in relation to its publication⁷⁰ and does not know, and has no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. In a case where the defender thinks that the statement may be covered by a defence but knows no facts bearing one way or the other, only regulation 19 may be available because the section 1 defence is defeated where the intermediary has reason to believe that their conduct contributed to the publication of a defamatory statement.⁷¹

7.33 This all may tend to suggest that the law in this area is lacking in clarity in some important respects. There may be an argument that the relevant legislation should be fundamentally reviewed with a view to designing a scheme which is focussed on the activities of internet intermediaries and the extent to which they have control over the published material. Such a review would be a substantial task and careful consideration would have to be given to identifying the agency sufficiently qualified and resourced to undertake it. In the circumstances, we ask the following question.

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

Options for reform

Defence for website operators along the lines of section 5 of the 2013 Act

7.34 In England and Wales the Defamation Act 2013 introduced a defence for operators of websites. The key term of “operator of a website” is not defined. As a matter of statutory interpretation it may be assumed that it is a person with effective control over the content of the website; this could be more than one person for any defamatory statement.⁷² For example, a statement on a blog site could be removed by the person blogging or by the owner of the website hosting the blog. Given the technical hurdles which exist for search engines to take down defamatory material, to which Eady J referred in *Metropolitan*,⁷³ it is doubtful that the courts would hold that a search engine would be an operator of a website. The guidance issued by the Ministry of Justice on section 5 of the Defamation Act 2013

⁶⁹ Regulation 22 of the 2002 Regulations provides more detail on the content and effect of a notice.

⁷⁰ Section 1(5) provides further detail as to what taking “reasonable care” encompasses.

⁷¹ Matthew Collins, *The Law of Defamation and the Internet* (3rd edn, 2010), paras 16.75 and 16.76.

⁷² *Duncan and Neill on Defamation* (4th edn, 2015), para 6.32 and Professor Alastair Mullis and Richard Parkes, QC (eds), *Gatley on Libel and Slander* (12th edn, 2013), para 6.39.

⁷³ *Metropolitan International Schools Limited v Designtecnica* [2009] EWHC 1765 (QB), paras 55-58. See also the study on the liability of internet intermediaries commissioned by the European Commission, 12 November 2007, http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf, p 20.

states that the provision does not affect internet services such as search engines or services that simply transmit information or provide access to a communications network.⁷⁴

7.35 Apart from issues of application of the section 5 defence to certain internet activities, there has also been criticism of how the defence is supposed to work in practice for those intermediaries who can rely on it. There are concerns that the process for involving the person who posted the material complained of (referred to as the “poster”) in the handling of a complaint and in removing material, as set out in the Defamation (Operators of Websites) Regulations 2013,⁷⁵ made under section 5, is cumbersome and involves excessively short timescales. It is argued that going through the procedure is therefore not worth the investment of time and effort by intermediaries.⁷⁶ It has also been suggested that in practice the website operator may be required to take down the statement complained of on the basis of “half the story”, given the limited information which need be supplied in a notice of complaint, thereby producing a chilling effect on freedom of expression.⁷⁷ Moreover, it is argued that the effect of the section 5 defence is that website operators will have fewer hurdles to overcome if they respond to a notice of complaint relating to a statement by an anonymous poster: they would not have to contact the poster and would not have to comply with tight deadlines. Does that mean that website operators may be less inclined to ask for contact details in the first place? This would be a consequence which was not intended as anonymous postings are considered often to be less accurate and more likely to be abusive.⁷⁸ In relation to Twitter, questions have been raised as to whether section 5 and the deadlines in the 2013 Regulations make sense given that the vast majority of re-tweets occur within 24 hours after the first tweet appeared; after 24 hours tweets are quickly archived on Twitter.⁷⁹ We are not aware that the courts have yet had much opportunity to consider these issues. In *Richardson v Facebook UK* and *Richardson v Google UK* Warby J did not have to consider the defence in section 5 as the claimant sued the wrong parties; Facebook UK and Google UK do not own or control the sites upon which the offending material was published and Warby J held that they cannot be held liable as the publishers of the material.⁸⁰

7.36 In *Delfi v Estonia*⁸¹ the Grand Chamber of the European Court of Human Rights found after balancing the right to reputation with freedom of expression, rights which as a matter of principle merit equal respect,⁸² that the decision of an Estonian court to impose a

⁷⁴ Ministry of Justice, “Complaints about defamatory material posted on websites: guidance on section 5 of the Defamation Act 2013 and Regulations”, January 2014, para 5.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269138/defamation-guidance.pdf.

⁷⁵ SI 2013/3028.

⁷⁶ Ashley Hurst, “Defamation Act 2013: Section 5, its decision time for website operators”, Infromm’s Blog, 6 January 2014; Jennifer Agate, “The Defamation Act 2013 – key changes for online”, (2013) *Computer and Telecommunications Law Review* 170, 172; see also Christine O’Neill, “Defamation and reputation management: difference between Scotland and England”, (2015) 228 *In-house Lawyer* 28, 29.

⁷⁷ John Gillen, “Defamation Act 2013: More to Admire than to Despise?”, (2014) 23 *Journal of the Commonwealth Lawyers’ Association* 25, 29; Alexia Bedat, “Defamation Act 2013: The Section 5 Regulations, cumbersome and of questionable benefit?”, (2014) Infromm’s Blog, 7 March 2014.

⁷⁸ Alexia Bedat, “Defamation Act 2013: The Section 5 Regulations, cumbersome and of questionable benefit?”, (2014) Infromm’s Blog, 7 March 2014.

⁷⁹ Sarosh Khan, “The UK draft Defamation Bill: will it actually address libel in the online world?”, (2013) *Computer and Telecommunications Law Review* 142, 147 and 148.

⁸⁰ [2015] EWHC 3154 (QB), at paras 39 and 42 for Facebook UK and para 76 for Google UK.

⁸¹ Application No 64569/09, judgement 16 June 2015.

⁸² *Mosley v United Kingdom*, application No 48009/08, ECHR 2011, para 111; *Axel Springer v Germany*, application No 39954/08, ECHR 2012, para 87; *Delfi v Estonia*, application No 64569/09, 16 June 2015, para 110.

fine on an Estonian internet news portal for carrying a manifestly defamatory comment for six weeks until the person who was the subject of it complained, did not amount to a breach of freedom of expression for the purposes of Article 10 ECHR. The section 5 defence allows website operators to remain passive unless and until there is a notice of complaint. This could suggest that the more passive or reactive behaviour which website operators may adopt under the defence in section 5 does not encourage the protection of the reputation of the complainer as much as may be desirable. In cases where the defamatory material was extreme and obviously actionable, the cumbersome take down procedure under the section 5 defence may sit uneasily with the tenor of the judgment in *Delfi*.⁸³

7.37 In this context, the absence of any obligation on website operators to append a notice of complaint alongside highly defamatory postings has also been criticised.⁸⁴ This would impose a duty on website operators to police third party content and compel them to judge the merit of complaints. This proposal was rejected by the UK Government in their response to the Report of the Joint Committee on the draft Defamation Bill. The UK Government relied on discussions with internet companies who pointed to practical and technical difficulties given the vast number of words posted every minute.⁸⁵

7.38 There has been criticism arising from a perceived lack of clarity in section 5(12) of the 2013 Act which provides that moderation of a statement does not defeat the defence for website operators.⁸⁶ For some websites “moderating” simply involves automatic removal or blocking of certain expressions; for others it means actively removing offensive content which they have noticed. Unless and until the courts clarify the meaning of moderation it is conceivable that this provision might encourage website operators not to moderate at all in order to avoid the risk of losing the protection of section 5.

7.39 Against this background we would be grateful to receive views on the following question:

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?

Responsibility and defences for hyperlinks, search engines and content aggregations

7.40 Perhaps the most difficult challenge is to devise meaningful criteria for determining the responsibility of and defences for providers of hyperlinks, including framing, search engines and content aggregation services. The European Directive 2000/31/EC on electronic commerce aims to remove obstacles to cross-border provision of online services; it has been transposed in the UK by the 2002 Regulations. These measures left the

⁸³ *Delfi v Estonia*, application No 64569/09, 16 June 2015, para 159.

⁸⁴ Alistair Mullis and Andrew Scott, “Tilting at Windmills: the Defamation Act 2013”, (2014) 77 MLR 88, 102; see also John Gillen, “Defamation Act 2013: More to Admire than to Despise?”, (2014) 23 Journal of the Commonwealth Lawyers’ Association 25, 29.

⁸⁵ Ministry of Justice, Government’s Response to the Report of the Joint Committee on the draft Defamation Bill Cm 8295 (2012) paras 78-80. <http://www.parliament.uk/documents/joint-committees/Draft-Defamation-Bill/Government%20Response%20CM%208295.pdf>.

⁸⁶ See James Price QC and Felicity McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (2013), paras 6.33 and 6.34.

responsibility and defences for these activities untouched.⁸⁷ The Department for Trade and Industry, after a consultation on the issue, came to the conclusion in 2006 that any extension of liability to such online services cannot be justified.⁸⁸ The defence in section 5 of the 2013 Act does not cover these internet activities.⁸⁹

7.41 However, as the Law Commission concluded in their 2002 scoping paper, there is a strong case for reviewing the way that defamation law impacts on internet intermediaries.⁹⁰ Search engines and to a certain extent providers of hyperlinks and aggregation services serve a social need, as they facilitate internet use. Infringements of the right to reputation on the other hand can be very far reaching as defamatory material is made available to an almost unlimited number of users of the internet. Therefore there is a need to balance the interests carefully for these internet activities carried out by intermediaries.

7.42 General considerations must include the extent to which the intermediary has control over the published material and the technical ability to block or filter it. The idea of having to have some control over the published material goes back to the principles of innocent dissemination⁹¹ and is also reflected in the defence in section 1 of the 1996 Act. It should also be relevant to what extent the defamed person has the option of suing the original author of the material and in this context we note the case of *Brett Wilson LLP v Persons Unknown – responsible for the operation and publication of the website www.solicitorsfromhell.com*, in which Warby J granted an injunction and awarded damages against defendants for whom there was no more than an email address.⁹²

7.43 In relation to hyperlinks (including framing) it is presumed that the provider of the hyperlink will generally be aware of the content of the website to which the user is directed via the hyperlink. The placing of the hyperlink is a deliberate action by the person setting the hyperlink. If the person who set the hyperlink has knowledge of the defamatory material, the person should be required to remove the hyperlink. In this sense the activity of setting a hyperlink could be compared to those who host material. A defence modelled broadly along the lines of regulation 19 of the 2002 Regulations, but with certain specific considerations for providers of hyperlinks, could be considered. It has also been suggested in this context that the defence of innocent dissemination contained in Australia's Uniform Defamation Laws⁹³ would be a suitable model for parties who link to or frame defamatory content because linking and framing parties will ordinarily have no editorial control over the first publication of the content to which they have linked or which they have framed.⁹⁴ The defence is in the following terms:

⁸⁷ Study commissioned by the European Commission, 12 November 2007, http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf, p 4; See also the recent consultation by the European Commission on online intermediaries: <https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>.

⁸⁸ See the DTI consultation document on the electronic Commerce Directive: the liability of hyperlinkers, location tool services and content aggregators, June 2005 and the Government response and summary of responses in December 2006

<http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/consultations/page13985.html>.

⁸⁹ See para 7.34 above.

⁹⁰ The Law Commission, "Defamation and the Internet", Scoping Study No 2, December 2002, para 1.12.

⁹¹ See para 7.4 above.

⁹² [2015] EWHC 2628 (QB).

⁹³ Defamation Act 2005 (NSW, Qld, Tas, Vic, WA), section 32; Defamation Act 2005 (SA), section 30; Civil Law (Wrongs) Act 2002 (ACT), section 139C; Defamation Act 2006 (NT), section 29.

⁹⁴ Matthew Collins, *The Law of Defamation and the Internet*, (3rd edn, 2010), para 16.98.

“(1) It is a defence to the publication of defamatory matter if the defendant proves that: (a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor; and (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory and (c) the defendant’s lack of knowledge was not due to any negligence on the part of the defendant.

(2) for the purposes of subsection (1), a person is a “subordinate distributor” of defamatory matter if the person: (a) was not the first or primary distributor of the matter, and (b) was not the author or originator of the matter, and (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.”

7.44 In relation to search engines it is clear that the results produced by search engines have high social benefit for internet users. One option would be to introduce legislation which, along the lines of Eady J’s decision in *Metropolitan*, would provide that producing search results does not trigger responsibility as a publisher.⁹⁵ However, the criteria developed by the Court of Justice for the liability of search engines would have to be kept in mind.⁹⁶ In addition, the European Court of Human Rights has held that the right to respect for private life in Article 8 ECHR includes the right to protection of reputation and there may be Article 8 issues for those individuals whose reputation has been infringed by a search result and who may be confronted with a continued infringement without redress.⁹⁷ Article 8 imposes certain positive obligations on the institutions of a state to ensure positive enjoyment of this right, which may require the adoption of measures designed to secure effective respect of the right in relations of individuals between each other.⁹⁸ In this context it may be of interest that the Bundesgerichtshof (Federal Court/Civil Division) held that the autocomplete function provided by a search engine may violate the right to protection of reputation. However, the search engine could only be liable insofar as they have the ability to stop the violation of the right and if they have a duty to monitor such violations. The Bundesgerichtshof denied a general duty to monitor in advance as it would hinder considerably the activity of offering the autocomplete function and held that a duty to monitor would only arise after the search engine knew of the violation of the right of the individual.⁹⁹

7.45 Another option to limit liability for search engines may be to draw a parallel between the internet activity of search engines and the activity of providing access to internet communications as covered by section 1(3)(e) of the 1996 Act. That would require search engines to take down the defamatory material if they knew or had reason to believe that they contributed to the publication of a defamatory statement as required by section 1(1)(c). It would also impose an obligation on them to take “reasonable care” in relation to the search results as required under section 1(1)(b) of the 1996 Act. What that means exactly would

⁹⁵ See paras 7.24 and 7.29 above. Matthew Collins, *The Law of Defamation and the Internet*, (3rd edn, 2010), at para 17.56 claims that there are good policy reasons for this position.

⁹⁶ C-236/08 *Google France v Louis Vitton* [2010] ECR I- 2417, paras 106-118 and the considerations above in paras 7.17 and 7.30.

⁹⁷ *Axel Springer v Germany*, application No 39954/08, ECHR 2012, para, 83, quoting *Chauvy and others v France*, application No 64915/01, [2005] 41 EHRR 29, para 70 and *Pfeifer v Austria*, application No 12566/03, [2007] ECHR, para 35.

⁹⁸ *Mosley v United Kingdom*, application No 48009/08, ECHR 2011, para, 106; *Von Hannover v Germany (No 2)*, application nos 40660/08 and 60641/08, ECHR 2012, para 98.

⁹⁹ *R.S. v Google* 14 May 2013 Bundesgerichtshof, paras 28-30 reported in *Medien, Internet und Recht* 2013, <http://medien-internet-und-recht.de/pdf/VT-MIR-2013-Dok-029.pdf> .

not be easy to determine in the absence of any recognised standards of care.¹⁰⁰ Leaving it to the courts to develop criteria based upon basic principles of negligence may not add to the certainty in this area of law although the principles developed for the defence of innocent dissemination may provide some guidance on the issue.¹⁰¹ In this connection it is interesting to recall that Lord Stormonth-Darling held in relation to a defamatory newspaper advertisement that it is for the pursuer to satisfy the jury that there was a certain recklessness on the part of the newspaper in inserting the advertisement; it is said to be necessary to show that the paper ought to have seen the defamatory statement.¹⁰²

7.46 Intermediaries who offer aggregation services may be said to have some responsibility for their feeds, for example in deciding which statements are being fed to the user as a news item. The situation may be slightly different where the person who operates an aggregation service has left the selection of feeds entirely to the discretion of the individual subscribers. The question is whether intermediaries who offer aggregation services could be compared to those who provide a service by means of which the statement is retrieved or made available in electronic form (section 1(3)(c) of the 1996 Act). If so, they would be under an obligation to take “reasonable care” in relation to the feeds under section 1(1)(b) of the 1996 Act and it would be necessary, as for search engines, to determine what that means.

7.47 Against this background we ask the following questions:

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

¹⁰⁰ Study commissioned by the European Commission, 12 November 2007, http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf, pp 20 and 21.

¹⁰¹ See para 7.4 above.

¹⁰² *M'Lean v Bernstein* (1900) 8 SLT 42.

Chapter 8 Absolute and qualified privilege

Introduction

8.1 There are privileged occasions on which it is to the benefit of the public and in the interest of freedom of speech that a person should be able to communicate freely and that this should outweigh the right of any individual to the protection of their reputation. If the occasion when defamatory words are used is privileged, the words do not need to be either proved to be true or defensible as fair comment.¹ The Defamation Act 2013 made numerous changes to existing privileges in England and Wales whereas the increased protection of publishing some scientific and academic material is one of the few provisions of the 2013 Act which has also been adopted in Scotland.

8.2 We will examine to what extent the law in Scotland needs to be amended to ensure that an occasion is privileged where appropriate.

Absolute privilege

8.3 Absolute privilege attaches to relatively few occasions, but where it so attaches, it provides protection even for a false statement made with malice. Where privilege is absolute, no action will lie.

Judicial proceedings

8.4 Absolute privilege arises under common law in relation to defamatory statements made in the course of judicial proceedings by judges,² advocates and solicitors³ and witnesses.⁴ In Scotland parties to proceedings do not enjoy absolute privilege but qualified privilege⁵ and may be sued for defamatory statements maliciously made.⁶ The rationale behind the application of privilege to judges, counsel and witnesses is to encourage those who participate actively in court proceedings to express themselves freely without fear that they may be sued for defamation in relation to something they say. Absolute privilege for defamatory statements in judicial proceedings sits comfortably with other immunities in connection with the administration of justice; for example, no action generally lies against a judge for the wrongful granting of an order.

¹ For further detail see also para 8.13 below.

² *Harvey v Dyce* (1876) 4 R 265; *Primrose v Waterston* (1902) 4 F 783.

³ *Williamson v Umphray & Robertson* (1890) 17 R 905; *Rome v Watson* (1898) 25 R 733.

⁴ *Mackintosh v Weir* (1875) 2 R 877; *AB v CD* (1904) 7 F 72.

⁵ See on qualified privilege para 8.13 below.

⁶ *Williamson v Umphray & Robertson* (1890) 17 R 905; *Neill v Henderson* (1901) 3 F 387. The common law position in Scotland differs from that in England and Wales. There absolute privilege applies at common law to all statements made in the course of judicial proceedings before a court of justice, including statements made by a litigant conducting his or her own case in person, at least to the extent that it would apply to statements made by an advocate or lawyer instructed on his or her behalf. For recent affirmation of this, albeit on the strength of limited legal argument on the point, see *King v Grundon* [2012] EWHC 2719 (QB), para 87 (Sharp J).

Proceedings in Parliament and publication of parliamentary papers

8.5 Parliamentary privilege goes back to the Bill of Rights 1688 which in article 9 provides that freedom of speech and debates and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. The same applies in Scotland even though the Scottish equivalent, the Claim of Right Act 1689, was less specific.⁷ Following devolution not only are statements made in either House of the UK Parliament absolutely privileged but also statements made in the Scottish Parliament.⁸

8.6 The matter of what is protected as falling into the category of “parliamentary proceedings” is a question of fact. The privilege covers statements made in proceedings in Parliament. That includes what is said or done by a Member of Parliament in the exercise of his or her functions as a Member and in the transaction of parliamentary business. The extent to which parliamentary privilege might protect statements made outside Parliament may give rise to some questions. Lord Reed in *Adams v Guardian Newspapers* held that an article in a newspaper accusing an MP of leaking to other MPs a confidential suicide note left by a fellow MP was not covered by parliamentary privilege since it was not in any way related to parliamentary business.⁹

8.7 The courts have avoided giving parliamentary privilege an over-extensive scope and have restricted it to situations involving the minimum possible infringement of the liberties of individuals.¹⁰ The importance of this became clear when a challenge to parliamentary privilege was made in the European Court of Human Rights.¹¹ The Court has confirmed that absolute parliamentary privilege pursues two legitimate aims, namely protecting free speech in Parliament and maintaining the separation of powers between legislature and judiciary. It does not exceed the margin of appreciation afforded to States in limiting an individual’s rights under the European Convention on Human Rights.

8.8 The publication of parliamentary papers is privileged under the Parliamentary Papers Act 1840. Under section 1 of that Act all reports etc published by or under the authority of, either House of Parliament are absolutely privileged and the court will sist any proceedings in respect of defamatory proceedings contained therein. The publication under the authority of the Scottish Parliament of any statement is also absolutely privileged.¹² Only qualified privilege attaches to the publication of any extract from or abstract of a parliamentary report etc.¹³

8.9 We have not had any indication that there is a need for the reform of absolute privilege as it attaches to defamatory statements made in the course of judicial proceedings by judges, advocates, solicitors or witnesses or in parliamentary proceedings.

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?

⁷ See *Adams v Guardian Newspapers* 1993 SC 425 (OH), para 13 (Lord Reed).

⁸ Section 41 of the Scotland Act 1998.

⁹ *Adams v Guardian Newspapers* 1993 SC 425 (OH), para 23 (Lord Reed).

¹⁰ *Adams v Guardian Newspapers* 1993 SC 425 (OH), para 22 (Lord Reed); *Privy Council in Attorney-General of Ceylon v de Livera* [1963] AC 103 (PC), 120 (Viscount Radcliff).

¹¹ *A v United Kingdom* (2002) 36 EHHR 51 (application No 35373/97).

¹² Section 41 of the Scotland Act 1998.

¹³ See further para 8.20 below.

Reports of court proceedings

8.10 A fair and accurate report of proceedings in public before any court in the UK, if published contemporaneously with the proceedings, is protected by absolute privilege under section 14 of the Defamation Act 1996. The same applies to a report of public proceedings of the European Court of Justice,¹⁴ the European Court of Human Rights and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party.

8.11 As regards England and Wales, section 7(1) of the 2013 Act extends the protection of section 14 of the Defamation Act 1996 to reports of the proceedings of any court established under the law of a country or territory outside the United Kingdom and of any international court or tribunal established by the Security Council or by an international agreement.¹⁵ That provision of the 2013 Act does not apply to Scotland.

8.12 In relation to reports of court proceedings it is not obvious to us why the Scottish Government decided not to follow the changes made in the 2013 Act to extend absolute privilege to fair, accurate and contemporaneous reports of the public proceedings of foreign courts and a wider range of international courts and tribunals.¹⁶ This extension of absolute privilege received strong support from the Joint Committee on the Draft Defamation Bill and among respondents to the consultation on the [then] draft Defamation Bill as published by the Ministry of Justice.¹⁷ We would ask the following question:

- 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?**

Qualified privilege

Qualified privilege: common law and statutory

8.13 A statement which is false and defamatory is presumed to be made with malice; that presumption is rebutted if the occasion is subject to qualified privilege. In the event of qualified privilege it is for the pursuer to prove malice.¹⁸ The underlying policy is that there are occasions, identifiable by the existence of reciprocal duties or interests, where the public interest requires the frank and uninhibited provision of information, irrespective of any consequent harm to the reputation of any individual affected.¹⁹ The leading of evidence may

¹⁴ For the European Court of Justice is now to be read the Court of Justice of the European Union.

¹⁵ Section 7(1) substitutes subsection (3) of section 14 of the Defamation Act 1996.

¹⁶ See also Gavin Phillipson, "The "global pariah", the Defamation Bill and the Human Rights Act", (2012) 63 Northern Ireland Legal Quarterly 149, 180.

¹⁷ James Price QC and Felicity McMahon (eds.), *Blackstone's Guide to the Defamation Act 2013* (2013), para 8.08.

¹⁸ *Lyons v Chief Constable of Strathclyde Police* (2013) CSIH 46, at para 29 (Lord Brodie); Lord Hope in his dissenting opinion in *Reynolds v Times Newspaper* [2001] 2 AC 127, 229; *Massie v McCaig* (2013) CSIH 14, para 27 (Lord Carloway).

¹⁹ *Lyons v Chief Constable of Strathclyde Police* (2013) CSIH 46, para 33 (Lord Brodie). See also Eric Descheemaeker, "Mapping Defamation Defences", (2015) 78 MLR 641, 665.

be necessary in order to determine whether there was in fact a relationship of reciprocal duties or interests giving rise to an occasion attracting qualified privilege when the statement was made.²⁰

8.14 No individual or organisation (such as a newspaper or any other section of the media) can assert that it is entitled to the benefit of qualified privilege simply because of who or what that individual or organisation is or what it does.²¹ One particular example of that is covered by section 10 of the Defamation Act 1952; it states that a candidate in any election of a local government or the Scottish Parliament cannot claim a special privilege by virtue only of publishing words that are material to a question at issue in the election. A candidate must establish, like any other citizen, the facts which would attach qualified privilege to a particular occasion.²²

8.15 Qualified privilege arises both at common law and under statute. There are a very large number of circumstances in which a statement will be covered by qualified privilege under common law²³ but a well-recognised example relates to a reference for a former employee given by a former employer to a potential new employer.²⁴

Statutory privilege in the Defamation Act 1996

8.16 The Defamation Act 1996 provides for a long list of occasions which enjoy qualified privilege.²⁵ Section 15 confers qualified privilege on the publication of any report or other statement mentioned in Schedule 1 to the Act. Part I of Schedule 1 lists statements which attract qualified privilege “without explanation or contradiction”. Part II of that Schedule lists those communications which are privileged “subject to explanation or contradiction”; that means communications listed in Part II will not be privileged if the pursuer can show that he or she requested the defender to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction but the defender refused or neglected to do so. Examples of statements protected by Part II are fair and accurate copies of a notice published by a legislature in a member state of the EU, a copy of a document made available by a court in a member state of the EU, a report of proceedings at any public meeting in the UK of, for instance, a local authority or justices of the peace and a report of proceedings at a general meeting of a UK public company.

8.17 For England and Wales, the Defamation Act 2013 extends in a number of respects the existing statutory privileges in Part II of Schedule 1 to the 1996 Act.²⁶ For example, it has “internationalised” the privilege by extending it to occasions where statements (or summaries of statements) are issued by a legislator, public authority or court located anywhere in the world,²⁷ whereas in Scotland privilege is limited to statements issued by authorities based in

²⁰ *Lyons v Chief Constable of Strathclyde Police* (2013) CSIH 46, para 34 (Lord Brodie); *Massie v McCaig* (2013) CSIH 14, para 27 (Lord Carloway).

²¹ *Reynolds v Times Newspaper* [2001] 2 AC 127, 229 (Lord Hope).

²² Whether or not section 10 of the Defamation Act 1952 should be restated in a new Defamation (Scotland) Act is a drafting issue which we will address after the consultation.

²³ For a comprehensive discussion of qualified privilege with some references to differences between Scots and English law see Professor Alastair Mullis and Richard Parkes, QC (eds.), *Gatley on Libel and Slander* (12th edn, 2013), paras 14.1-14.81.

²⁴ See Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), para 29.14.

²⁵ The provisions of the 1996 Act modified and rationalised similar provisions in the Schedule to the Defamation Act 1952, which in turn replaced earlier legislation.

²⁶ Subsections (3) to (8) and subsection (10) of section 7 of the 2013 Act.

²⁷ Section 7(4) of the 2013 Act substituting new paragraphs 9 and 10 of Schedule 1 to the 1996 Act.

the UK and in other member states of the European Union. Other examples of where the 2013 Act internationalised qualified privilege include a fair and accurate report of a press conference held anywhere in the world for the discussion of a matter of public interest²⁸ and a fair and accurate report of proceedings at general meetings of listed companies held anywhere in the world, and regardless of where the companies are registered.²⁹ The 1996 Act restricted the privilege to UK public companies,³⁰ which was seen as unsatisfactory by many, and accordingly the extension to listed companies anywhere in the world was supported by the vast majority of respondents to the UK Government's consultation on the Defamation Bill.³¹

8.18 Territorial limitation of privilege to the reporting of matters taking place in the UK and member states of the European Union, as currently applicable in relation to Scotland, seems to make little sense in the internet age and it may be time to modernise the law in Scotland in this respect.³² We are not aware of any reason why the law in this technical but important area should differ in certain respects as between Scotland and England and Wales. It seems unsatisfactory that some parts of the 1996 Act previously applying across the UK have been amended for England and Wales, but not for Scotland; the result is confusing. However, it is to be noted that the changes made by the 2013 Act may be said to have added to the overall complexity of the law. Given that the 2013 Act has extended quite considerably the scope of the statutory qualified privileges in Part II of Schedule 1 to the 1996 Act, the already complex statutory provisions on qualified privilege have not been made easier to follow. There may also be some overlap between provisions on absolute and qualified privilege.³³ The Bill introduced by Lord Lester provided for a restatement of the law in this area. That Bill had a provision on qualified privilege for certain reports etc which are mentioned in Schedule 1 to the Bill. There may have been some merit in that approach.³⁴ However, looking at those provisions it is conceivable that a restatement of the law might not necessarily result in provisions that are much simpler or more certain. And the advantage of certainty in knowing which category a case falls into must be measured against the disadvantages which tend to flow from rigidity.³⁵ We have so far not been made aware of any gaps or shortcomings in this area, other than those addressed by the Defamation Act 2013.

8.19 In the light of these considerations we ask the following questions:

²⁸ Section 7(5) of the 2013 Act inserted para 11A into Schedule 1.

²⁹ Section 7(7) of the 2013 Act amended para 13 of Schedule 1.

³⁰ Para 13 of Schedule 1 to the 1996 Act as applicable in Scotland still has that restriction.

³¹ James Price QC and Felicity McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (2013), para 8.13.

³² See also James Price QC and Felicity McMahon (eds.), *Blackstone's Guide to the Defamation Act 2013* (2013), para 8.09.

³³ For example, section 14 of the 1996 Act provides for court reports to enjoy absolute privilege but para 2 of Schedule 1 to that Act affords only qualified privilege. See also para 8.20 below in relation to parliamentary papers.

³⁴ See again James Price QC and Felicity McMahon (eds.), *Blackstone's Guide to the Defamation Act 2013* (2013), para 8.29.

³⁵ See also Lord Hope in *Reynolds v Times Newspaper* [2001] 2 AC 127, at p 229 on classes and categories under common law.

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?
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?

Extract from or abstract of a parliamentary report etc.

8.20 As touched on above, the publication of any extract from or abstract of a parliamentary report etc is covered by qualified privilege according to section 3 of the Parliamentary Papers Act 1840.³⁶ This was later extended to cover extracts from or abstracts of a parliamentary report broadcast by means of wireless telegraphy according to section 9(1) of the Defamation Act 1952. These provisions seems to create some overlap with the qualified privilege attached to a copy or extract from matter published by a legislature anywhere in the world according to paragraph 7 of Schedule 1 to the Defamation Act 1996. This in turn appears to have some overlap with the qualified privilege (subject to explanation or contradiction)³⁷ attached to a copy of or extract from a notice or other matter issued for the information of the public by or on behalf of a legislature in any member state of the EU according to paragraph 9 of Schedule 1 to the 1996 Act.³⁸

8.21 Lord Lester's Bill³⁹ proposed a clause providing for absolute privilege to apply not only to reports of proceedings in Parliament but also to a report of anything published by the authority of Parliament as well as to a copy of, extract from or summary of anything published by such authority.⁴⁰

8.22 The extension of absolute privilege to copies and extracts of anything published by the authority of Parliament was not taken up in the Defamation Act 2013. The reference in section 9(1) of the 1952 Act to "broadcasting by wireless telegraphy" does not take account of more modern means of communication such as the internet. We would consider it helpful at the very least to clarify whether there is a need for the provision in section 9 of the 1952 Act given the protections of extracts or copies of a matter published by a legislature under paragraphs 7 and 9 of Schedule 1 to the 1996 Act.

8.23 Against this background we ask the following question:

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?

³⁶ See para 8.8 above.

³⁷ See para 8.16 above on qualified privilege subject to explanation or contradiction.

³⁸ For the changes made to this by section 7(4) of the 2013 Act, see para 8.17 above.

³⁹ See para 8.18 above.

⁴⁰ Clause 7 of Lord Lester's Bill.

Qualified privilege in academic discourse

8.24 Section 6 of the Defamation Act 2013 provides for a new defence for publication in a scientific or academic journal of a statement relating to a scientific or academic matter if it can be shown that the statement has been subject to an independent review of its scientific or academic merit carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned.⁴¹ As with other forms of qualified privilege, the privilege is lost if it is shown that the publication was made with malice.⁴² This provision applies to Scotland.⁴³

8.25 Section 7(9) extends qualified privilege to a fair and accurate report of proceedings of a scientific or academic conference held anywhere in the world, and to copies, extracts from and summaries of material published by such conferences.⁴⁴ Such reports will be privileged unless shown to have been made with malice or unless the pursuer can show that the defender has not complied with a request to publish a contradiction or explanation in the form of a letter or statement provided by the pursuer.⁴⁵ Section 7(9) applies to Scotland.⁴⁶

8.26 The privilege in section 6 is not intended to offer a general protection of academic speech. None of the high-profile cases that gave rise to this provision,⁴⁷ for example, would have benefitted from it as the statements in those cases were made at a conference or published in e-mails, newspaper articles or the editorial section of an academic journal.⁴⁸ The question may therefore be raised as to whether the alleged chilling effect⁴⁹ of defamation law on academic and scientific debate has in fact been addressed by the privilege in section 6. On the other hand, section 6 and section 7(9) must be seen together with other reforms such as the new statutory provisions setting out the defences of fair comment and responsible journalism as well as other forms of qualified privilege such as those in Schedule 1 to the Defamation Act 1996. These defences play an important role for academic and scientific debate.

8.27 In relation to section 6 it may also be questioned why only statements in journals are protected, thereby excluding statements in academic or scientific books, for example. Part of the answer may lie in the fact that the UK Government was seeking to adopt a cautious approach to describing the type of material which should be subject to the newly created privilege. Relying on the recommendations of the Joint Committee⁵⁰ it opted for peer reviewed material as that is said to be a well understood process and stated that at the end of the day it was left to the courts to determine in individual cases whether any given journal,

⁴¹ Section 6(2) and (3) of the 2013 Act.

⁴² Section 6(6) of the 2013 Act.

⁴³ Section 17(3)(a) of the 2013 Act.

⁴⁴ See para 14A of Schedule 1 to the Defamation Act 1996, inserted by section 7(9) of the 2013 Act.

⁴⁵ Section 15(2) of the 1996 Act read with para 14A of Schedule 1 of that Act.

⁴⁶ Section 17(3)(b) of the 2013 Act.

⁴⁷ For the background to section 6 see again James Price QC and Felicity McMahon (eds.), *Blackstone's Guide to the Defamation Act 2013* (2013), paras 7.05-7.33.

⁴⁸ For more details on these cases see *Blackstone's Guide to the Defamation Act 2013* (2013), paras 7.05-7.06 and para 7.40; Alistair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013", (2014) 77 MLR 87, 99; Eric Descheemaeker, "Mapping Defamation Defences", (2015) 78 MLR 641, 664.

⁴⁹ The chilling effect was mentioned by the Joint Committee on the Defamation Bill First Report: *Draft Defamation Bill* [2010-12] HL Papers 203/HC930, para 47 but a small-scale survey carried out by *Science* magazine did not produce evidence of it, see Tim Wogan, "A chilling effect?" (2010) 328 *Science* 1348.

⁵⁰ Joint Committee on the Defamation Bill, First Report: *Draft Defamation Bill* [2010-12] HL Papers 203/HC930, paras 48 and 49. <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>.

or material in a journal, should be protected.⁵¹ During the pre-legislative scrutiny a registration system⁵² was discussed as an alternative method for identifying reliable contributions to academic and scientific debate.⁵³ However, that was rejected as impracticable because there are tens of thousands journals potentially and also there was concern about the government (who would manage the registration system) being called upon to determine which scientific or academic conferences or journals are more worthy of protection than others.⁵⁴ Against this background we ask the following question:

- 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?**

⁵¹ *The Government's Response to the Report of the Joint Committee on the Defamation Bill* (Cm 8295, February 2012), para 43.

⁵² This was proposed in 1975 by the Faulks Committee.

⁵³ Joint Committee on the Draft Defamation Bill, First Report: *Draft Defamation Bill* [2010-12] HL Papers 203/HC930, paras 48 and 49. <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>.

⁵⁴ *Ibid.*

Chapter 9 Remedies

Introduction

9.1 In this chapter we examine whether the remedies available in defamation proceedings in Scotland could be improved.

The Scots law position

9.2 In Scots law the usual remedy for defamation is an award of damages;¹ interdict and *interim* interdict against further publication of the defamatory statement are also often sought. As Lord Justice-Clerk Macdonald explained in *Bradley v Menley & James Ltd*² the law implies in actions of this type, if the facts are made out, that there was damage. Damages are awarded as compensation and not as a penalty. Compensation for the affront suffered by the pursuer takes the form of an award of *solatium*. As discussed elsewhere,³ in principle, such an award may be made even where there has been no communication of the defamation to a third party, although in such circumstances any award would be likely to be modest. Substantial awards may be justified where the pursuer has been ostracised or has suffered vilification.⁴ Where specifically quantified in the claim, it is possible to seek damages for monetary loss as well as for injury to feelings.⁵ In contrast to the law of England and Wales, Scots law does not recognise the concept of exemplary damages.⁶ In some cases the judge or jury may award only nominal damages, for instance where the pursuer's reputation was already impaired or where a satisfactory apology and retraction have been unreasonably turned down.

9.3 Evidence as to the circumstances surrounding publication may serve to aggravate the damages, for example where the accusation has been persisted in or broadcast widely. On the other hand, grounds for mitigation of damages can arise from evidence of provocation⁷ or where it can be shown that the pursuer had little or no character or reputation to harm. In *C v M*⁸ Lord President Clyde observed that whenever a pursuer asks for damages in respect of the harm done to his character, he necessarily puts his own character in issue.⁹ An example might be where a person previously convicted of child abuse seeks damages for a false allegation of rape.

9.4 Under section 12 of the Defamation Act 1952, the defender may give evidence in mitigation of damages to prove that the pursuer has recovered damages, or has brought actions for damages, in respect of the publication of words to the same effect as the words on which the action is founded, or that he has received or agreed to receive compensation in

¹ Criminal sanctions for verbal injury had disappeared by the middle of the nineteenth century – Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), para 10.62.

² 1913 SC 923.

³ See paras 3.1-3.4 above.

⁴ *Baigent v BBC* 2001 SC 381.

⁵ *Hay v Institute of Chartered Accountants in Scotland* 2003 SLT 612.

⁶ These are damages extending beyond mere compensation so as to reflect a punitive or deterrent element.

⁷ *Ogilvie v Scott* (1835) 14 S 729; *Bryson v Inglis* (1844) 6 D 363.

⁸ 1923 SC 1.

⁹ *Ibid* at 4.

respect of any such publication. Where there have been two or more similar defamatory statements¹⁰ the court is entitled to take into account the fact that each of the statements is liable to have contributed to the damage to the pursuer's reputation. It may be necessary for damages to be apportioned between the respective publishers. The court should avoid the pursuer being compensated more than once for the same loss.¹¹ The purpose of section 12 is to allow a defender to lead evidence about the effect of other publications which he alleges have contributed to the damage to the pursuer's reputation. The court can deal with the matter only on broad lines. We are not aware of any criticism of section 12 and see no reason why the provision should not be retained.

9.5 In modern English law the function of damages has been stated to be threefold as follows:

- (1) To compensate for distress and hurt feelings;
- (2) To compensate for any actual injury to reputation which has been proved or which may reasonably be inferred;
- (3) To serve as an outward and visible sign of vindication.¹²

We believe that this corresponds to the present day position in Scots law.¹³

Discussion

9.6 The law on damages was not affected by the 2013 Act.¹⁴ Our advisory group has not suggested that any changes are needed in Scots law. The law appears to work satisfactorily in practice; it is straightforward to understand and is based on sound principles. We note that in the Northern Ireland Law Commission consultation paper there was some discussion about the possibility of imposing a cap on damages where a right of reply has been offered,¹⁵ but this was in the context of a wider consideration of discursive remedies (such as corrections, retractions, rights to reply and apologies), possibly accompanied by the abolition of the single meaning rule, in an attempt to reduce the number of defamation claims reaching court. We are not aware of any support for reform along these lines in Scotland. The promotion of discursive remedies is not within the scope of our current project. It raises wider questions that concern the court system as a whole, not just defamation actions; it would be inappropriate to look at the issue in the context of defamation law only. The single meaning rule is a fundamental mechanism of the law of defamation; it attempts to strike a proper balance between the need to protect reputation and the importance of preventing multiple complaints based on numerous possible readings of the statement complained of.¹⁶ We see no reason to propose reform of the single meaning rule.

¹⁰ As where several newspapers run the same story on the same day.

¹¹ Per Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, at 261.

¹² See Professor Alastair Mullis and Richard Parkes, QC (eds), *Gatley on Libel and Slander* (12th edn, 2013), para 9.4 et sequ; *Cleese v Clark* [2004] EMLR 3, per Eady J at 37.

¹³ Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), para 10.64.

¹⁴ Except to the minor extent covered by section 14 abolishing certain exceptions to the rule in English law that special damage must be established in an action for slander.

¹⁵ NILC 19 (2014), para 5.56.

¹⁶ *Charleston v New Group Newspapers Ltd.* [1995] 2 AC 65.

9.7 In addition to damages, interdict and *interim* interdict against further publication are often sought in defamation actions. As regards *interim* interdict the position must now take account of section 12 of the Human Rights Act 1998. This provides that the court must have particular regard to the Convention right to freedom of expression when considering whether to grant any relief that might affect the exercise of that right. In *Cream Holdings v Banerjee*¹⁷ the House of Lords held, in a breach of confidence action, that the effect of section 12(3) was that, in general, no injunction¹⁸ should be granted unless a claimant satisfied the court that he or she was more likely than not to succeed at trial. We understand that the same approach is followed in practice in Scotland, although there appear to be no reported Scottish cases on the point.

9.8 Our advisory group did not identify any need for reform of the law on interdict and *interim* interdict and any general reform of the law in relation to these remedies would, in any event, be well beyond the scope of this project. The principles governing the grant or withholding of interdict and *interim* interdict are well-settled and the Scottish courts are experienced in dealing with such applications on the basis of these rules. We are not aware of any evidence that the rules and principles are not working properly in practice. In these circumstances we do not consider that there is any justification for legislative intervention in this area. We would, however, welcome the views of consultees on whether there is any need to consider reform of the remedies of interdict and *interim* interdict. We, therefore, ask the following question:

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.

Offer to make amends

9.9 Sections 2 to 4 of the Defamation Act 1996¹⁹ provide for a settlement procedure under which the court is empowered to enforce the settlement and, where necessary, to determine appropriate compensation. The objective is to allow defenders, who accept that they have made a mistake by publishing defamatory material, to avoid litigation by acknowledging their error and offering to make reasonable amends.²⁰ The objective, which should be to the advantage of both sides, is vindication without litigation.²¹ The purpose of the procedure is to reduce delay and expense. The procedure provides a defender, who is unwilling or unable to advance a substantive defence, with an exit route, while giving the pursuer a rapid and economical means of resolving his complaint or part of it.²²

9.10 In outline,²³ the principal features of the procedure may be summarised as follows:

¹⁷ [2005] 1 AC 253.

¹⁸ The English equivalent of an interdict.

¹⁹ Enacting the substance of proposals made by the 1991 Neill Committee on Practice and Procedure in Defamation for a 'streamlined defence' where the publisher of a defamatory statement behaved 'fairly and reasonably'.

²⁰ *Abu v MGN Ltd* [2003] 1 WLR 2201, per Eady J at 4.

²¹ *KC v MGN Ltd* [2013] EWCA Civ 3.

²² *Cleese v Clarke* [2004] EMLR 37; *Warren v Random House Group Ltd* [2009] QB 600.

²³ See *Duncan and Neill on Defamation* (4th edn, 2015), para 21.01.

1. The publisher of an allegedly defamatory statement is entitled to make an offer of amends.²⁴
2. The offer may be in relation to the statement generally or in relation to a specific defamatory meaning (a 'qualified offer').²⁵
3. The offer is to make a 'suitable correction' and 'suitable apology' published in a 'reasonable and practicable' manner and to pay such compensation, if any, and such expenses as may be agreed or determined.²⁶
4. If the offer is accepted the parties should seek to agree the wording of an apology and correction and its placement and, if possible, the amount of compensation and legal expenses.²⁷
5. The pursuer cannot raise or continue court proceedings against the person who has made the offer, but he can obtain a court order enforcing the settlement terms.²⁸
6. If settlement terms cannot be agreed, the defender may proceed anyway to make the correction and apology by means of a statement in open court in terms approved by the court and give an undertaking as to the manner of their publication.²⁹
7. If the parties cannot agree on the amount of compensation, the court will determine this 'on the same principles as in defamation proceedings'.³⁰
8. If the offer is not accepted (and not withdrawn), it constitutes a complete defence (or for a qualified offer a complete defence in relation to the accepted meaning) unless the pursuer can prove that the defender 'knew or had reason to believe' that the statement was 'both false and defamatory' of the pursuer.³¹ This requires the pursuer to show that the defender acted in bad faith; mere negligence would not be sufficient.³² The defender will have 'had reason to believe' that a statement was false only if he was recklessly indifferent to its truth.³³

9.11 The 1996 Act does not lay down a set period within which an offer to make amends must be accepted (or rejected). In *Loughton Contracts Plc v Dun & Bradstreet Ltd*³⁴ Gray J held that the claimant must decide promptly whether or not to accept the offer. A more flexible approach was taken by Eady J in *Tesco Stores v Guardian News & Media Ltd*³⁵ where he held that the claimant should be allowed a reasonable period within which to make

²⁴ Section 2(1), (3) and (5).

²⁵ Section 2(2).

²⁶ Section 2(4).

²⁷ *Duncan and Neill on Defamation* (4th edn, 2015), para 21.05.

²⁸ Section 3(2), (3).

²⁹ Section 3(4).

³⁰ Section 3(5).

³¹ Section 4(3).

³² *Milne v Express Newspapers plc*. [2005] 1 WLR 772.

³³ *Milne* at 47, 50.

³⁴ [2006] EWHC 1224 (QB).

³⁵ [2009] EMLR 5.

a decision; what was reasonable would depend on the circumstances of the case. Eady J said that it would be wholly unrealistic to suggest that the offer could be kept open indefinitely at the claimant's option;³⁶ he disagreed with the reasoning to contrary effect in a decision in the Outer House of the Court of Session in *Moore v Scottish Daily Record and Sunday Mail Ltd*.³⁷ The legislative policy behind the offer of amends procedure was clearly designed to encourage early settlement of claims. As Eady J observed in *Tesco Stores*, it would be inconsistent with the policy to allow an offer of amends to remain open, at the claimant's option, until judgment in an action or just before it so that the claimant can see how the trial goes.³⁸ That would be, as Eady J put it, to bypass the discipline intended by the Neil Committee and adopted by Parliament.³⁹

9.12 We understand from our advisory group that the offer of amends procedure is frequently used by media organisations and others to settle claims. Our provisional view is that it is a valuable procedure and should continue to be available. The 2013 Act made no changes to it. If there is to be a new statute governing defamation law in Scotland it would be useful for the procedure to be incorporated in it so that the law can be easily found in one place. In view of the conflict between the decision in *Moore* and the view taken by the English courts, there might be advantages in making it clear on the face of the statutory provision that an offer to make amends must be accepted within a reasonable time; otherwise it will be treated as having been rejected. We would welcome views on that issue as well as on the suggestion that the procedure should be incorporated in a new statute.

- 33. Should the offer of amends procedure be incorporated in a new Defamation Act?**
- 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?**
- 35. Are there any other amendments you think should be made to the offer of amends procedure?**

Summary disposal

9.13 Sections 8 and 9 of the Defamation Act 1996 introduced for England and Wales and for Northern Ireland, but not for Scotland, a procedure for summary disposal of defamation proceedings. We understand that the procedure has been little used in practice. In such proceedings the court was empowered to make a declaration that the statement was false and defamatory of the claimant; order that the defendant publish a suitable correction and apology; award damages up to £10,000; and make an order restraining further publication.⁴⁰ It was for the parties to agree on the content of the correction and apology, but if they were unable so to do the court could direct the defendant to publish or cause to be published a summary of the court's judgment agreed by the parties or settled by the court. If the parties were not able to agree on the time, manner, form or place of publication, the court was

³⁶ *Ibid*, at 46-48.

³⁷ 2007 SLT 217.

³⁸ At 46.

³⁹ *Ibid*.

⁴⁰ Section 9(1).

entitled to direct the defendant to take such reasonable and practicable steps as it considered appropriate.

9.14 For England and Wales the power to order publication of a summary of a court's judgment has now been extended to apply to all cases by Section 12 of the 2013 Act. This provides as follows:

“12 Power of court to order a summary of its judgment to be published

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.
- (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.
- (3) If the parties cannot agree on the wording, the wording is to be settled by the court.
- (4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.
- (5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).”

9.15 In introducing the Bill in the House of Commons in May 2012 the Lord Chancellor, the Rt Hon Kenneth Clarke MP, explained the thinking behind the new provision as follows:

“... I want to ensure that effective remedies are available for those defamed. Often what most concerns claimants is not financial compensation, but meaningful public clarification that the story was wrong. We have therefore included provisions in (section) 12 extending existing powers to enable the court to order publication of a summary of its judgement.”.

9.16 In Scotland the courts do not at present have power to order an unsuccessful defender in defamation proceedings to publish a summary of a judgment. There could be much to be said for conferring such a power on the Scottish courts; we tend to think it would be of particular value in media cases. As the Lord Chancellor stated, for a person who has been defamed the priority may often be to obtain a public retraction or correction of the defamatory statement; for some (perhaps many) this may be of greater importance than the payment of compensation. It seems inherently just that a publisher who has been held to have published defamatory material should be required to publish a summary of the relative court judgment. We recognise that this cannot, however, be regarded as a hard and fast rule and that there may be circumstances in which publication of a summary of a court judgment would not be appropriate. The power, if enacted in Scotland, should, therefore, be of a discretionary nature so that the court could take account of the whole circumstances of the particular case in deciding whether and if so on what basis to make an order.

9.17 Section 13 of the 2013 Act is intended to cater for the scenario where an author of material that is found to be defamatory is not in a position to remove the material or prevent further dissemination of it. Subsection (1) empowers the court, if giving judgement in favour of the claimant in a defamation action, to order the operator of a website on which a

defamatory statement is posted to remove the statement. Alternatively, it may make an order requiring a person who was not the author, editor or publisher of the statement, but who is distributing, selling or exhibiting material containing it, to cease disseminating the material.

9.18 Under the present law the Scottish courts have no powers that are directly equivalent to those conferred by section 13 of the 2013 Act. Section 46 of the Court of Session Act 1988 gives the Court of Session discretionary power to grant specific relief against an illegal act which might have been prohibited by interdict. An order under section 46 can only be granted against a respondent to proceedings in the Court of Session. It is conceivable that the Court of Session might be prepared to grant an order against a respondent under section 46 requiring them to remove defamatory material they had posted on the Web, but this has not been authoritatively decided. There is no power similar to section 46 available to the Sheriff Court. It will be noted that the power under section 13 of the 2013 Act extends to the making of orders against persons who were not parties to the proceedings; section 46 by contrast applies only against parties to proceedings. Against the background of the foregoing discussion, we ask the following questions:

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

Statement in open court

9.19 Another procedure which is available in the courts of England and Wales and in Northern Ireland allows for a statement to be made in open court as part of the settlement of a defamation action; this power is of long standing. It pre-dates the offer of amends regime and its predecessor in section 4 of the Defamation Act 1952. The matter was recently considered by the Court of Appeal in *Murray v Associated Newspapers Ltd*⁴¹ where Sharp LJ said the following:

“A statement in open court is often a valuable end point to litigation brought to achieve vindication, since it provides the means for more publicity to be given to a settlement (and therefore to a claimant’s vindication) than might otherwise occur. Such statements often include an explanation of why proceedings were brought, why what was said was particularly hurtful or damaging, and the effect that the publication complained of, and of events associated with it, has had on a claimant. It is conventionally said in such statements that in the light of the settlement and the reading of the statement in open court, the particular claimant is now ‘content to let the matter rest’. The existence of the procedure benefits both litigants and the public, by facilitating settlement.”

9.20 So far as we are aware, the reading of a statement in open court has never been part of the procedure governing defamation actions in Scotland. The reasons for this are not clear. In our provisional view, for the reasons explained by Sharp LJ in the *Murray* case, the advantages of such a procedure are obvious. We would ask the following question:

⁴¹ [2015] EWCA Civ 488.

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

Chapter 10 Limitation of defamation claims and application of long-stop prescription

10.1 In this chapter we consider whether there would be merit in making statutory provision to displace the multiple publication rule which currently applies in Scots law. The effect of this would be that each republication of particular material would not automatically give rise to the running of a new limitation period. We also consider other options for change which would operate alongside the continued existence of the multiple publication rule. We look, too, at the length and starting date of the limitation period in defamation actions in Scots law, and the length of the long-stop period for the bringing of defamation actions, and whether these should be altered.

Limitation, prescription and defamation actions: brief background as to the current position in Scotland

10.2 Section 18A(1) of the Prescription and Limitation (Scotland) Act 1973 sets down the general rule that an action for defamation must be commenced within a period of three years after the date on which the cause of action (or right of action, as it is referred to in the Act) accrued. This three year period is referred to as the limitation period. In the context of defamation actions, the cause of action accrues on the date on which the publication or communication first comes to the notice of the pursuer.¹ Accrual does not, therefore, happen automatically on the date of original publication (though this may, of course, be the relevant date, if the item comes to the pursuer's notice on the day it is first published, be that in print or online). Where, for example, a newspaper article only comes to a pursuer's attention several months, or longer, after its publication, the lapse of time is, therefore, irrelevant. This may be said to be extremely favourable to pursuers and, accordingly, somewhat harsh on defenders.²

10.3 The general rule in section 18A(1) operates subject to certain exceptions. One exception is provided for in section 19A of the 1973 Act. In relation to defamation actions, the effect of section 19A(1) is that where a person would be entitled, but for section 18A(1), to bring an action, the court may allow them to do so after the expiry of the three year period, where that seems equitable. The obligation to make reparation in a defamation action is also subject to the 20 year long-stop period currently provided for in section 7.³ Section 7 provides for the running of the long-stop prescriptive period from the date on which the obligation has become enforceable. Unsurprisingly there does not seem to be any case law on the application of the long-stop prescriptive period to defamation actions. However, it can, it seems, be assumed that in the context of a defamation action, an obligation to make

¹ Section 18A(4) of the 1973 Act.

² D Johnston, *Prescription and Limitation* (2nd edn, 2012), paras 11.04-11.05.

³ See section 7(2) of the 1973 Act. It is to be noted that the 5 year prescriptive period in section 6 of the 1973 Act does not apply to defamation actions. This is excluded expressly by paragraph 2(gg) of Schedule 1 to the 1973 Act, as inserted by section 12(5) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

reparation becomes enforceable on the date on which a defamatory statement is published. In broad terms this means that where a period of 20 years has elapsed since the date of publication, without a claim having been brought or an acknowledgement of the subsistence of the obligation, the obligation will cease to exist. This is likely to be of relevance typically where a publication has not come to the attention of a pursuer for a period of several years, meaning that there has been a significant delay in the accrual of the cause of action and hence the start of the three year period of limitation.⁴

Limitation and its particular significance for archiving

10.4 It is a long-established principle of defamation law as it currently applies to Scotland that each individual publication of defamatory material gives rise to a separate cause of action, even if the same, or substantially the same, material has been published previously.⁵ Each cause of action is subject to its own limitation period. This is known as the multiple publication rule. The result is that each time a publication is read by a new reader, sold or otherwise republished, a new limitation period will start to run, with effect from the date of republication. The principle was upheld much more recently by the European Court of Human Rights in *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom*.⁶ albeit with a strong indication that the protection of the rule may be lost if there was a significant delay in the bringing of a claim, unless exceptional circumstances pertained. This is the *Loutchansky v Times Newspapers Ltd (No. 2)* case,⁷ as brought to the European Court of Human Rights. It involved a claimant who was an international businessman, of Russian and Israeli dual nationality. He sued for libel initially in respect of two articles printed in *The Times*. In a second action raised a year later he sued in respect of the continued publication of the same articles on *The Times* website. The articles claimed that he was involved in serious international criminal activities, including money laundering and smuggling of nuclear weapons. There is a recognised possibility that the risk of perpetual liability could discourage publication of material, contributing to what is commonly known as a “chilling effect.” In particular, authors may live in fear of becoming the subject of actions in respect of material originally published several years earlier. They may by then be unable to gather the evidence required to put forward a defence of truth or responsible publication. This may discourage them from publishing certain material in the first place.

10.5 As the law currently stands in Scotland, each “hit” on a particular item in an online archive by a new reader will amount to a republication, with a new limitation period beginning from the date it is accessed. Similarly, applying the same principle in the context of Twitter, as per the approach of the court in *Lord McAlpine of West Green v Bercow*,⁸ every re-tweet will impose fresh liability on the publisher of the original tweet, having amounted to a republication. It is not only in the context of online material that the law in relation to republication is likely to be of significance; reading for the first time a hard copy article stored in a newspaper archive is likely also to amount to a republication. This may add weight to the claim that retention of the multiple publication rule could contribute towards a chilling effect, discouraging publication in Scotland. By all accounts we think it is worthwhile to give

⁴ See again *Prescription and Limitation*, paras 11.07-11.10.

⁵ *Duke of Brunswick v Harmer* 117 ER 75; (1849) 14 QB 185.

⁶ [2009] EMLR 14.

⁷ [2002] EWCA Civ 1805.

⁸ [2013] EWHC 1342 (QB), para 88.

consideration as to whether it may be appropriate to depart from the multiple publication rule.

The position under the 2013 Act: the single publication rule

10.6 In England and Wales the situation has been addressed, at least to an extent, by section 8 of the 2013 Act, in the form of the “single publication rule.” Action in respect of republication by the same publisher of material in print or online with substantially the same content as the original material is now subject to a one year limitation period, running from the date of the first publication to the public. In other words, republication in these circumstances does not trigger a new limitation period. Rather, there is one single limitation period running from the date of first publication. Once that period has expired, the general position is that no further action can be brought.

10.7 The single publication rule is expressly excluded where the manner of the subsequent publication is materially different from that of the first one. In this situation a new limitation period begins on the date of the new publication. In assessing whether there is a material difference, the factors which the court may take account of include the level of prominence a statement is given and the extent of the subsequent publication.⁹ It has been suggested that the question of whether a material difference has arisen is likely to be a common source of litigation. For example, does the addition of a new link to archived material on a website, making the archive more readily accessible from the homepage, amount to a material change, as a result of increased prominence?¹⁰ Similarly, the question of what amounts to a “section of the public”, for the purposes of section 8(2), is likely also to generate debate. Would it cover, for example, publication to a group of friends via a Facebook page to which access is restricted?¹¹ On the other hand, the Explanatory Notes to the 2013 Act make plain that publication to a limited number of people, such as the followers of, or subscribers to, a blog which has a limited following, is caught by the section.¹²

10.8 Questions have also been raised as to whether it is appropriate that the limitation period should be tied not to a deemed date of publication but rather to the date of “first publication.” “First publication” tends to suggest that time will start to run as soon as positive action is taken by a publisher, such as uploading an item to a website.¹³ Applying the first publication rule, it seems easy to conceive of situations in which claimants will be left with a very short period in which to bring an action, having only become aware of an article perhaps nine months or more after its publication. Equally, they may lose the opportunity to raise an action altogether. Applying a date of deemed publication, tied to awareness of the article by the claimant, could allow for a later start date to the limitation period. Conversely, the comments below about the interaction between section 8 of the 2013 Act and section 32A of the Limitation Act 1980 should be taken into account.

⁹ See section 8(4) and (5) of the 2013 Act.

¹⁰ This point is developed in an article by David Hooper, Kim Waite and Oliver Murphy, “Defamation Act 2013 – what difference will it really make?”, 2013 Entertainment Law Review 199, 204-205. Reference to increased accessibility of material as constituting a possible example of subsequent publication that is “materially different” is to be found in the Explanatory Notes to the Defamation Act 2013, at para 63.

¹¹ See further James Price QC and Felicity McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (2013), paras 9.17-9.18.

¹² See para 61 of the Notes.

¹³ See again “Defamation Act 2013 – what difference will it really make?”, p 204.

Preliminary thoughts on the possible application of the 2013 Act model in Scotland

The single publication rule as a possible mixed blessing

10.9 In considering any alteration of the effect of republication on the running of the limitation period it has to be borne in mind that each republication brings with it the potential for harm to reputation. Indeed, it has been suggested there is a viable argument that what is significant is not the occasion on which particular material is originally published, but rather what happens each time the material is read. Related to this may be the question of *by whom* it is read. All things being equal, it is quite possible that a reading of an article six months after its original publication may have more damaging effects than a reading the day after. To that extent the introduction of the single publication rule in England and Wales may be viewed as something of a mixed blessing.¹⁴

The single publication rule and ECHR considerations

10.10 Issues have also been raised about the interaction between the single publication rule and section 32A of the Limitation Act 1980. In England and Wales section 8 of the 2013 Act operates subject to section 32A of the Limitation Act 1980. The result is that the rule in section 8 may be disapplied where a court considers it equitable to do so in all the circumstances of a case. It has been suggested that, given the duty of courts to interpret legislation, in so far as possible, in a manner compatible with ECHR rights, the waiving of the rule is likely to be a frequent occurrence, certainly whenever a credible argument for Article 8 interference is brought forward promptly after a relevant publication comes to the attention of the claimant. The defendant would then be liable for all harms occurring since the date of first publication, rather than just those arising over the first year. This could cast doubt on the extent to which section 8 may be relied on as a protection against perpetual liability.¹⁵ This is particularly so against the background that there may be a gap in time before it comes to light that serious harm has been suffered or is likely to be suffered.¹⁶ For example, if an allegation was published initially only to a group of the claimant's friends, this is unlikely to be defamatory, given there would be an assumption they would not believe it. If, however, it was subsequently republished to others who would be likely to believe it, it may become defamatory at that point.¹⁷ Having said all of this, account should be taken of the approach of the Court of Appeal in *Bewry v Reed Elsevier (UK) Limited*.¹⁸ This case concerned an appeal against the decision of a judge to grant the respondent's application under section 32A for disapplication of the limitation period. The appeal was allowed. The Court took the view that the judge had erred in not taking sufficient account of significant delay by the respondent after the issuing of proceedings, for which no good reason had been given, when

¹⁴ See further the discussion of the pros and cons of the single publication rule in the Northern Ireland Law Commission Consultation Paper on Defamation Law in Northern Ireland NILC 19 (2014), especially paras 4.38-4.41. Similar views are expressed in "Tilting at Windmills: the Defamation Act 2013" by Alistair Mullis and Andrew Scott, (2014) 77 MLR 87, 102-104.

¹⁵ See again "Tilting at Windmills", pp 103-104. A similar view is expressed in *Blackstone's Guide to the Defamation Act 2013* (2013), para 9.23.

¹⁶ This was expressly acknowledged as a possibility by Warby J in *Lachaux v AOL (UK) Ltd* [2015] EWHC 2242 (QB), at para 68 of the judgement.

¹⁷ Dan Tench "Defamation Act 2013: A Critical Evaluation – Part 2: "Serious Harm"" *Inform* 27 July 2014: <https://inform.wordpress.com/2014/07/27/defamation-act-2013-a-critical-evaluation-part-2-serious-harm-dan-tench/>.

¹⁸ [2015] 1 WLR 2565.

considering the application under section 32A.¹⁹ It further stated that a claimant was expected to pursue their complaint promptly irrespective of the limitation period and whether they knew about it, simply because any failure to do so promptly was inconsistent with a genuine wish to pursue vigorously the vindication of his or her character. Ignorance of limitation could be relevant only in marginal types of case, for example where a claimant is actively misled.²⁰

10.11 In Scots law, section 19A of the Prescription and Limitation (Scotland) Act 1973 provides an equivalent to section 32A of the 1980 Act. Looking at matters from an Article 8 ECHR perspective, and arguably also Article 6, it seems clear that any equivalent of the single publication rule would have to operate subject to section 19A. The argument that each republication brings potential for significant harm, no matter how many times it has happened before, cannot be ignored. There may, however, be a counter argument to concerns about the interaction between the single publication rule and the option to disapply a limitation period. It seems fair to assume, as the court did in *Reed Elsevier*, that in so far as a pursuer or claimant has a genuine claim in defamation, it is likely to be in his or her interests to bring a prompt action for vindication of their reputation; those practising in the field of defamation law are well-aware of the importance of bringing proceedings promptly. On that basis it may be argued that the interaction between section 8 and section 32A of the Limitation Act 1980 does what is necessary to provide adequate protection against potentially adverse consequences of republication in any case where that happens after the expiry of the limitation period, but goes no further. It should not generally be expected to open the floodgates to perpetual liability. In so far as this argument is accepted, it could be applied, also, to interaction between section 19A of the 1973 Act and an equivalent of the single publication rule.

Relevant differences in Scots and English law

10.12 It should be borne in mind that the approach of section 8 does not directly lend itself to importation in Scots law. As noted in chapter 3 above, Scots law differs from that in England and Wales in the sense that an imputation need not necessarily be “published” in order to found an action of defamation; it is enough that it is communicated to the person who is the subject of it. However, questions could be asked as to whether there continues to be a place for such a broad approach to what amounts to defamation; and we tend towards the view that there is not.²¹ In any event, it seems difficult to envisage how the single publication rule could appropriately be applied in this type of situation. The crucial consideration is that there is no “publication”; the closest thing is the reading or hearing of the imputation. Taking that a stage further, the nearest analogy to a republication would, it seems, be to say that this arises, for example, any time a person who has received a letter containing the imputation complained of elects to re-read that letter. It seems that this would almost certainly be dismissed as an abuse of process.

¹⁹ In a similar vein, an application for disapplication under section 32A was rejected in the case of *Lokhova v Tymula* [2016] EWHC 225 QB. This involved a claim for libel brought by a banker against two former colleagues. Dingemans J highlighted that there had been an unexplained period of delay during which the claimant had done nothing to pursue the claim.

²⁰ See para 38 of the judgement, per Sharp LJ.

²¹ See Elspeth Reid, “English defamation reform: a Scots perspective”, 2012 SLT (News) 111. See also para 3.4 above.

10.13 As regards the question of when the limitation period begins, the position in Scotland is different to that in England and Wales. The “first publication” rule in section 8 mirrors the position in section 4A of the Limitation Act 1980, as would be expected. Section 4A provides that in actions for libel or slander, amongst others, the limitation period is one year, running from the date of accrual of the cause of action.²² In Scotland, as discussed above, limitation in defamation actions starts to run only when the publication comes to the attention of the pursuer. Ordinarily, therefore, any introduction in Scotland of an equivalent of the single publication rule would be expected to involve the limitation period running from the date on which the pursuer became aware that the material in question had been published. The limitation period would be three years in length, subject to the 20 year long-stop prescriptive period. Assuming this is the case, the issues outlined above in connection with reliance on the date of first publication are eliminated. However, it seems that there may be a need for re-balancing of the interests of the pursuer and defender.

10.14 As matters stand, in any application of an equivalent of the single publication rule to Scotland, it would, in theory at least, be possible for a cause of action to be taken to accrue on a date which fell, say, 19 years and 11 months after the date of publication of an article, if it was only at this point that publication had come to the attention of the pursuer.²³ The pursuer would by then have only one month to raise proceedings, given that the 20 year prescriptive period, assuming it was taken to have started to run on the date of publication, would almost have extinguished the obligation to make reparation. Nevertheless, the fact remains that there would be a possibility of proceedings being brought, notwithstanding that a significant period of time had passed since publication. Whilst this may be an extreme example, it could raise a question as to whether, against the background of the combination of a limitation period three years in length and a long-stop period of 20 years, a Scottish equivalent of section 8 would be completely effective in providing a protection against protracted liability. Consideration may, therefore, be given to shortening the three year limitation period applicable to defamation actions, and also to shortening the long-stop period in so far as it applies to such actions. Arguably both of these matters should be considered even if an equivalent of the single publication rule is not to be introduced in Scotland. On the other hand we note that the Law Commission for England and Wales, in its Report on Limitation of Actions, published in 2001, recommended that the limitation period in respect of defamation claims be extended from one year to three years, but with the exclusion of judicial discretion to disapply the limitation period. This was partly to reduce the risk of forum shopping to Scotland and partly because the one year period was proving to be too short to allow claimants to prepare their claims.²⁴ This recommendation has not so far been implemented, however. We note, too, that the starting date for the long-stop prescriptive period in section 7, and the length of the period, is currently under review as part of this Commission’s project on aspects of the law of prescription.

²² In England and Wales the cause of action accrues on the date of publication, regardless of the awareness, or otherwise, of the claimant. This is established by the case of *Grappelli v Derek Block (Holdings) Ltd* [1981] 1 WLR 822.

²³ As would be expected there is no provision for constructive knowledge; a pursuer cannot be deemed to be aware of publication of a particular article because he or she could readily have bought the newspaper in which it appeared. See again D Johnston *Prescription and Limitation*, at para 11.05.

²⁴ Law Com No 270. See para 3.98, as read with paras 4.38-4.46.

The position in other jurisdictions

10.15 Returning to the example of Australia, the effect of the Uniform Defamation Laws is to produce a basic limitation period of one year running from the date of publication of the allegedly defamatory imputation.²⁵ This is, however, subject to the power of the court to extend the period, if satisfied that it was not reasonable in all the circumstances for the plaintiff to have commenced the action within one year from the date of publication of the matter complained of. The test is an objective one, referring to the circumstances as they appeared to the court to exist, rather than as they were believed by the plaintiff to exist.²⁶ Nevertheless, the court is not precluded from focussing attention on the actual reasons advanced by the plaintiff for failure to bring the action within one year of the date of publication.²⁷ Equally, any claim is subject to a three year long-stop period. In other words, an action cannot be commenced if three years have elapsed since the date of publication. The effect of the statutes comprising the Uniform Defamation Laws is that where a person has already brought an action for damages in respect of publication of any matter, permission of the court must be sought in order to bring proceedings against the same defendant in respect of any further publication of the same matter, or publication of similar matter.²⁸

Other possible options for reform

Defence of non-culpable republication

10.16 The thinking behind this prospective defence has been developed by Alastair Mullis and Andrew Scott.²⁹ It would operate against the background of the continued existence of the multiple publication rule. In England and Wales the defence would be available after the lapse of one year from the date of the first publication of the material in question. In the event that a challenge to accuracy was brought after that time, an archivist seeking to rely on the defence of non-culpable republication would require to append a notice to the archived article indicating that a challenge had been brought. This would allow them the option of ultimately contesting a defamation action. Alternatively, if the archivist was persuaded of the inaccuracy at the point of the approach by the prospective claimant, it would be open to them instead to amend the article or append a notice of correction.

10.17 One advantage of this defence, it is suggested, lies in the fact that future users of the archive are made aware that further investigation is needed before a particular statement can be relied on. Moreover, if a notice appended to indicate a challenge included an outline of the competing perspective of the person whose reputation had been impugned, this could add to the discursive value of the original piece.³⁰

²⁵ See for example Limitation Act 2005 (WA), section 15.

²⁶ *Noonan v MacLennan* [2010] Aust Tort Reports 82-501.

²⁷ *Carey v Australian Broadcasting Corp* (2010) 77 NSWLR 136; this line was upheld on appeal *Carey v Australian Broadcasting Corp* (2012) NSWCA 176.

²⁸ In most cases the relevant provision is section 23.

²⁹ Alastair Mullis and Andrew Scott, "Worth the Candle? The Government's Draft Defamation Bill" (2011) 3 *Journal of Media Law* 1, 13-15.

³⁰ See "Worth the Candle?", p 15.

Reliance on a threshold test

10.18 The Northern Ireland Law Commission Consultation Paper on Defamation Law in Northern Ireland includes a suggestion that the issue of potentially perpetual liability could be resolved by introduction of a threshold equivalent to that in section 1 of the 2013 Act. If no significant publication had occurred in the [then] recent past, giving rise to notable harm, the court would not permit an action to proceed. However, it is noted that the publisher would still be faced with potential liability in terms of Article 8 ECHR.³¹ Indeed, it could be argued that the introduction of the single publication rule in England and Wales is surplus to requirements, given the existence of the serious harm threshold in section 1, and perhaps even the development of the *Jameel* jurisdiction before that.³²

Discussion

10.19 We tend to the view that the possibility of adoption in Scotland of a rule of equivalent effect to the single publication rule should not be excluded on grounds of principle, albeit that the criticisms outlined above must not be lost sight of. The question arises as to whether the time periods currently provided for in sections 7 and 18A of the 1973 Act should be modified in so far as they apply to defamation actions, to accommodate a better balancing of interests between pursuer and defender, if a single publication-type rule is to be introduced. It may be thought that the time periods should be shortened only in so far as defamation actions concerning republication are under consideration. However, this could produce an unduly complex scheme. Alternatively, the time periods may be modified regardless of whether there is to be a single publication-type rule. Another possible approach may be to alter the basic rule for limitation in defamation actions, such that the limitation period runs from the date of original publication, rather than the date on which the publication of the material comes to the attention of the pursuer. This would continue to operate subject to the power of the court in section 19A to override the time limit. These are matters to be considered in detail at the report stage of the project. For present purposes, we are interested simply in consultees' preliminary views on possible modification of time periods, as a matter of principle.

10.20 We would welcome views on the following questions:

- 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?**
- 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 republication; or (b) reliance on a threshold test; or (c) another defence? (We would be interested to hear suggested options if choosing (c)).**
- 41. Should the limitation period applicable to defamation actions be reduced to less than three years?**

³¹ See NILC 19 (2014), para 4.41. The idea is also discussed in "Tilting at Windmills" by Alastair Mullis and Andrew Scott, (2014) 77 MLR 87, 104.

³² See again *Blackstone's Guide to the Defamation Act 2013* (2013), at para 9.24. See also paras 3.5-3.8 above.

- 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?**
- 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?**
- 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?**

Chapter 11 Jurisdiction and jury trials

Jurisdiction

11.1 At present, there are no special rules governing the jurisdiction of the Scottish courts in defamation actions. The normal rules contained in the Civil Jurisdiction and Judgments Act 1982, the Brussels Regulation as amended¹ and the Lugano Convention² accordingly apply for the purposes of determining whether there is jurisdiction in Scotland against the publisher of allegedly defamatory material. These rules are broadly to the effect that a person may be sued in the courts for the place where he is domiciled, in matters relating to delict in the courts for the place where the harmful event occurred or may occur and in proceedings for interdict in the courts for the place where the alleged wrong is likely to be committed.³ It follows that where a statement that is alleged to be defamatory has been published in Scotland, the Scottish courts would have jurisdiction over the publisher wherever he is domiciled. Similarly, if publication is anticipated to take place in Scotland the Scottish courts would have jurisdiction to pronounce an order for interdict or *interim* interdict against the publisher even if he is domiciled outside Scotland. In a case governed by the 1982 Act, the defence of *forum non conveniens* (ie that the action would more appropriately be brought in a different court) would be available.⁴

11.2 Section 9 of the 2013 Act creates for England and Wales a new threshold test for establishing jurisdiction in defamation actions brought against persons who are not domiciled in the United Kingdom, elsewhere in the European Union or in a Lugano state. Where the defendant is domiciled in the European Union, the EU jurisdiction regime contained in the Brussels Regulation will continue to apply. Similarly, in the case of defendants domiciled in a state party to the European Free Trade Association the Lugano Convention regime will continue to regulate questions of jurisdiction. Section 9 provides that in respect of non-domiciled persons a court in England and Wales does not have jurisdiction unless satisfied that of all the places in the world in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

11.3 The Explanatory Notes to the Defamation Act 2013 make clear that the section aims to address the issue of 'libel tourism', a term used to apply where cases with a tenuous link to England and Wales were raised within that jurisdiction.⁵ Concerns about libel tourism had been one of the main themes of the campaign for libel reform.⁶ The intention behind the provision was that in cases where a statement had been published in England and Wales and elsewhere in the world the court would have to consider the overall global picture in

¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the European Community and the Republic of Ireland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30 October 2007.

³ Section 20 and Sch 8.

⁴ Section 22(1).

⁵ At para 65.

⁶ Libel Reform Group, *Free Speech is Not for Sale*, 6. See also para 1.4 above.

order to decide where it would be most appropriate for a claim to be heard. The example given in the Explanatory Notes is where a statement was published 100,000 times in Australia and only 5,000 times in England. This would be a good basis for holding that the most appropriate jurisdiction in which to bring an action would be Australia rather than England. There would, however, be a range of factors to be taken into account, such as the amount of damage to the claimant's reputation in a particular jurisdiction, the extent to which publication was aimed at a readership in a particular jurisdiction and whether there is reason to suppose that the claimant would not receive a fair trial elsewhere.⁷ In *Ahuja v Politika Novine I Magazini D.O.O.*⁸ Sir Michael Tugendhat approved the view expressed in *Gatley*⁹ that the effect of section 9 is to oblige the court to consider all the jurisdictions where the defamatory statement has been published, in order to determine whether the domestic jurisdiction is clearly the most appropriate place in which to bring actions.¹⁰ In addition to the factors referred to in the Explanatory Notes, he considered that the court would wish to consider matters such as the convenience of witnesses and the relative expense of suing in different jurisdictions. He observed that it would be unsurprising if claimants resident in England and Wales were to surmount the new threshold more readily than foreign claimants. In the same case an argument that section 9 imposed an unreasonable and disproportionate restriction on a claimant's right to access to the court at least in the case of defamation on the internet was rejected.¹¹

11.4 We are not aware of any firm evidence to suggest that the phenomenon of 'libel tourism' has so far arisen in Scotland. Members of our advisory group did not suggest that there was, at present, a problem of this nature in this jurisdiction. There has been no sign of an increase in the number of defamation actions being raised in the Scottish courts (by foreign or other parties) since the 2013 Act came into force. Nonetheless, there may be the potential for libel tourism to occur in Scotland if the rules on jurisdiction here are perceived to be more liberal than those applying in England and Wales. If such a view were to gather force it could lead to attempts to invoke the jurisdiction of the Scottish courts in circumstances where the factors connecting the dispute with this jurisdiction were tenuous and where there was no substantial justification for bringing proceedings here. While the Scottish courts might be expected to be unsympathetic to such claims, publishers would still have to incur expense and suffer delay in defending unmeritorious actions in Scotland. In other words, there is the potential for there to be a chilling effect. In these circumstances, we ask the question whether there is a need for Scots law to be reformed along the lines of section 9 of the 2013 Act.

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.

⁷ See para 66 of the Explanatory Notes.

⁸ [2015] EWHC 3380 (QB).

⁹ Professor Alastair Mullis and Richard Parkes, QC (eds.), *Gatley on Libel and Slander* (12th edn, 2013), para 24.29.

¹⁰ *Ahuja v Politika Novine I Magazini D.O.O.* [2015] EWHC 3380 (QB), para 31.

¹¹ *Ahuja*, paras 33-41.

Jury trials

11.5 The effect of sections 9 and 11 of the Court of Session Act 1988 is that any action raised in that court for “libel or defamation”¹² must be tried by a jury unless the parties agree otherwise or the court is satisfied that “special cause” exists for withholding a jury trial.¹³ Such actions have long been one of the “enumerated causes” considered appropriate for jury trial.¹⁴ The expression “enumerated cause” arose from section 28 of the Court of Session Act 1825 in which a lengthy list of causes was set out and enumerated as being specially appropriate for trial by jury. Whether special cause for refusing a jury trial exists is essentially a matter for the discretion of the court, the object being to select as between the alternative methods of inquiry which type of tribunal would best secure justice as between the parties to the action.¹⁵ Each case depends very much on its own facts, but the existence of difficult questions of fact or of law, difficulties in assessing damages, pleadings of doubtful relevancy or betraying a lack of specification are each factors that have been recognised as being capable of amounting to special cause for refusing a jury trial. Defamation cases are, in principle, no different from other types of enumerated causes when it comes to considering whether special cause exists.

11.6 Andrew Hajducki QC in his book on civil jury trials states that historically the plea of special cause was rarely taken in defamation actions and, even where it was, a number of extremely complex cases were tried by jury.¹⁶ In the case of *McCabe v News Group Newspapers Ltd*¹⁷ the argument that defences of *veritas* and fair comment raised difficult and delicate questions of mixed fact and law was rejected, Lord Morrison observing that if such an argument were to be accepted the result would be to erode substantially if not to eliminate the statutory right to jury trial in defamation cases.¹⁸

11.7 In recent years a small number of defamation cases have been decided by juries in the Court of Session, most notably the action successfully brought by Tommy Sheridan MSP against the publishers of the News of the World newspaper.¹⁹ There was also a high-profile jury trial in 1999 in an action brought by a Roman Catholic priest and a school teacher against the publishers of the Sun²⁰ in which the pursuers were awarded heavy damages and an action in which a jury awarded substantial damages to a solicitor against the publishers of the Sunday Mail.²¹

11.8 In the English case of *Joseph v Spiller*²² Lord Phillips asked whether the time had not come to recognise that defamation was no longer a field in which jury trial was desirable. He expressed the view that the issues were often complex and that jury trials simply invited

¹² It is unclear why the statute uses both terms since they are synonymous in Scots law.

¹³ Jury trial was abolished in the Sheriff Court by section 11 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1980. There is now the possibility that it will be reinstated in certain classes of action – see sections 41 and 63 of the Court Reform (Scotland) Act 2014. Whether this will be done is not yet known.

¹⁴ The others are actions of damages for personal injuries, damages claims based on delinquency or quasi-delinquency and actions for reduction on the ground of incapacity, essential error or force and fear.

¹⁵ *Graham v Associated Electrical Industries Ltd* 1968 SLT 81, at 82 per Lord President Clyde.

¹⁶ *Civil Jury Trials* (2nd edn, 2006), p 71.

¹⁷ 1992 SLT 707.

¹⁸ Lord Morrison at 709.

¹⁹ *Sheridan v News Group Newspapers Ltd*, Lord Turnbull, jury trial 4 August 2006, unreported.

²⁰ *Barry and Clinton v News Group Newspapers Ltd* (1999) SC 367.

²¹ *McCormick v Scottish Daily Record & Sunday Mail Ltd*, Lord Menzies, jury trial, 2006, unreported.

²² [2011] 1 AC 852 at para 116.

expensive interlocutory battles, which attempted to pre-empt issues from going before the jury

11.9 Section 11 of the 2013 Act abolishes the presumption of jury trial in libel and slander actions in England and Wales. The presumption was contained in section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984. Under those provisions both parties to an action had a statutory right to apply to have the case tried by a jury. However the court was obliged to order that the trial be by jury, unless it was of [the] “opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.”

11.10 The rationale behind the decision to abolish the presumption goes back to the position that key issues of fact, such as what defamatory meaning the words complained of bear, and whether they were statements of fact or comment were treated as jury questions. That being the case, it was proving impossible in practice to have these sort of questions decided as preliminary issues at an early stage in the litigation. The result was the unnecessary prolongation of litigation, discouragement of settlement and the inflation of costs.²³

11.11 Under section 11 of the 2013 Act the court may still order jury trial as a matter of discretion. The prevailing view amongst specialist practitioners in England is that the occasions on which the court will exercise its discretionary power to order trial by jury are likely to be “extremely rare”²⁴ and confined to cases in which the defendant is a public authority or where the position of the claimant gives rise to a risk of involuntary bias on the part of the trial judge.²⁵ Factors militating against trial by jury are seen as including: the advantages of a reasoned judgment; proportionality; and the promotion of effective case management. With regard to the last of these, the ability of the court to provide early rulings on meaning is seen as particularly important. Where there is to be a jury trial the parties are entitled to complain of and to defend any meaning which a reasonable jury properly directed could find the words complained of to bear.²⁶ This means that a claimant may insist on pursuing an action to the stage of a jury verdict based on a defamatory imputation that the words complained of do not in fact carry. A defendant may have to expend substantial resources in attempting to prove the truth of such an assertion. Equally a defendant may needlessly pursue a defence of justification based on a less serious meaning than the words in fact convey. Where there is an issue as to whether words are factual assertions or comments this will often only be capable of resolution at the end of the jury trial. The current thinking in England and Wales is that it is preferable for all of these issues to be resolved wherever possible by preliminary rulings by the court. This promotes the efficient conduct of litigation and the saving of expense. Defamation law is a particularly complex and in many respects technical area. Many of the issues likely to arise in such actions may be more suitable for determination by a judge in a reasoned judgment, for example *Reynolds* privilege or fair comment. The editors of *Gatley* express the view²⁷ that cases involving *Reynolds* privilege are peculiarly unsuited to trial by jury by reason of the confused division of functions of judge and jury, and by the jury having to find specific facts, sometimes

²³ Report of the Joint Parliamentary Committee, HL Paper 203, HC Paper 930-I, 19 October 2011.

²⁴ *Duncan and Neill on Defamation* (4th edn, 2015), para 32.42.

²⁵ *Yeo v Times Newspapers Ltd* [2015] 1 WLR 971.

²⁶ *Yeo v Times Newspapers Ltd* [2015] 1 WLR 971, per Warby J at para 71.

²⁷ Professor Alastair Mullis and Richard Parkes, QC (eds.), *Gatley on Libel and Slander* (12th edn, 2013), para 34.1.

necessitating an “exam paper” of questions for them to answer. At present the Scottish courts do not have such extensive case management powers as their English counterparts, although this is likely to change with the fundamental revision of the rules of court project currently being conducted under the direction of the Scottish Civil Justice Council.

11.12 On the other hand, there are cogent arguments in favour of retaining the possibility of jury trials in defamation actions. As it was put in the Northern Ireland Law Commission’s Consultation Paper, many questions in the law of defamation must be answered from the perspective of the ordinary, right-thinking member of the community.²⁸ Justice Steven Rares of the Federal Court of Australia has expressed the view in an extra-judicial lecture that the issues which go to the heart of a defamation trial are best determined by a cross section of ordinary citizens bringing to bear their experience of life.²⁹ It may be thought that trial by jury provides the best means of achieving that objective.

11.13 One option for any modification of the existing rules would be to confer a broad discretionary power on the court to decide on what form of inquiry is appropriate in the particular circumstances of the case; on that approach there would no longer be a presumption in favour of jury trial or a need to show special cause for withholding jury trial.

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

²⁸ Para 4.07.

²⁹ The Jury in defamation trials (FCA) [2010] FedJSchol10. <http://www.fedcourt.gov.au/publications/judges-speeches/justice-raises>.

Chapter 12 Defamation of the deceased

Background

12.1 The issue with which we are concerned in this chapter is what happens when allegedly defamatory statements about a person are made *after* his or her death. The accepted position in Scots law seems to be that such statements are not actionable under the law of defamation.¹ This is in contrast with the situation where a defamatory statement was made prior to the death of the person who was the subject of it. In that event the executor may continue with an action raised by the deceased prior to his or her death, or commence an action. In the latter scenario only patrimonial loss can be recovered; there is no provision for recovery of *solatium*.²

Scotland: brief summary of activity in the area so far

The progression of case law

12.2 The case of *Cadell and Davies v Stewart*³ established the idea of family personality rights. Here the family of Robert Burns was held to be entitled to interdict to prevent the publication of his private correspondence. The same approach was applied to defamation in *Walker v Robertson*,⁴ where the surviving son of a deceased person was awarded damages for *solatium* as a result of defamation of his late father. However, the authority of this decision was brought into doubt in the later case of *Broom v Ritchie and Co.*⁵ This involved an action by the widow and children of a man whose death had been reported in a newspaper under the heading of “Determined suicide.” The action was dismissed on the basis that it was not competent to claim *solatium* alone in such circumstances. This decision was upheld on appeal. Lord Justice Clerk Macdonald did, however, point out that such an action could be competent in certain circumstances, namely where defamation of the deceased person could be classed, by innuendo, as a direct defamation of the pursuer; or if the defamation affected the financial interests of the pursuer.⁶ The *Broom v Ritchie* approach seems still to hold good today.

Petition to the Public Petitions Committee of the Scottish Parliament

12.3 The issue of defamation of the deceased is of some significance in both Scotland and England. In Scotland it may be said to have been given increased prominence by the case involving the Watson family. This involved remarks published about a teenage girl following her murder in a playground dispute. Her parents, Margaret and James Watson,

¹ See Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots law* (2010), pp 159-161. This is the result of what is described as, and seems to remain, the leading case in this area, *Broom v Ritchie* (1904) 6 F 942.

² See Damages (Scotland) Act 2011, section 2(1)-(3).

³ (1804) Mor, *Literary Property*, Appendix, 13-16.

⁴ (1821) 2 Mor 508, at 516.

⁵ (1904) 6 F 942.

⁶ See para 946 of the judgement, together with the discussion of Kenneth McK Norrie in *Defamation and Related Actions in Scots Law* (1995), at pp 59-60.

are the authors of what was a long-running petition to the Scottish Parliament. The petition called for the Scottish Parliament to take steps to prevent defamation of murder victims and in particular to stop convicted murderers or members of their families from profiting from their crimes by selling accounts of their crimes for publication.⁷ This was lodged with the Public Petitions Committee in May 2002. The petition did not specifically mention defamation of homicide victims. However, this was considered by the Committee as an associated issue. This included the taking of evidence from Victim Support Scotland. After detailed consideration of the issue, the ultimate conclusion of the Committee was that a consultation by the Scottish Government would be the most appropriate route to taking the matter forward. On that basis the Committee agreed on 9 November 2010 to close the petition.⁸ In England defamation of the deceased has been brought into focus more recently as a result of the allegations made about the late Sir Edward Heath.

“Death of a Good Name” - the Scottish Government consultation

12.4 The Scottish Government Consultation Paper on defamation of people who have died - “Death of a Good Name: Defamation and the Deceased” – was published in January 2011.⁹ It generated a total of 23 responses, received from individuals and organisations. These included academics, religious groups, media organisations and Victim Support Scotland. The thrust of the idea being canvassed would seem to be encapsulated in question 1: asking whether there is real evidence of a significant deficiency in the current law in this area; and seeking views in principle on whether the law on defamation should be extended to allow a relevant party (for example, a close relative) to bring an action for defamation of a recently deceased person. The paper acknowledged expressly that it was not canvassing the possibility of an open-ended provision allowing actions on behalf of a deceased person to be raised by anyone at any time. This was described as “excessive”.¹⁰

12.5 The outcome of the consultation was said not to be conclusive. There was little firm, factual evidence to the effect that the current position was either demonstrably effective or demonstrably ineffective, albeit that people taking either position tended to hold their views strongly.¹¹ Those who opposed reform in this area did, however, raise a number of significant concerns relating to the practicability of making provision for defamation of the deceased. One overarching concern was that such a change would lead to a significant shift in what constitutes defamation. It was highlighted that the function of defamation law had long since been understood to be the protection of the reputation of the individual; the idea canvassed in the consultation paper went beyond that, in effect to the mitigation of the distress of close relatives of people who had recently died.¹² In the wake of the consultation,

⁷ Public Petition PE504.

⁸ Further information about the petition can be found in the archive on the Scottish Parliament website: <http://archive.scottish.parliament.uk/business/petitions/docs/PE504.htm>.

⁹ <http://www.gov.scot/Publications/2011/01/11092246/0>.

¹⁰ At p 16 of the document, para 4. It is, though, to be noted that the consultation paper, while considering the possibility that any provision be restricted to death in specified circumstances, is not premised on the basis that it will operate only in relation to murder cases. To that extent it is wider in scope than the petition looked at by the Committee.

¹¹ The Scottish Government position is set out in a letter from Roseanna Cunningham MSP to [then] convenor of the Public Petitions Committee, David Stewart MSP, dated 27 October 2011: <http://www.gov.scot/Resource/Doc/254430/0123401.pdf>. This relates to Petition PE504, the petition by Margaret and James Watson.

¹² See the responses to the Consultation Paper by the Press Association, the Scottish Newspaper Society and the Faculty of Advocates: <http://www.gov.scot/Topics/Justice/law/damages/defamationresponses>. We note,

the position of the Scottish Government was that whilst it was appropriate to pursue the objective of ensuring that the reputation of a recently deceased person could not be defamed with impunity, an extension of the law may not be the most appropriate way to achieve that aim. Rather, a new regulatory regime for the media, possibly based on self-regulation, may be a more appropriate solution. Against the background that the Leveson Inquiry was by then under way, it was decided to await the outcome of that before considering the matter further.

12.6 However, the Inquiry Report, published in November 2012, did not touch on the issue of defamation of the deceased. This may tend to provide further evidence that there was no clear mandate for statutory provision in the area.

The Defamation Bill (now the Defamation Act 2013) – Legislative Consent Motion

12.7 An attempt was made during the passage of what is now the Defamation Act 2013 to introduce an amendment to the Bill so as to enable people closely connected to a deceased person – the person’s spouse or partner, parents, siblings or offspring - to sue publishers of an article they considered defamatory of their loved one, up to 12 months after the person’s death.¹³ The attempt was made during a committee stage hearing of the Bill, held in June 2012. However the committee voted 11 to 5 to reject the amendment. One argument raised against it was that the restrictiveness of libel law often meant that certain things about a person – knowledge of which may be in the public interest – could only be reported after the person’s death. To restrict reporting at that point may run contrary to the public interest. It was noted, also, that, in line with the fundamental principles of defamation law, relatives of the deceased had no right of action unless the words used reflected on their own reputation. The proposed amendment could create problems for people involved in historical analysis and debate, not to mention paving the way for a further extension of defamation law in so far as it applies to the living.¹⁴ Turning to consider principles of civil proceedings generally, it was noted that applying those, a claim for damages can be brought only by the person who has suffered damage to his or her own reputation as a result of the act or omission of another person.

12.8 The issue was referred to only briefly during the Justice Committee’s consideration of the Legislative Consent Motion for the Defamation Bill. The then Cabinet Secretary for Justice, Kenny MacAskill MSP, referred to the fact that the matter of defamation of the deceased had been examined and consulted upon, but explained that a decision on what, if any, course of action to follow had been delayed pending the outcome of the Leveson Inquiry. He further explained that the matter had not been raised with him by the Faculty of Advocates or the Law Society of Scotland around the time of the LCM.¹⁵

Royal Charter on Self-Regulation of the Press

12.9 Following the Legislative Consent Motion for the Defamation Bill and the publication of the Leveson Report, the issue of possible provision in relation to defamation of people

however, that this understanding does not fully reflect the current principle of Scots law that defamation may nonetheless arise where an imputation is communicated only to the person who is the subject of it.

¹³ <http://www.pressgazette.co.uk/node/49522>.

¹⁴ It seems that this could pave the way for an equivalent, in terms of defamation law, to slander on a third party in verbal injury. See the discussion in ch 13 below.

¹⁵ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/55001.aspx>.

who had died was brought into focus again in Scotland during the Education and Culture Committee's consideration of the implications for Scotland of the Royal Charter on Self-Regulation of the Press.

12.10 The Scottish Government proposed that certain wording be inserted into paragraph 8 of Schedule 3 to the Royal Charter on Self-Regulation of the Press, to deal with defamation of the deceased.¹⁶ The wording was as follows:

“.....[A]nd the need for appropriate respect and decency in reporting and commenting on the recently deceased, where the only public interest in them is in the manner and circumstances of their death, and their near relations.”

12.11 This was raised during an evidence session of the Culture and Media Committee looking at the implications for Scotland of the Royal Charter, held on 23 April 2013. The Scottish Parliament, in a debate on 30 April 2013, approved a motion that the Royal Charter should apply to Scotland. However, that motion did not include reference to insertion of the proposed wording.¹⁷ The matter of defamation of the deceased was not discussed during the debate.

The position in other jurisdictions

Germany

12.12 It has been noted that, with the exception of England and Wales, most European jurisdictions make some provision for the bringing of defamation actions on behalf of people who have died.¹⁸ In Germany this amounts to a criminal offence; there is no equivalent civil wrong. Section 189 of the German Criminal Code under the heading “Violating the memory of the dead” provides as follows:

“Whosoever defames the memory of a deceased person shall be liable to imprisonment not exceeding two years or a fine.”

12.13 It is to be noted that case law tends to indicate that a ‘serious interference’ or ‘grave distortion’ of the reputation of the deceased person is needed before section 189 is deemed to be infringed.¹⁹ Moreover, the courts simply offer retraction or an injunction by way of remedy. Damages are not generally granted, especially for non-economic loss.²⁰

United States - Georgia

12.14 Beyond Europe, provision for defamation actions to be raised on behalf of the deceased seems to be uncommon. However, exceptions to the rule can be found in a small number of US States. In the State of Georgia, for example, paragraph 16-11-40 of Article 2

¹⁶ The Royal Charter on Self-Regulation of the Press was approved at a specially-convened Privy Council meeting on 30 October 2013. Its function is to implement the recommendations of the Leveson Inquiry.

¹⁷ S4M-06388 The motion, lodged by Fiona Hyslop MSP, Cabinet Secretary for Culture, Europe and External Affairs, simply invited the Parliament to agree to Scottish participation in the Royal Charter, “....[S]ubject to its amendment to reflect properly Scotland's devolved responsibilities, Scots law and Scottish circumstances...”

¹⁸ Christian von Bar, *The Common European Law of Torts - Volume 2* (2000), at para 116.

¹⁹ This is a long-standing principle, dating back at least to the decision of the Bundesgerichtshof of 20 March 1968.

²⁰ This principle was established by the Oberlandesgericht Munich 26 Jan 1994, *Neue Juristische Wochenschrift-RR* 1994, p 925.

of Chapter 11 of the Official Code of Georgia provides as follows under the heading “offences against public order”:

“O.C.G.A. 16-11-40 (2010) Criminal defamation

(a) A person commits the offense of criminal defamation when, without a privilege to do so and with intent to defame another, living or dead, he communicates false matter which tends to blacken the memory of one who is dead or which exposes one who is alive to hatred, contempt or ridicule, and which tends to provoke a breach of the peace.

(b) A person who violates subsection (a) of this Code section is guilty of a misdemeanour.”

Australia

12.15 In general²¹, the Uniform Defamation Laws provide as follows in section 10 of the relevant statutes:

“10 No cause of action for defamation of, or against, deceased persons

A person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to:

(a) the publication of defamatory matter about a deceased person (whether published before or after his or her death), or

(b) the publication of defamatory matter by a person who has died since publishing the matter.”²²

Discussion of the general principle

12.16 The responses to the consultation by the Scottish Government reveal many of the arguments against and in favour of enacting a provision to allow actions to be brought on behalf of deceased people.

The main arguments against allowing defamation actions on behalf of deceased people

12.17 Aside from the argument set out above about departure from the basic idea of defamation as involving an imputation against the person bringing an action,²³ a number of other concerns were raised during the Scottish Government’s consultation exercise. One related to the possible thwarting of investigative journalism, for example in relation to the backgrounds of murder victims and, in certain circumstances, others who have died, in situations where such investigation would be in the public interest. The investigations following the death of Jimmy Savile may be said to provide an example of this. It has been suggested that the allegations against Jimmy Savile brought to light after his death

²¹ However, an exception may arise in relation to Tasmania. In the Defamation Act 2005 (Tas), section 10 is left blank, though no explanation is given as to why.

http://www5.austlii.edu.au/au/legis/tas/consol_act/da200599/.

²² See, for example, Defamation Act 2005, New South Wales:

http://www.austlii.edu.au/au/legis/nsw/consol_act/da200599/.

²³ This is subject to an exception where the subject of a defamatory imputation is a minor. In that case a parent or guardian can bring a claim on their behalf.

demonstrate the risks associated with making provision in relation to defamation of those who have died. If such provision had been in existence at that point, it is possible that there would have been a reluctance to proceed with publication.²⁴

12.18 Issues of proof and evidence were raised by a number of those whose responses were published; the obvious impossibility of cross-examining the allegedly defamed person would go against the grain of defamation actions. Three of the major defences to defamation actions – truth, fair comment and *Reynolds* privilege – may often be fact-sensitive. In most cases the defamed person would have been the main witness to fact. It was queried how a defender could be expected to respond to claims that allegations were untrue when the claims of untruth were made not by the person who was the subject of allegations but rather by relatives or others closely connected to them.²⁵ It was suggested that taking account of these issues, together with those about possible thwarting of investigative journalism, significant questions could be raised as regards the viability of justifying provision of the nature proposed not only in terms of freedom of expression under Article 10(2) ECHR but also in relation to the right to have access to justice under Article 6(1) ECHR.²⁶

12.19 It was also noted at consultation that provision of the nature suggested would set Scotland apart from the rest of the UK.²⁷ Moreover, while a number of European jurisdictions provide for defamation of people who have died, England and Wales does not, and there seem to be few beyond Europe which do so.²⁸ This could serve to undermine any provision relating to defamation of the deceased, certainly as far as online publication is concerned. Any apology or interdict which was ordered by way of remedy under the proposed new scheme would have effect only in Scotland. There would, therefore, be nothing to stop a London-based newspaper website – or potentially a news website based considerably further afield – carrying the allegedly defamatory material.²⁹

12.20 Attention was focussed, too, on the possibility that defamation actions on behalf of those who had died could, in fact, produce more harm than benefit to the relatives of the deceased. The raising of an action may fuel publicity for a comment that had been forgotten publicly, potentially giving rise to further defamatory comments. Moreover, in the event that a defamation action was unsuccessful, the suffering of relatives may be compounded.³⁰ In any case, other forms of remedy are available. It was noted that the possibility remains open that an action for verbal injury to feelings could be brought on behalf of someone who

²⁴ “You Can’t Defame the Dead – Why the Savile Case Shows Mr MacAskill Shouldn’t Change the Rules” 23 October 2012. Part of the blog entitled “Random Thoughts Re Scots Law by Paul McConville”: <https://scotslawthoughts.wordpress.com/2012/10/23/you-cant-defame-the-dead-why-the-savile-case-shows-mr-macaskill-shouldnt-change-the-rules/>. Related issues may arise in relation to the allegations against Sir Edward Heath, made 10 years after he died.

²⁵ See the response of the Press Association. Similar points were also raised by the Supreme Court Procedure Committee chaired by Lord Justice Neill, when it reported on the issue in 1991.

²⁶ See in particular the response of the BBC, at the penultimate paragraph of p 1.

²⁷ This point is raised in the response of the Faculty of Advocates to question 1(b)(i). At the time of the consultation, an extension of the point was that any reform in this area would take place in something of a vacuum, in the absence of any general reform of Scots law of defamation. To the extent that the issue is now being considered as part of a wider review, this point seems, however, to be less significant.

²⁸ As explained at paras 12.14 and 12.15 above.

²⁹ See the response of the Press Association.

³⁰ See again the response of the Faculty of Advocates in relation to question 1(b)(ii).

has died.³¹ There may also be redress under the Damages (Scotland) Act 1976, now the Damages (Scotland) Act 2011, if the alleged defamer had caused the death.³²

12.21 Outside the court room some forms of social media offering instantaneous communication could be used to provide redress.³³ More conventionally there was, at the time of consultation, the Press Complaints Commission, to which complaints could be made not only by family members of those who had died, but also by others who had close ties with the deceased. Some consultees took the view, in response to a specific relevant question, that adequate arrangements were operated by the Press Complaints Commission to deal with defamation of the deceased, or at least that there was ample scope to deal with any flaws in that system.³⁴ Nowadays there is an equivalent body in the form of the Independent Press Standards Association ('IPSO'). Like the Press Complaints Commission before it, one of IPSO's main roles is to handle complaints regarding alleged breaches of the Editors' Code of Practice. It is to be noted that paragraph 5(i) of that Code provides as follows:

"5 Intrusion into grief or shock

i) In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. This should not restrict the right to report legal proceedings, such as inquests".³⁵

12.22 IPSO was established on the basis of work of the Press Recognition Panel (PRP) to determine which type of body would be most appropriate to fulfil the role of media self-regulator. Membership of IPSO by publishers is on a voluntary basis, by means of entry into a contract to join.

The main arguments in favour of allowing defamation actions on behalf of deceased people

12.23 As would be expected, consultees supporting the introduction of such provision focussed not on financial recompense but rather on the restoration of the reputation of a deceased person by proving that allegations against the person were false and preventing their republication. Victim Support Scotland suggested the importance of this was heightened by the tendency of cases involving death as a result of particularly serious crimes or particularly tragic circumstances to attract significant levels of media attention.³⁶

12.24 In the 2013 case of *Putistin v Ukraine*³⁷ the European Court of Human Rights paved the way for a seriously defamatory imputation against a recently deceased person to constitute an infringement of the Article 8 rights, which can include reputational rights, of those closely connected to that person. Its effect is that in the right circumstances, the State

³¹ See again the response of the Faculty of Advocates. It is, though, to be borne in mind that there has been no discussion of this in case law since the early 20th Century case of *Broom v Ritchie*. A question has been raised as to whether the example given in that case, relating to allegations that the deceased's children were born outwith wedlock, would nowadays found an action for verbal injury; and there is no more recent case law to cast light on the circumstances in which such an action could legitimately be brought after a person's death. See further Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), at para 10.61.

³² See the response to question 8 of the consultation paper by Professor Norrie.

³³ The point is made at paragraph 13 of the Press Association response.

³⁴ These include the Scottish Newspaper Society, Professor Norrie and the Faculty of Advocates.

³⁵ The Code is reviewed periodically by the Editors' Code of Practice Committee.

³⁶ See pp 1-2 of the Victim Support Scotland response.

³⁷ Application No 16882/03, 21 November 2013.

may be said to have a positive obligation to protect those people in respect of their Article 8 rights. The case concerned the son of Mikhail Putistin, a participant in the so-called death match between football club Dynamo Kyviv and a German military football team in 1942. The newspaper *Komsomolska Pravda* published an article in which it was alleged that some of the players had collaborated with the Gestapo. The applicant contended that his and his father's reputation had impliedly been discredited, given that his late father was, by implication, included among the footballers who had been in collaboration with the Gestapo. The Court took the view that, on this occasion, the action was inadmissible, given that the applicant's father was not named in the article. In order to draw such an implication, a reader would have to know that the applicant's father's name had appeared in the original poster advertising the match. This possibility seemed remote. However, the following passage from the concurring opinion to the judgement of the court is of note:

"This judgement is important in that it accepts that under certain conditions the damage to the reputation of a deceased person can affect the private life of that person's surviving family members. The judgement makes very clear, however, that such a situation will occur only in relatively exceptional circumstances. The present case is one where the applicant's private life was indeed affected, but only "marginally."³⁸

12.25 It has been argued that the case does not affect the long-standing principle that a deceased person cannot be defamed, given that the applicant sought redress for damage to his and his family's reputation in so far as it affected *him*, rather than damage to the reputation of the deceased person.³⁹ However, to the extent that the Court is prepared to recognise the possibility of Article 8 being engaged by the defamation of a deceased person, it appears that provision to allow defamation actions to be brought on behalf of a deceased person by people closely connected to the person may serve as a means of providing the appropriate protection of the private life of those closely connected to the deceased person.

Decision to consider the issue as part of the current project

12.26 Against the background of the recent development at Strasbourg, together with the sensitivities around the issue in Scotland, and the fact that a general review of defamation law is being undertaken in Scotland, we ask the following question:

- 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?**

Some more specific points

12.27 The following sections deal with specific issues potentially to be addressed in the event that provision is to be made for defamation actions to be brought on behalf of people who have died.

³⁸ See para 1 of the concurring judgement.

³⁹ HC Deb 28 November 2013, Col 411W:

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131128/text/131128w0002.htm>.

Who should be able to bring an action?

12.28 The Scottish Government Consultation Paper canvassed three possible options as to parties who might bring an action. The first was to follow the definition of “immediate family” in Schedule 1 to the Damages (Scotland) Act 1976, as read with section 10. This provision has now been repealed. However it has been replaced by the definition of “relative” in section 14 of the Damages (Scotland) Act 2011, which is in broadly the same terms. This is subject to the exception that the definition extends to the immediate family members of people who accepted the deceased as a grandparent or who were accepted by the deceased as grandchildren. Moreover, it applies to civil partners and cohabitants living as either spouses or civil partners. The second option was to leave the position more open, so that it would include all those who had enjoyed close ties of love and affection with the deceased. The third option was an even more open one, allowing action to be brought by anyone who could demonstrate “a sufficient business, family, professional or other relationship” with the deceased. As the paper acknowledged, there seems to be clear merit in restricting the categories of people who may bring an action, not least to reduce the potential for family disputes centred around the bringing of actions.⁴⁰

12.29 Of those who responded to the relevant question in the paper, the majority took the view that the definition in the Damages (Scotland) Act 1976 should be followed.⁴¹

12.30 We ask the following questions:

- 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?**
- 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?**

Lapse of time after death

12.31 The Scottish Government Consultation Paper highlighted the risk of perpetual liability given that, as the law currently stands, any provision of this nature could be used to bring an action at any time during the life of the person bringing it. This could create significant uncertainty. On the other hand, some of the responses to the consultation, although not in favour of provision to bring defamation actions on behalf of people who had died, highlighted that any attempt to limit the period within which an action could be brought was likely to be arbitrary.⁴² Against this, it would clearly be anomalous for there to be a limitation period affecting claims by living persons but not for claims in respect of those who have died.

12.32 Against the background of these competing considerations, we ask the following question:

⁴⁰ See para 21 of the Consultation Paper.

⁴¹ See the Scottish Government Summary Analysis of Responses, in relation to question 3. <http://www.gov.scot/resource/doc/254430/0121368.pdf>

⁴² See in particular the responses of the Faculty of Advocates and the Scottish Newspaper Society.

- 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?**

Circumstances giving rise to death

12.33 The Scottish Government Consultation Paper asked whether it would be preferable and practicable to limit the extension to defamation of people who had died in specified circumstances, namely murder, culpable homicide, dangerous driving, warfare or suicide. The further question was raised as to whether any extension of the law in this area should apply only to actions against alleged defamers who had been convicted of causing the death of the deceased. It was noted that a balance had to be drawn between providing a sufficient remedy and avoiding the opening of the floodgates to speculative or otherwise unjustified litigation.⁴³

12.34 Of those who responded to the relevant questions, the vast majority answered them in the negative. As regards the circumstances of the death, the general view taken was that any attempt to impose such a limitation would be arbitrary. Moreover, there was no evidence to suggest that greater distress occurred to relatives where death arose in one of the circumstances outlined in the question than in any other circumstances.⁴⁴

12.35 As regards the second question, a range of reasons against such a restriction were advanced. These included the fact that defamation of people who had died tended to arise from a number of sources; it was in no way restricted to the perpetrators of their death.⁴⁵ Moreover, there were said to be arguments that any such restriction would be arbitrary,⁴⁶ would undermine the value of a provision of the nature proposed as a protection against irresponsible journalism⁴⁷ and would serve to provide extra punishment to those convicted of causing death, rather than offering redress to an injured party.⁴⁸

12.36 We ask the following question:

- 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?**

⁴³ See paras 17–18 of the Consultation Paper.

⁴⁴ This point is highlighted in the response of the Faculty of Advocates.

⁴⁵ This point is highlighted in the response of Victim Support Scotland.

⁴⁶ See the responses of Professor Eric Clive and the Editors' Code of Practice Committee.

⁴⁷ See in particular the response of James Watson.

⁴⁸ This point is highlighted in the response of Professor Norrie.

Chapter 13 Verbal injury and defamation

Introduction

13.1 Verbal injury is a civil wrong analogous to, though distinct from, defamation. It covers statements which, although not necessarily defamatory, are likely to be highly damaging. The question of which of the categories a given imputation most probably falls into is not always easily answered in any given case.¹

13.2 The scope of verbal injury – and the precise categories into which it can be divided – is also a source of uncertainty. Certain main categories do, however, appear to be typically recognised. These are as follows, and we will outline each one briefly in turn below:

- Slander of title;
- Slander of property;
- Falsehood about the pursuer causing business loss;
- Verbal injury to feelings by exposure to public hatred, contempt or ridicule;
- Slander on a third party.

13.3 We will examine to what extent it may be desirable to maintain verbal injury as a separate wrong to defamation and if so, whether it may be possible to clarify the scope of some or all forms of verbal injury.

Some general points on verbal injury

13.4 The following points apply to each of the categories of verbal injury listed.

Absence of presumptions in favour of the pursuer

13.5 One of the main distinguishing factors between verbal injury and defamation seems to be that the pursuer in verbal injury does not enjoy the benefit of any of the presumptions that exist in defamation. Accordingly, each of the three prerequisites for actionable verbal injury - broadly stated as falsity of an imputation, intent to injure and actual injury consequent on the imputation - needs to be proved by the pursuer.² It has been suggested that it is therefore often to the advantage of a pursuer if words can be construed as defamatory, rather than falling under the verbal injury head.

¹ The division, in so far as one can be formulated, is usefully explored by Kenneth McK Norrie in a case comment entitled "Actions for Verbal Injury", (2003) 7 Edin LR 390. See in particular the opening paragraph. We say not necessarily defamatory given the comments below about the potential for overlap between defamation and verbal injury. An imputation may fall into both categories. See in particular the discussion at paras 13.26-13.40 below.

² *Steele v Scottish Daily Record & Sunday Mail Ltd* 1970 SLT 53 (IH) (2nd Div). See also *Argyllshire Weavers Ltd v A Macaulay (Tweeds) Ltd* 1965 SLT 21 (OH), at 35 per Lord Hunter. See also more detailed discussion below of the requisites of each of the types of verbal injury.

The requirement to prove malice

13.6 One of the requisites of verbal injury is that the intention to cause harm must be malicious. This is made clear by one of the few modern cases in the area, *Barratt International Resorts Ltd v Barratt Owners Group*.³ In other words, it is not enough that there is a deliberate intention to cause harm, but for what is perceived to be a good motive, as may at times be the case with political satire. There must be no “good” motive, perceived or otherwise. It was held in *Steele v Scottish Daily Record* that a general averment of malice is insufficient.⁴ The pursuer must not only aver specific facts and circumstances from which the intention to injure can be inferred, but also demonstrate intention to cause the specific loss that occurred.

Section 3 of the Defamation Act 1952

13.7 Section 3 of the 1952 Act introduces a presumption that words intended to cause pecuniary loss do indeed cause such loss. It provides that the pursuer or plaintiff does not require to aver or prove special damage if the words complained of are calculated to cause the pursuer pecuniary damage. The pursuer is subject only to a requirement to make averments as to quantification of his or her loss.⁵ In Scotland section 3 operates to the same effect as in England and Wales but refers simply to “verbal injury”; in relation to England and Wales section 3 refers to “slander of title, slander of goods or other malicious falsehood”.⁶

13.8 It may be thought that section 3 as it applies in Scotland was only *intended* to capture verbal injury causing business loss, given that it is centred around special damage. It is not, however, restricted in that way.

Defences in actions relating to verbal injury

13.9 The defence of fair comment applies in actions for verbal injury, as does the defence of absolute privilege. The application of absolute privilege in this context is demonstrated by *Tripp v Mackie* where the House of Lords affirmed the decisions of the Court of Session that the proceedings of a statutory inquiry into the dismissal of the rector of a school were absolutely privileged.⁷ There has never been doubt on the part of the courts that the truth of an allegation is an absolute defence to an action for verbal injury. Indeed, this may be said to flow naturally from the fact that falsity is a requisite of verbal injury. There is, however, a difference between verbal injury and defamation in this context. In defamation, as noted in chapter 4 above, it is for the defender to establish the defence of truth. In verbal injury, by contrast, falsity is part of the definition of the wrong and the pursuer must prove it.⁸

Outline of the main categories of verbal injury

13.10 The first three categories - slander of property, slander of title and falsehood about the pursuer causing business loss - concern verbal injury in the context of business. These correspond to “malicious falsehoods” in English law.⁹ Under the heading of verbal injury to

³ 2003 GWD 1-19 (OH). *Barratt* affirms the line taken in the earlier case of *Tripp v Mackie* 1977 SLT 194.

⁴ *Steele v Scottish Daily Record & Sunday Mail Ltd* 1970 SLT 53 (IH) (2nd Div), at 57.

⁵ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), pp 47-48.

⁶ See section 14 of the 1952 Act.

⁷ 1977 SLT 194; aff'd 1978 SC 283; 1979 SC (HL) 38.

⁸ See again *Defamation and Related Actions in Scots Law*, at p 127.

⁹ Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), para 7.02.

feelings by exposure to public hatred, contempt or ridicule we will also examine what is referred to as *convicium*.

Slander of property

13.11 Slander of property arises from untrue and malicious statements as to the quality of the pursuer's property. The disparaging remarks must be shown to be false, they must have been made with intent to cause loss to the pursuer and they must have caused the pursuer specific identifiable loss of the intended nature. It is not sufficient that they are *capable* of causing loss.¹⁰

13.12 There appears to be little case law dealing with slander of property. The most recent case decided solely on the basis of slander of property dates back to 1898.¹¹ However, in the more recent and very important case of *Argyllshire Weavers v A Macauley (Tweeds) Ltd*¹², Lord Hunter reaffirmed the existence of slander of property as a subcategory of verbal injury.¹³ Professor Reid has pointed to difficulties in reconciling the case law in this branch of verbal injury, particularly as regards the requirement to prove malice. Cooper¹⁴ suggested that the leading case was *Hamilton v Arbuthnott*.¹⁵ This involved an award of damages where one merchant had described the goods of another merchant as "rotten and mildewed trash." It can be contrasted with the later case of *M'Lean v Adam*.¹⁶ Here a doctor was misrepresented by the chairman of a public health committee as claiming that a case of typhoid could be traced to milk from a cow belonging to the pursuer. The pursuer's dairy business was destroyed as a result. The pursuer's claim for verbal injury failed, the court taking the view that, because the defender had acted in fulfilment of a public duty, malice could not be proved. It did, however, acknowledge the possibility that in some extreme cases even a statement made in fulfilment of a public duty may, taking account of all the circumstances, be so rash as to amount to "utterly reckless, and therefore, in a legal sense, malicious calumny."¹⁷ Professor Reid suggests that this means even if the defender acted from a sense of public responsibility a claim for slander of property on the basis of negligent misrepresentation would not be excluded if the necessary lack of care could be proved.¹⁸

13.13 A further difficulty with slander of property seems to lie in lack of clarity relating to its interaction with defamation.¹⁹ Imputations may be open to two parallel interpretations simultaneously - as being both a slander on the objects in question and a defamation of their owner in relation to conduct of the owner's trade. This is highlighted in the judgement of Lord Moncreiff in *Bruce v J M Smith*.²⁰ The case concerned publication by the Edinburgh Evening News of an article alleging that a tenement erected by the pursuers had collapsed and that the new tenement which they were constructing at the same site at the time of the article had insecure foundations. Lord Moncreiff said this:

¹⁰ The need for *actual* loss was highlighted by Lord Hunter in the case of *Argyllshire Weavers Ltd v A Macauley (Tweeds) Ltd* 1965 SLT 21 (OH) at 35.

¹¹ This point is made by Reid, *Personality, Confidentiality and Privacy*, at para 7.08. The case in question is *Bruce v J M Smith* (1898) 1 F 327, discussed further below.

¹² 1965 SLT 21.

¹³ At 35.

¹⁴ F T Cooper, *The Law of Defamation and Verbal Injury* (2nd edn, 1906), p 88.

¹⁵ (1750) Mor 7682.

¹⁶ (1888) 16 R 175.

¹⁷ See para 179 of the judgement. "Malicious calumny" is simply an old fashioned term for defamation.

¹⁸ See paras 7.05–7.07 of *Personality, Confidentiality and Privacy in Scots Law*.

¹⁹ See further paras 13.28-30 below.

²⁰ (1898) 1 F 327, at 332.

“I should like to add that I think that we have here not merely slander of property, but slander of the pursuer himself in connection with his trade, if one may use that term as describing one of his means of making a livelihood, viz., the erection of dwelling-houses to sell or let. The remarks in the paragraph could scarcely fail to affect the pursuer injuriously.”

Slander of title

13.14 This involves casting doubt on the pursuer’s title to property with the intention of jeopardising a sale or other business transaction relating to the property, thereby causing the pursuer loss. In other words, an allegation of this kind is actionable as verbal injury only if it is false, made with the intention to cause harm to the pursuer and has caused actual harm of the nature intended.

13.15 Cases involving slander of title have been few in number.²¹ The paradigm example seems to be *Philp v Morton*.²² Here the defender’s agent protested (wrongly) at a public auction that the pursuer was not entitled to sell the articles that were being exposed for sale. Damages were awarded to compensate for the difference between the expected sale proceeds and those achieved after the intervention. It is also noted that the requirement to prove loss has been the most significant impediment to recovery in this type of claim.²³

13.16 Interestingly, there is a reasonably recent case dealing with slander of title.²⁴ *Mclrvine v Mclrvine* was concerned with an e-mail sent by the respondent to solicitors acting for the Forestry Commission in which he raised questions as to whether the petitioner had title to convey with vacant possession subjects which he intended to sell to the Forestry Commission. Lord Brodie took the view that the respondent’s actions amounted to slander of title. The e-mail was clearly intended to cause the Forestry Commission doubt as to whether the petitioner had title to convey the subjects with vacant possession and thereby prevent or delay a sale. Lord Brodie pointed to the tentative terms in which the e-mail was worded as being “consistent with the writer having no real basis for impugning the petitioner’s title....”²⁵

Falsehood about the pursuer causing business loss

13.17 This involves a malicious statement which significantly damages the pursuer’s business, even though it is not necessarily defamatory. It has been described as a residual category, accommodating actionable business loss that does not arise from slander of property or slander of title.²⁶ The three prerequisites in this context are falsity of the statement, intention to cause injury to the pursuer’s business, and actual injury to the pursuer’s business of the nature intended. Their application is demonstrated by *Steele v Scottish Daily Record*.²⁷ This involved publication of an article in which the pursuer, a car dealer, was accused of pressurising a customer to proceed with a hire-purchase agreement after the customer had sought to cancel the agreement on the basis that he was no longer in

²¹ See Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), at para 7.03.

²² (1816) Hume 865. This is cited in Cooper’s work on Defamation: F T Cooper, *The Law of Defamation and Verbal Injury* (2nd edn, 1906), p 86.

²³ See again Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010), at paras 7.03-7.04.

²⁴ *Mclrvine v Mclrvine* [2012] CSOH 23.

²⁵ See especially at 23.

²⁶ Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), para 29.23.

²⁷ *Steele v Scottish Daily Record & Sunday Mail Ltd* 1970 SLT 53 (IH) (2nd Div).

a financial position to proceed. The court took the view that the pursuer had not relevantly pled a case of actionable verbal injury to his business. In particular, he had not averred that the article had harmed him in his business. Accordingly, that head of claim was dismissed.

Verbal injury to feelings caused by exposure to public hatred, contempt or ridicule

13.18 The prerequisites of verbal injury to feelings caused by exposure to public hatred, contempt or ridicule correspond broadly to the prerequisites of verbal injury in the business context. They were laid down in *Paterson v Welch*²⁸ as requiring that the defender had made a statement about the pursuer that was false, made with a “design” of injury and resulted in actual injury.²⁹ Lord President Robertson stated that the falsity of a statement had to be proved by the pursuer. This was the first case in which an issue of holding up to public hatred, contempt and ridicule was permitted when only one statement and a repetition thereof was being complained of, rather than a series of articles.³⁰

13.19 Given the prerequisites of verbal injury by exposure to public hatred, contempt or ridicule, it seems clear that any statement triggering this head of claim must have been communicated to a third party.

13.20 The scope of verbal injury, as it had until then been understood, is said to have been narrowed by two cases in the late nineteenth century – *Paterson v Welch* and *Waddell v Roxburgh*.³¹ The approach of the court in these cases was to limit recovery of damages for verbal injury to “special damage” only. “Special damage” was understood as having the same meaning as in the leading English case on malicious falsehood, *Ratcliffe v Evans*,³² which had been decided a short time earlier. In other words, the pursuer had to prove that loss of money had been suffered, or at least loss of some material advantage that was quantifiable in monetary terms. While such a requirement may be expected in cases involving injury to business, it is less easily reconcilable with claims for exposure to public hatred, contempt or ridicule. However, the restriction to recovery of special damage has not always been observed in subsequent Scottish cases, as *Steele v Scottish Daily Record*, seems to demonstrate. The court there was prepared to entertain the possibility of a claim for *solatium*. Professor Reid suggests it is doubtful that the restriction to recovery of damages for patrimonial loss should be revived.³³ Professor Norrie has pointed out that there was no suggestion in *Steele* that *solatium* could only be claimed where damages for patrimonial loss were also claimed. Indeed, the two claims in that case were considered separately.³⁴

13.21 Professor Reid suggests that *Steele v Scottish Daily Record* demonstrates that the barrier to a successful claim that public hatred, contempt or ridicule has arisen is set high. Regardless of the level of hurt caused to the pursuer by particular allegations, or the seriousness of the allegations, a claim will fail unless evidence is led to show that the public has been induced to think of the pursuer with hatred and contempt as a result. This requires something more than the test laid down in *Sim v Stretch*, namely something more than

²⁸ (1893) 20 R 744.

²⁹ At 749 per Lord President Robertson.

³⁰ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), p 52.

³¹ (1894) 21 R 883.

³² [1892] 2 QB 524 (CA).

³³ See para 8.21 of *Personality, Confidentiality and Privacy in Scots Law*.

³⁴ See *Defamation and Related Actions in Scots law*, p 42.

lowering the pursuer “in the estimation of right-thinking members of society generally.”³⁵ *Steele* demonstrates that the social impact of the allegation on the pursuer must be severe. Lord Milligan suggested that something more was needed than causing the person to be looked on “with disapproval or even disgust”,³⁶ while Lord Wheatley took the view that, though hatred in the full sense of the word was not needed, “something of the order of condemn or despise”³⁷ should be in evidence. Lord Fraser referred to there being no evidence that the pursuer “was socially ostracised nor that his general standing in the community was adversely affected.”³⁸ The reference to being *ostracised* seems to reflect the severity of the social exclusion required.

13.22 In this context it should be mentioned that *convicium* is a category of wrong which has been developed by the institutional writers, the idea being that it is a form of wrong separate from verbal injury. In its more modern incarnation it essentially comprises exposure to public hatred, contempt or ridicule, but with the significant feature that the wrong can, at least in the opinion of some of those who recognise it, be committed even if the statement giving rise to public hatred, contempt or ridicule is true. This incarnation of *convicium* is supported, in particular, by Walker, a substantial section having been devoted to it in the first edition of his *Law of Delict*, published in 1966.³⁹ Professor Reid suggests that the cases referred to in that work in fact provide little support for the existence of *convicium* as a separate category of wrong, given that none of them refers to it as an entity separate to verbal injury, and none involves a truthful imputation being held to be actionable.⁴⁰ It may also be argued that Walker’s approach cuts across what may be regarded as the more persuasive, albeit much older, examples of allegations that could fall within the category of *convicium*, namely where the allegation reveals disease or infirmity, or the dredging up of an old and now irrelevant scandal. Subject, perhaps, to a few exceptions, it seems difficult to envisage that a right-thinking person would tend to think less of someone, or regard them with hatred or contempt, because they had been diagnosed with a particular disease.⁴¹ To that extent the older understanding of *convicium* may be said to fill a gap left by both defamation on the one hand and exposure to public hatred, contempt and ridicule on the other. There have, however, been some references in case law to Walker’s approach to *convicium* since the publication of *Law of Delict*. In *Steele v Daily Record*, it was noted that the sheriff-substitute had at first instance recognised that a claim based upon *convicium* might be relevant where the pursuer had been held up to public hatred and contempt. Significantly, however, he had held that it was actionable only if false.⁴² Much more recently, a passing reference was made to it in the case of *Barratt International Resorts Ltd v Barratt Owners’ Group*.⁴³ Lord Wheatley referred to a distinction between verbal injury and *convicium*, the basis being that verbal injury is concerned purely with damage to *business* relations, with matters of hurt by exposure to public hatred, contempt or ridicule always

³⁵ See para 8.24 of *Personality, Confidentiality and Privacy in Scots Law*, together with Lord Wheatley’s judgement in *Steele*, at 62.

³⁶ At 64.

³⁷ At 62.

³⁸ At 66.

³⁹ See p 744 of the first edition and p 738 of the second edition.

⁴⁰ See again *Personality, Confidentiality and Privacy in Scots Law*, pp 114-115.

⁴¹ See Elspeth Reid, “Protection of Personality Rights in the Modern Scots Law of Delict” in *Rights of Personality in Scots Law: A comparative perspective* (2009), p 276. This understanding of *convicium* emanates from Glegg. As with Walker’s approach, it appears to be underpinned by the idea that it may be actionable even where the imputation in question is true.

⁴² See the discussion at 57 of the decision of the Second Division.

⁴³ 2003 GWD 1-19.

falling under the *convicium* head.⁴⁴ However, no authority was offered for the separation of cases of exposure to public hatred, contempt or ridicule from verbal injury. Equally importantly, there was no suggestion that *convicium* may allow action to be brought on the basis of a statement which is true.⁴⁵

13.23 If it is accepted that there is no scope to bring an action under the *convicium* head where an imputation is true, it would seem likely that *convicium*, certainly as regards its more modern incarnation as advanced by Walker, should be regarded as verbal injury by exposure to public hatred, contempt or ridicule, simply known by a different name. On that basis, any decision ultimately taken in relation to the future of the latter would apply to the former. This seems to accord with the approach taken by Professor Norrie:

“*Steele* can be regarded as authority for nothing more than the proposition that the public hatred cases might be called *convicium*, and it lays down no different criteria to be applied to those cases from those applied to other cases for verbal injury. There is no legally separate class, and it is suggested that the terminology of *convicium* should be avoided lest one is led into the error of thinking that there is.”⁴⁶

Slander on a third party

13.24 In short, slander on a third party involves a claim based on injury caused by an attack on the reputation of a third party. This was recognised as a possibility in early Scottish case law, in the form of *North of Scotland Banking Co v Duncan*,⁴⁷ albeit that the action was unsuccessful. The case involved an action for damages brought by North of Scotland Banking Company against the writer of a letter containing certain comments about the management committee of the bank. The letter was said to contain a defamatory statement to the effect that “...through the fraudulent connivance of the committee of management some of their number had been allowed to put their hands into the bank till.” The court took the view that it was not sufficiently averred that the comments related, by innuendo, to the bank as a corporate entity, and not merely to the individual members of the committee. The action was therefore dismissed on the basis that there was no intelligible explanation as to how the imputation was intended to be of and concerning the bank. Lord Deas in his judgement cited as an example of slander on a third party the situation where a person was directly and intentionally injured by an attack on the character of a member of his or her family. However, he went on to suggest that a company or corporation may be able to sue under this head, if it was averred and proved that an attack was directed not only at an individual connected with a body but also at the body itself, with a view to injuring both.⁴⁸ By way of illustration, an allegation that an employee of a particular company is entirely incompetent may be intended as an attack on the company in terms of the quality of the services it provides.

13.25 Slander on a third party may be contrasted with defamation, where an imputation generally will not be actionable by anyone other than the person who is the subject of it.⁴⁹

⁴⁴ At 25.

⁴⁵ See p 115 of *Personality, Confidentiality and Privacy in Scots Law*. A similar line is taken by Professor Norrie—see again *Defamation and Related Actions in Scots Law*, p 38.

⁴⁶ See again *Defamation and Related Actions in Scots Law*, p 38.

⁴⁷ (1857) 19 D 881 at 887. This proposition was put forward in obiter remarks by Lord Deas.

⁴⁸ See again at 887.

⁴⁹ An exception is made where a claim relates to a comment made about a person prior to his or her death. See further para 12.1 above.

There seems to be little reported case law dealing with this area, and such as exists is extremely dated.⁵⁰ However, as discussed by Professor Reid,⁵¹ such authority as does exist indicates that the circumstances in which recovery under this head is likely to be permitted are narrow. *Finburgh v Moss' Empires Ltd* lays down the proposition that a party claiming to have been harmed as a result of slander on a third party has to demonstrate that the injury was of some severity; it must not have been “merely oblique”.⁵² In *Finburgh* it was not enough that the pursuer be affronted by the fact that his wife was ordered to leave a theatre, having been mistaken for a notorious prostitute. There must be evidence that the defender intended to injure the pursuer directly by slandering the third party. As regards the nature of the loss, *Broom v Ritchie* tends to suggest that injury to feelings is not enough. An element of patrimonial loss or injury to “status” will be needed.⁵³ There has been no reported Scottish case in which such a claim has been successfully pursued, leading to the recovery of damages.⁵⁴

Discussion

13.26 Different categories of verbal injury interact in different ways with defamation. We suggest that the extent to which a category of verbal injury occupies a field which is not covered by defamation is key to the question as to whether it is worth retaining the particular category.

13.27 With regard to slander of property, the requirement that disparaging remarks must cause the pursuer loss gives rise to a distinction between defamation and this particular category of verbal injury; whereas defamation can arise where remarks are communicated only to the person who is the subject to them, a diminution in the value of property can logically only take place if those remarks are communicated to a third party (rather than simply the owner of the property).⁵⁵ It seems that the same must apply to the other business-related categories, given the need to prove actual loss. Similarly, it seems clear that exposure to *public* hatred, contempt or ridicule can logically only arise if remarks are communicated to a person other than the subject of them.

13.28 Reference is made above to difficulties in deciding whether an imputation should most suitably be classed as defamation of a pursuer or, alternatively, slander of his or her property under the verbal injury head. In this connection useful guidance is provided by the case of *Continental Tyre Group Ltd v Robertson*,⁵⁶ and a case note commenting on it.⁵⁷ This case involved a number of allegedly defamatory remarks made by the defender against a particular type of tyre sold and distributed by the pursuer. The thrust of the remarks was that the tyre was highly unsafe. The Sheriff Principal accepted that there was a stateable argument that the pursuer ought to have pleaded the case on the basis of verbal injury rather than defamation.⁵⁸ The case does not provide any clarification as to the distinction

⁵⁰ The two main cases seem to be *Broom v Ritchie* (1904) 6 F 942 and *Finburgh v Moss' Empires Ltd* 1908 SC 928.

⁵¹ See again *Personality, Confidentiality and Privacy in Scots Law*, para 9.04.

⁵² p 940, per Lord Stormonth-Darling.

⁵³ p 946, per Lord Justice-Clerk Macdonald.

⁵⁴ See again *Defamation and Related Actions in Scots Law*, p 58.

⁵⁵ Kenneth McK Norrie, *Defamation and Related Actions in Scots Law* (1995), at p 47. See also the discussion in ch 3 above.

⁵⁶ 2011 GWD 437-442.

⁵⁷ R T Whelan, “Slander of Property: *Continental Tyre Group Ltd v Robertson*”, (2011) 15 Edin LR 437.

⁵⁸ At 23 of the judgement.

between slander of property and defamation, nor does it make clear when a claim based on one or the other may be appropriate. The Sheriff Principal took the view that this was unnecessary, given that the action was confined to seeking an interdict to prevent repetition of the allegations about the tyres. The question of whether they amounted to defamation or verbal injury was therefore thought to be incidental; the main question was whether there was an actionable wrong.⁵⁹ However, the case has given rise to commentary which is useful in identifying where the distinction may lie.

13.29 There would seem to be merit in the approach taken by Ryan Whelan in his comment on the *Continental Tyre Group* case as regards verbal injury in the business context. He suggests that the distinction between verbal injury and defamation has not been properly maintained. Allowing cases to go to proof before answer on the basis of being simply “actionable wrongs”, and therefore potentially to go forward erroneously as defamation actions, perpetuates the erosion, to the benefit of the pursuer. He argues that it is only where the “tend to lower the plaintiff/pursuer in the estimation of right-thinking members of society generally” test is properly met that an action should be treated as one based on defamation.

13.30 Professor Norrie suggests that it is unlikely that an allegation concerning a person’s property will be defamatory of that person as an individual. The statement that the property a person owns is defective in some way will seldom amount to an attack on a person’s character, honour or reputation as an individual.⁶⁰ In relation to *business* reputation it is not necessarily defamatory to state that another person owns or distributes (as opposed to manufactures) property which is unsafe or less than desirable. This could cause the distributor economic loss or loss of goodwill, but will not, it is suggested, found an action for defamation, unless there is an implication that the pursuer, as a distributor, was aware that the items were unsafe and continued to distribute them in spite of this. In contrast, defamation of business reputation may arise if the pursuer is the manufacturer of the items in question, as opposed to the distributor.⁶¹ In relation to slander of title there may be greater scope for defamation of a person’s character than in connection with slander of property.⁶² However, this would be subject to there being sufficient evidence to allow an innuendo to be drawn of fraud, theft or some other type of dishonesty on the part of the pursuer in relation to the title, founding an action for defamation. Defamation of *business* reputation seems unlikely.

13.31 In relation to falsehood about the pursuer causing business loss, it appears that there is fairly wide scope for findings of defamation in the context of the carrying out of a business. False statements which disparage a person’s professional or business capacity or fitness for their particular office are likely to be regarded as defamatory of the pursuer specifically in relation to their activities in connection with their trade, business or profession. However defamation in this context also encompasses certain types of misconduct that do not necessarily speak of lack of *competence* in the business or professional sphere. Examples of imputations giving rise to defamation of this type include an allegation that a garage persuaded customers to have shock absorbers fitted to their vehicles even though they did not need them and an allegation that a hire-purchase company was aggressive in the

⁵⁹ See again 23.

⁶⁰ See again *Defamation and Related Actions in Scots Law*, p 45.

⁶¹ See p 439 of the Case Comment.

⁶² See again *Defamation and Related Actions in Scots Law*, p 48.

conduct of its business.⁶³ It seems that they could, in appropriate circumstances, perhaps involving a party who is in some way vulnerable, also give rise to defamation of the pursuer as an individual. All of this is likely to make the task of determining the boundary between defamation and verbal injury in the context of falsehood causing business loss a less than straightforward one. By way of illustration, case law has provided examples of conduct which has been classed as falsehood causing business loss. This includes publication of a fictitious interview with a variety artist, painting her in an unpopular light with a view to diminishing her chances of getting work on stage,⁶⁴ and making false claims to the pursuer's customers that the pursuer was about to go out of business, with a view to causing loss of orders.⁶⁵ Given what is said above about misconduct not impinging upon competence, it seems that these could equally be thought to constitute defamation in relation to the carrying out of a business. And yet again they may also be defamatory of a person as an individual, depending on the circumstances involved.

13.32 As far as verbal injury to feelings caused by exposure to public hatred, contempt or ridicule is concerned Professor Reid suggests that the effect of the stringent requirements laid down in *Steele* is that a statement which has had a serious enough impact to generate public hatred, contempt or ridicule is likely also to have been defamatory in the sense of being derogatory or demeaning of the pursuer so as to lower him or her in the estimation of society generally. Indeed, it is possible that something deeper is required for exposure to public hatred, contempt or ridicule, perhaps more akin to abhorrence. If this is accepted, it is highly unlikely that an imputation will be taken to generate exposure to public hatred, contempt or ridicule, but fall short of being defamatory.⁶⁶

13.33 There seems little to be gained by opting for an action for verbal injury rather than defamation as the pursuer in a defamation action has the benefit of the presumptions of malice and falsity. The argument against opting for verbal injury to feelings may be bolstered by the fact that many of the moral issues which may, at one time, have given rise to an adverse public reaction – such as certain matters of lifestyle or sexual relations – are unlikely now to trigger a significant response of the nature required by *Steele*. Professor Reid suggests that, all things being equal, verbal injury actions in relation to injury to feelings are unlikely to have a future role.⁶⁷

13.34 This line of argument would seem to be further supported by the case of *Moffat v West Highland Publishing Co Ltd*.⁶⁸ This involved an action by the director of a media company against the publishers of a newspaper in respect of allegedly defamatory statements in a newspaper article in which he was described as an “in-house bully” in the company in which he worked. It was alleged that the description was intended to suggest, directly and by innuendo, behaviour of a threatening nature designed to cause fear and distress in the company's employees. It was claimed that the words complained of identified the pursuer as a person who tyrannised those in a weaker position; he was not simply

⁶³ See again *Defamation and Related Actions in Scots Law*, at pp 22-24. The examples derive respectively from the cases of *Kwik-Fit-Euro Ltd v Scottish Daily Record and Sunday Mail* 1987 SLT 226 and *NG Napier Ltd v Port Glasgow Courier Ltd* 1959 SLT (Sh Ct) 54.

⁶⁴ *Lamond v Daily Record (Glasgow) Ltd* 1923 SLT 512.

⁶⁵ *Craig v Inveresk Paper Merchants Ltd* 1970 SLT (Notes) 50. In the event this claim was not successful, but only, it is suggested, because the pursuer did not sue the correct defenders. See again *Defamation and Related Actions in Scots Law*, at p 50.

⁶⁶ See para 8.26 of *Personality, Confidentiality and Privacy in Scots Law*.

⁶⁷ See again the discussion para 8.26 of *Personality, Confidentiality and Privacy in Scots Law*.

⁶⁸ 2000 SLT 335.

subject to ridicule as a result. Lord Cameron of Lochbroom took the view that the pursuer was in a position of responsibility in the media industry and might require to suffer what could be described as rough language or unmannerly jests, so long as these did not attack the pursuer's private character, business reputation or fitness for office. There was no substance to the suggestion that any of these had been attacked by the words complained of, or that the words used were capable of being so read either directly or by innuendo.⁶⁹ It would seem that if the category of exposure to public hatred, contempt or ridicule had been recognised as offering redress for a lesser form of wrong than defamation, the court might have been invited to consider its potential application here.

A possible way forward

13.35 In summary, given the serious imputations held not to amount to verbal injury in *Steele*, it seems that little if anything would be lost by abolishing verbal injury to feelings by exposure to public hatred, contempt or ridicule as a category and simply relying on defamation. If the thinking set out above in relation to *convicium* is accepted, certainly as regards Walker's incarnation of *convicium*, this would at the same time dispose of *convicium*. If it is thought that the older understanding of *convicium*, relating to disease and historical scandal, does have a part to play, there might be more modern grounds of action available. Depending on the facts of the particular case, gaps might be filled, for instance, by the law relating to privacy and breach of confidence or, in appropriate circumstances, by a claim based on breach of the data protection principles of the Data Protection Act 1998, including the emerging notion of the so-called right to be forgotten.

13.36 As regards the potential relevance of breach of confidence, a useful illustration may be provided by the case of *Grappelli v Derek Block (Holdings) Ltd.*⁷⁰ This concerned [untrue] allegations that a concert violinist was seriously ill and may never tour again. As much as the case was at the time dealt with as one of alleged defamation, that action being unsuccessful, it seems that it may nowadays be dealt with under breach of confidence.⁷¹ The accepted position in Scots law appears to be that the test for the existence of a duty of confidentiality is simply that the person receiving the information knows or ought to know that the information is fairly and reasonably to be regarded as confidential.⁷² In contrast with the position in relation to defamation and, it seems, verbal injury, the fact that the information passed on is true does not negate any breach of a duty of confidentiality.

13.37 The principle underlying the right to be forgotten is that a person should not be stigmatised permanently or periodically by an action performed sufficiently far in the past. The right was brought into focus by the decision of the Court of Justice in the case of *Google Spain v Costeja*.⁷³ The underlying principle is encapsulated in Article 12 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. A person can ask for data to be deleted once the retention of the data is no longer required, or where the data is incomplete or inaccurate. In the UK the Directive has been implemented by the Data Protection Act 1998. The data protection

⁶⁹ At p 338.

⁷⁰ [1981] 1 WLR 822.

⁷¹ See further Rosalind McInnes, *Scots Law for Journalists* (8th edn, 2010), para 30.02.

⁷² See further Gloag and Henderson, *The Law of Scotland* (13th edn, 2012), para 29.30.

⁷³ Case C-131/12 [2014] 3 CMLR 50.

principles are set out in Part 1 of Schedule 1 to the Act. The notion of the right to be forgotten may be said to be captured at paragraph 5 of Part 1—"Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes."⁷⁴

13.38 The availability of confidentiality and data protection as grounds of action do not, of course, go any way towards meeting concern that may arise from any decision to make communication to a third party a requisite of defamation. These grounds operate on the basis of publication having taken place. However, as noted above, the law relating to protection from harassment may come into play.⁷⁵

13.39 By contrast, as much as there has not so far been any successful action in Scotland involving slander on a third party, it is possible to envisage circumstances in which this would be the only available cause of action, given that defamation is limited to action concerning imputations of which the pursuer is the subject. In practice, cases are likely to be rare, however. Similarly, it seems that there may be advantage in retaining the business categories – slander of title, slander of property and falsehood about the pursuer causing business loss. On the basis of *Mclrvine v Mclrvine* there is doubt as to whether casting aspersions on a person's title to convey subjects with vacant possession could be said to lower their reputation in the estimation of right-thinking members of society generally unless there was a basis to draw an innuendo of fraud, theft or some other type of dishonesty. Similarly, in the *Continental Tyre* type of case, it seems there would be a need for evidence of an innuendo that the pursuer was proceeding with distribution of items which he or she knew to be unsafe or defective. In the business context it does not seem safe to assume that everything potentially caught under verbal injury would also be defamatory, albeit that there may be greater scope for findings of defamation in relation to falsehood about the pursuer causing business loss than in relation to the other two categories. Indeed, to the extent that falsehood about the pursuer causing business loss is intended to be a residual category, sweeping up matters of business loss that do not concern either property or title, one possibility is that it could be redrawn in statutory form as a more general head of claim embracing property and title.

13.40 For present purposes our intention is to assess the extent to which the various categories of verbal injury may continue to be of practical utility by filling gaps which would otherwise be left open. In assessing any such gaps account should be taken not only of the existing reach of defamation law but also of the law relating to breach of confidence and the data protection principles. We have not as yet formed any concluded view on the future of the law of verbal injury, and how it may be modified or clarified. That is likely to be influenced by how the reform of defamation law is taken forward, in the light of the present consultation exercise. Our views in the present chapter are preliminary and are intended to assist consultees in answering the questions which follow.

⁷⁴ It is to be noted that a common Data Protection Regulation is currently being prepared by the European Commission. This sets out a general EU framework for data protection, applicable to all EU member states. It includes express provision for a right to be forgotten, requiring companies collecting data to delete information upon request.

⁷⁵ See para 3.4 above.

- 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.**
- 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.**

Chapter 14 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)
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)
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)
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)
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)
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)
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)
8. Do consultees consider, as a matter of principle, that the defence of truth should be encapsulated in statutory form?

(Paragraph 4.15)

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)
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)
11. Do you agree that the defence of fair comment should be set out in statutory form?
(Paragraph 5.21)
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)
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)
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)
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)
16. Should there be a statutory defence of publication in the public interest in Scots law?
(Paragraph 6.15)
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)
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)

19. Should there be a full review of the responsibility and defences for publication by internet intermediaries?
- (Paragraph 7.33)
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)
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)
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)
23. Do you think that intermediaries who search the internet according to user criteria should be responsible for the search results?
- (Paragraph 7.47)
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)
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)
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)
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)

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)
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)
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)
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)
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)
33. Should the offer of amends procedure be incorporated in a new Defamation Act?
- (Paragraph 9.12)
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)
35. Are there any other amendments you think should be made to the offer of amends procedure?
- (Paragraph 9.12)
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)
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)

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)
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)
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 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)
41. Should the limitation period applicable to defamation actions be reduced to less than three years?
- (Paragraph 10.20)
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)
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)
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)
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)
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)

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)

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)

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)

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)

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)

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)

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)

Appendix

Defamation Act 2013

2013 CHAPTER 26

An Act to amend the law of defamation

[25th April 2013]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Requirement of serious harm

1 Serious harm

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.

Defences

2 Truth

- (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
- (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
- (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

- (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

3 Honest opinion

- (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
- (2) The first condition is that the statement complained of was a statement of opinion.
- (3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.
- (4) The third condition is that an honest person could have held the opinion on the basis of—
 - (a) any fact which existed at the time the statement complained of was published;
 - (b) anything asserted to be a fact in a privileged statement published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
- (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
- (7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—
 - (a) a defence under section 4 (publication on matter of public interest);
 - (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
 - (c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
 - (d) a defence under section 15 of that Act (other reports protected by qualified privilege).
- (8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

4 Publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that—
 - (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

- (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
- (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
- (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
- (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
- (6) The common law defence known as the Reynolds defence is abolished.

5 Operators of websites

- (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
- (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
- (3) The defence is defeated if the claimant shows that—
 - (a) it was not possible for the claimant to identify the person who posted the statement,
 - (b) the claimant gave the operator a notice of complaint in relation to the statement, and
 - (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.
- (5) Regulations may—
 - (a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);
 - (b) make provision specifying a time limit for the taking of any such action;
 - (c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;
 - (d) make any other provision for the purposes of this section.

- (6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—
 - (a) specifies the complainant's name,
 - (b) sets out the statement concerned and explains why it is defamatory of the complainant,
 - (c) specifies where on the website the statement was posted, and
 - (d) contains such other information as may be specified in regulations.
- (7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.
- (8) Regulations under this section—
 - (a) may make different provision for different circumstances;
 - (b) are to be made by statutory instrument.
- (9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (10) In this section “regulations” means regulations made by the Secretary of State.
- (11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.
- (12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

6 Peer-reviewed statement in scientific or academic journal etc

- (1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.
- (2) The first condition is that the statement relates to a scientific or academic matter.
- (3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—
 - (a) the editor of the journal, and
 - (b) one or more persons with expertise in the scientific or academic matter concerned.
- (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—
 - (a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and
 - (b) the assessment was written in the course of that review.

- (5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
- (6) A publication is not privileged by virtue of this section if it is shown to be made with malice.
- (7) Nothing in this section is to be construed—
 - (a) as protecting the publication of matter the publication of which is prohibited by law;
 - (b) as limiting any privilege subsisting apart from this section.
- (8) The reference in subsection (3)(a) to “the editor of the journal” is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.

7 Reports etc protected by privilege

- (1) For subsection (3) of section 14 of the Defamation Act 1996 (reports of court proceedings absolutely privileged) substitute—

“(3) This section applies to—

 - (a) any court in the United Kingdom;
 - (b) any court established under the law of a country or territory outside the United Kingdom;
 - (c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;

and in paragraphs (a) and (b) “court” includes any tribunal or body exercising the judicial power of the State.”
- (2) In subsection (3) of section 15 of that Act (qualified privilege) for “public concern” substitute “public interest”.
- (3) Schedule 1 to that Act (qualified privilege) is amended as follows.
- (4) For paragraphs 9 and 10 substitute—

“9 (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

 - (a) a legislature or government anywhere in the world;
 - (b) an authority anywhere in the world performing governmental functions;
 - (c) an international organisation or international conference.

(2) In this paragraph “governmental functions” includes police functions.
- 10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.”

(5) After paragraph 11 insert—

“11A A fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.”

(6) In paragraph 12 (report of proceedings at public meetings)—

(a) in sub-paragraph (1) for “in a member State” substitute “anywhere in the world”;

(b) in sub-paragraph (2) for “public concern” substitute “public interest”.

(7) In paragraph 13 (report of proceedings at meetings of public company)—

(a) in sub-paragraph (1), for “UK public company” substitute “listed company”;

(b) for sub-paragraphs (2) to (5) substitute—

“(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

(4) In this paragraph “listed company” has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).”

(8) In paragraph 14 (report of finding or decision of certain kinds of associations) in the words before paragraph (a), for “in the United Kingdom or another member State” substitute “anywhere in the world”.

(9) After paragraph 14 insert—

“14A A fair and accurate—

(a) report of proceedings of a scientific or academic conference held anywhere in the world, or

(b) copy of, extract from or summary of matter published by such a conference.”

(10) For paragraph 15 (report of statements etc by a person designated by the Lord Chancellor for the purposes of the paragraph) substitute—

“15 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.

- (2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

(11) For paragraphs 16 and 17 (general provision) substitute—

“16 In this Schedule—

“court” includes—

- (a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State;
- (b) any international tribunal established by the Security Council of the United Nations or by an international agreement;
- (c) any international tribunal deciding matters in dispute between States;

“international conference” means a conference attended by representatives of two or more governments;

“international organisation” means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation;

“legislature” includes a local legislature; and

“member State” includes any European dependent territory of a member State.”

Single publication rule

8 Single publication rule

(1) This section applies if a person—

- (a) publishes a statement to the public (“the first publication”), and
- (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) “publication to the public” includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

- (a) the level of prominence that a statement is given;

- (b) the extent of the subsequent publication.
- (6) Where this section applies—
- (a) it does not affect the court’s discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and
 - (b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

Jurisdiction

9 Action against a person not domiciled in the UK or a Member State etc

- (1) This section applies to an action for defamation against a person who is not domiciled—
- (a) in the United Kingdom;
 - (b) in another Member State; or
 - (c) in a state which is for the time being a contracting party to the Lugano Convention.
- (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.
- (3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.
- (4) For the purposes of this section—
- (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;
 - (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.
- (5) In this section—

“the Brussels Regulation” means Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(OJ No L299 16.11.2005 at p 62);

“the Lugano Convention” means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom

of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

10 Action against a person who was not the author, editor etc

- (1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.
- (2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

Trial by jury

11 Trial to be without a jury unless the court orders otherwise

- (1) In section 69(1) of the Senior Courts Act 1981 (certain actions in the Queen’s Bench Division to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit “libel, slander,”.
- (2) In section 66(3) of the County Courts Act 1984 (certain actions in the county court to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit “libel, slander,”.

Summary of court judgment

12 Power of court to order a summary of its judgment to be published

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.
- (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.
- (3) If the parties cannot agree on the wording, the wording is to be settled by the court.
- (4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.
- (5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

Removal, etc of statements

13 Order to remove statement or cease distribution etc

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order—

- (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
 - (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.
- (2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.
- (3) Subsection (1) does not affect the power of the court apart from that subsection.

Slander

14 Special damage

- (1) The Slander of Women Act 1891 is repealed.
- (2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

General provisions

15 Meaning of “publish” and “statement”

In this Act—

“publish” and “publication”, in relation to a statement, have the meaning they have for the purposes of the law of defamation generally;

“statement” means words, pictures, visual images, gestures or any other method of signifying meaning.

16 Consequential amendments and savings etc

- (1) Section 8 of the Rehabilitation of Offenders Act 1974 (defamation actions) is amended in accordance with subsections (2) and (3).
- (2) In subsection (3) for “of justification or fair comment or” substitute “under section 2 or 3 of the Defamation Act 2013 which is available to him or any defence”.
- (3) In subsection (5) for “the defence of justification” substitute “a defence under section 2 of the Defamation Act 2013”.
- (4) Nothing in section 1 or 14 affects any cause of action accrued before the commencement of the section in question.
- (5) Nothing in sections 2 to 7 or 10 has effect in relation to an action for defamation if the cause of action accrued before the commencement of the section in question.
- (6) In determining whether section 8 applies, no account is to be taken of any publication made before the commencement of the section.

- (7) Nothing in section 9 or 11 has effect in relation to an action for defamation begun before the commencement of the section in question.
- (8) In determining for the purposes of subsection (7)(a) of section 3 whether a person would have a defence under section 4 to any action for defamation, the operation of subsection (5) of this section is to be ignored.

17 Short title, extent and commencement

- (1) This Act may be cited as the Defamation Act 2013.
- (2) Subject to subsection (3), this Act extends to England and Wales only.
- (3) The following provisions also extend to Scotland—
 - (a) section 6;
 - (b) section 7(9);
 - (c) section 15;
 - (d) section 16(5) (in so far as it relates to sections 6 and 7(9));
 - (e) this section.
- (4) Subject to subsections (5) and (6), the provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint.
- (5) Sections 6 and 7(9) come into force in so far as they extend to Scotland on such day as the Scottish Ministers may by order appoint.
- (6) Section 15, subsections (4) to (8) of section 16 and this section come into force on the day on which this Act is passed.

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