Book Review

Personality, Confidentiality and Privacy in Scots Law
Elspeth Reid

In the midst of the ‘Giggs-gate’ super-injunction saga it seems apt to be reviewing Elspeth Reid’s textbook, ‘Personality, Confidentiality and Privacy in Scots Law’. With judicial and legislative developments afoot in this evolving area of law there will be many practitioners and academics seeking an authoritative textbook to inform and guide their viewpoints. This is the textbook to which they (and others) should turn.

Spanning 432 pages, this book covers much ground. It begins by providing a comparative and historical account of personality, confidentiality and particularly privacy, where the impact of the European Convention on Human Rights (ECHR) is considered. The text then examines the law regarding protection of the person; protection of liberty; defamation and verbal injury; and breach of confidence and protection of privacy. Whereas it is common, as the preface notes, to explain complexities in this area of law ‘by references to shoehorns, cans of worms, and of course poor overworked Pandora’, Reid adopts a different and infinitely more effective approach: clear legal analysis. Throughout the book Reid skilfully examines both the Scottish and European jurisprudence, providing the reader with an account of both. This review will concentrate on part four of the text: ‘Defamation and Verbal Injury’. This is not due, it must be said, to any particular excellence; the entire book is of an impressive standard. These chapters have instead been chosen for their importance in the view of the present author, and their ability to illustrate the generally applicable merits of this text.

In many respects part four of Reid’s text serves to update and expand upon the leading Scottish textbook in the area, written by Kenneth Norrie some sixteen years ago (K McK Norrie, Defamation and Related Actions in Scots Law (Butterworths, Edinburgh 1995). Reid’s work, achieving the aforementioned as it does, whilst contributing to various ongoing debates, is therefore a timely and useful contribution. However, more than this, Reid’s exploration of the law in this area serves to highlight and clarify some fundamental points that are regularly overlooked.

The right to protection of reputation is recognised as being guaranteed by Article 8 ECHR. In Scotland there are two routes by which one can protect reputation against false statements that cause damage: defamation and verbal injury. The boundary between the two has however narrowed to the point of
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being unclear. Reid assists in addressing this much overlooked problem. Defamation, Reid writes, is a means of ‘control over expression of that which is objective and false – or at any rate cannot be proved to be true’ (p. 99). Verbal injury meanwhile is harder to define, especially given that it continues to be used in its general sense as a genus and also in the specific sense as ‘an injury that has been inflicted by harmful words which cannot be classified as defamatory’. This is useful, but the real value is at p. 102 where Reid provides a much needed account of what may still constitute a ‘verbal injury’ under the latter head:

(a) intentional injury to business interests caused by false statements;
(b) intentional injury to feelings caused by false statements (although this is now a marginal category, since a claim is more likely to be made for defamation where the statements are so damaging as to be defamatory); and
(c) patrimonial loss suffered as a consequence of a slander upon a third party.

Within chapter seven, eight and nine Reid develops and illustrates the detail of the above verbal injury synopsis. This will assist in clarifying the ambit of verbal injury and, it is hoped, increase its utilisation by practitioners where appropriate. In advancing the above as remaining actionable, Reid notes it unlikely that either ‘loss or injury suffered as a result of the making of true statements’ or ‘injury to feelings suffered as a consequence of a slander upon a third party’ would still be actionable as a verbal injury.

As is illustrated in her exposition of verbal injury, Reid is disciplined in her reading of previous authorities – looking always to contextualise developments and analyse accordingly. This approach is to the reader’s benefit. A ‘labyrinth’ is how Lord Wheatley (Steele v Scottish Daily Record and Sunday Mail 1970 SLT 53 at para. 60) described the myriad of complexities in the Scottish law regarding defamation and verbal injury. His Lordship’s observation was accurate then, and remains applicable now. Nevertheless, in spite of this, Reid has produced a book which provides a useful and accurate synopsis of the present law. This will be infinitely helpful to those approaching (or utilising in argument) the ‘labyrinth’ that are the primary authorities.

Chapter ten, entitled ‘Defamatory Imputations’, thoroughly analyses the action of defamation in Scotland. Throughout there are interesting observations. For instance, at p. 138, Reid observes that the ‘right-thinking members of society’ test assumes ‘a level of community consensus as to the ‘right’ way to think’. Reid opines that ‘inevitably the standard becomes based upon a normative rather than a purely descriptive assessment – the values that members of the community ought to have, in the judgement of the court’. Far from being disadvantageous, it is further noted, with reference to a race case from the Supreme Court of South Carolina, that this is virtuous because it enables the court to progress the right-thinking person’s view. The normative
nature of the test should, according to Reid, be utilised so that the values and principles of the ECHR are held to inform the attitudes of the ‘right-thinking’ member of society in determining if a statement is defamatory or not. This seems sensible.

In chapter eleven the attention of the reader is turned to the defences and partial defences that may be advanced against an action for defamation: truth; absolute privilege; qualified privilege; fair comment; offer of amends; and innocent dissemination. Of the defences the most controversial at present is fair comment, recently examined and renamed ‘honest comment’ in a Supreme Court case which followed publication of the text (Spiller v Joseph [2010] UKSC 53). Reid’s discussion of fair comment, particularly the extent to which reference must be made to the facts upon which a comment is based – that being the fourth proposition in Cheng ([2001] EMLR 777, per Lord Nicholls at para. 19) and the question at the centre of Spiller - is illustrative of this text’s ability to remain relevant and useful in a rapidly developing area.

Throughout defamation law there are legislative (and likely piecemeal common law) changes on the horizon. Although the text obviously does not include them, it will undoubtedly provide a coherent and accessible basis upon which the changes can be assessed and further research undertaken. This book will be particularly useful for students at honours or masters level, and one would accordingly advocate this text as prescribed reading. Priced at £95 it is in all likelihood beyond the reach of all but the most dedicated students; thus, at the very least, law libraries should purchase copies for consultation.

In closing, homage must be paid to the depth of research, analysis and clarity of expression upon most complex concepts, material and jurisprudence within this text. Most academic books, whether legal writings or not, tend to be either accessible or impressively and accurately researched. It is rare indeed that you find a book dealing with a complex subject-matter which does both. ‘Personality, Privacy and Confidentiality’ is such a text, and an impressive example at that. I recommend it without reservation to student, practitioner and academic alike. A pleasure to read and review.

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