FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 27
XA111/19

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the remit from the Sheriff Appeal Court

in the cause

STUART CAMPBELL

Pursuer and Appellant

against

KEZIA DUGDALE

Defender and Respondent

Pursuer and Appellant: Sandison QC; Halliday Campbell WS
Defender and Respondent: Dunlop QC; Bannatyne Kirkwood France & Co

27 May 2020

Introduction

[1] The pursuer challenges the sheriff's interlocutor of 16 April 2019, which assoilzies the defender in the pursuer's action of defamation. The sheriff held that the defender's article in the Daily Record newspaper was defamatory in that it contained an innuendo that the

pursuer was homophobic. However, he went on to determine that the defender had established the defence of fair comment.

[2] The issues are, first, whether the statement in the article was a comment or an assertion of fact. Only if it were comment might the defence of fair comment apply. Secondly, if it was a comment, was there sufficient reference to facts which were true and upon which the comment could be based? Thirdly, was the comment fair? The pursuer also takes issue with the sheriff's assessment of damages at £100.

Background

[3] The pursuer has operated a blog called Wings Over Scotland since 2011. He had a related Twitter account. The blog had around 200,000 to 300,000 views per month. The Twitter feed had 60,000 followers. The pursuer's style can be rude, especially about unionist politicians, including the defender. The pursuer had previously described the defender as a serial liar.

[4] At the material time, the defender was a Member of the Scottish Parliament. She was the leader of the Scottish Labour Party. She wrote a weekly column, or rather page, for the Daily Record newspaper. This would refer to a variety of topical subjects.

[5] On 3 March 2017, during a conference of the Scottish Conservative and Unionist Party, which he attended, the pursuer tweeted as follows:

> "Oliver Mundell is the sort of public speaker that makes you wish his dad had embraced his homosexuality sooner".

Oliver Mundell was, and remains, a Conservative MSP. His father, David Mundell, is a Conservative MP. He was the Secretary of State for Scotland at the material time. On 13 January 2016, around 14 months prior to the pursuer's tweet, David Mundell had stated

that he was "coming out publicly as gay". His sexuality was public knowledge. He was reported in the press as commenting that the pursuer's tweet was homophobic.

[6] The defender's page in the Daily Record of 7 March 2017, a copy of which is appended hereto, referred to a number of matters. There was a central piece on what the defender described as the Conservative Government's austerity agenda. This was inset with the defender's view of the Scottish Cup draw. A side column dealt with gender balance in the Scottish Parliament. Below that was a short item on the lack of trade union involvement in certain supermarkets. At the top of the page there was a headline which stated: "Twitter tirade highlights divisions". The article to which it related read as follows:

> "I was shocked and appalled to see a pro-independence blogger's homophobic tweets during the Tory conference.
>
> Abuse and discrimination should have no part in our politics.
>
> But the Twitter tirade against David Mundell and his son Oliver is sadly symptomatic of our divided politics.
>
> People are welcome to disagree and challenge – indeed, it is healthy that we do so.
>
> But it is utterly unacceptable for someone to face abuse because of their sexuality, or indeed race or religion.
>
> Such comments are, of course, not unique to the man who tweets as Wings Over Scotland.
>
> But it is depressing and disheartening that there are SNP politicians who promote his work.
>
> As politicians, we have a responsibility to lead from the front and call out abuse for what it is – unacceptable. No elected member of any party should be endorsing someone who spouts hatred and homophobia towards others.
>
> It runs entirely counter to the sort of progressive, welcoming country we all want to (*sic*) Scotland to be.
>
> I hope Wings Over Scotland – and the SNP politicians who share his work – will reflect on what was said and recognise it as unacceptable.
>
> We are divided enough.
>
> Scottish Labour believe together we're stronger."

A copy of the page is appended.

[7] The pursuer's claim was that the article was defamatory in that it said that he: had sent "homophobic tweets"; had made David Mundell "face abuse" because of his sexuality" (the article was accompanied by a photograph of the two Mundells with the caption "ABUSED"); had "spouted hatred and homophobia towards others"; and is homophobic.

The Proof

[8] The evidence, as summarised by the sheriff, was broadly as follows. The pursuer said that he had been offended by the article. It was ridiculous and absurd for him to be described as homophobic. He had been horrified and considered that he had been defamed. No intelligent person would have considered his tweet to be homophobic. He had written a significant number of articles which were pro-equality and supportive of the gay lifestyle. A 2009 tweet about a video game level being too easy and therefore suitable only for "girls and homosexuals" had been a satire. A tweet in December 2016 about the recently deceased pop star, George Michael, and two other politicians, all three of whom were homosexual, was in the same category. The tweet of 3 March 2017 was not criticising, or even commenting on, the sexuality of David Mundell. Its sole purpose was to denigrate Oliver Mundell's public speaking skills by using a joke about him never having been born.

[9] Paul Kavanagh is the author of the pro-independence "Wee Ginger Dug" blog. He testified to the hardship and abuse which he had suffered as a result of his homosexuality. Homophobia, in its various forms and contexts, had blighted his life. Being described as homophobic was a particularly serious slur. It was the equivalent of being called a racist or a holocaust denier. It was particularly serious for a blogger, whose website or Twitter feed could be blocked and whose credibility would be destroyed. The pursuer's tweet was

"crass", "tasteless" and "insulting", but it was not homophobic. The pursuer's past writings showed that he was not homophobic.

[10] Colin Macfarlane is the director of Stonewall Scotland. This is a charity which is part of a European network. It is protective of lesbian, gay, bisexual and transgender rights. Stonewall's website described "homophobia" as:

> "the fear or dislike of someone, based on prejudice or negative attitudes, beliefs or views about lesbian, gay or bi people."

Mr Macfarlane thought that the pursuer's tweet was homophobic because it was "unnecessary" to reference David Mundell's sexuality and homosexuality had been the punchline.

[11] The defender described the pursuer's output as containing insulting personal remarks. The pursuer's comments about her had involved personal abuse. His tweet from 2009, which had referred to "girls and homosexuals", was homophobic. A tweet could not be a joke if it depended on a reference to sexuality at the expense of gay people. The defender had written her article in response to the pursuer's tweet. She had not made the first public comment on the tweet. There had been quite a negative reaction to it in other newspapers. Several commentators had thought that the tweet was homophobic and offensive. The defender had referred to "someone who spouts hatred" because MSPs were leaders who set the tone for others. They had a responsibility not to share the pursuer's material. The tweet was homophobic in that it considered gay people to be lesser beings because they could not, or did not, have children. It was not a joke. Homophobia was not funny in any form. The Mundell family were being abused on account of David Mundell's sexuality. The purpose of the article was to discuss the damage done by such material. It was poisonous to political debate. The Scottish National Party should not encourage it.

The sheriff's findings and reasoning

[12] On 16 April 2019, the sheriff found that, while the article bore the meaning that the pursuer was homophobic, it was fair comment. The sheriff considered both parties and their witnesses to be both credible and reliable. The pursuer and the defender had presented their positions in an honest manner. The pursuer was a man of principle, who was unwavering in his rejection of all forms of homophobia, even if the tone and terms of his writings were difficult to endorse.

[13] There were various definitions of homophobia. Most had a central theme of a fear, hatred or dislike of homosexuals. Neither the defender nor Mr Macfarlane could explain why the tweet was homophobic, in the sense that it demonstrated fear, hatred or dislike of homosexuality, rather than simply being offensive to gay people. Being described as homophobic was significantly damaging to a person's character and reputation; it would tend to lower that person in the estimation of right-thinking members of society generally. The pursuer had a history of supporting and promoting equal rights, including gay rights. A few historic tweets, which had referred to homosexuality, could be understood as derogatory, but they had been intended as ironic. They had no homophobic intent or motivation. The tweet had not been motivated by homophobic views. On a strict construction of the words used, it did not express homophobic views.

[14] The defender's interpretation of the tweet was rational, if incorrect. Her comments were not motivated by malice, but by a genuine perception that the tweet was insulting to homosexual people and was homophobic. The article referred to the tweet as homophobic. The reasonable reader would have understood it to describe the tweet as homophobic and, by innuendo, that the pursuer held homophobic views. The article had a defamatory

meaning. The test was what a reasonable person would take from reading it. The defender had said that she did not intend to go beyond criticising the tweet itself, but her intentions were not decisive.

[15] The next question was whether the defamatory meaning was a statement of fact or comment. If it was the former, the defence of *veritas* (which the sheriff held was not made out) could be pled. If the latter, the defence of fair comment would be available. The matter was one of common sense. The question was whether there was an "expression of an opinion as to a state of facts truly set forth" (*Archer* v *Ritchie and Co* (1891) 18 R 719 at 727). The comment on the facts had to be fair. The comment had been based on supporting facts which were materially true.

[16] A minor inaccuracy, which was all the reference to "tweets" (plural) amounted to, would not prevent the defence from succeeding. Whether there had been more than one tweet was easily checked by the modern reader via a Twitter search. It did not undermine the fairness of the article. Other, true, supporting facts were stated. The reference to "facing abuse" was not a fact, but a value judgment. Whether or not the tweet amounted to abuse, and which of the Mundells was facing the abuse, were matters of opinion. Although David Mundell had not strictly been abused, his sexuality was the focus of the jibe. It was not unreasonable to conclude that he had been abused. The reference to "spouts hatred" could not be taken literally, but was a pejorative description of the pursuer's manner of writing. "[H]atred" was a matter of opinion and was justified by the pursuer's history of tweeting and blogging. "[H]omophobia" was a value judgment; not a wrong assertion of fact. It was an honest comment.

[17] The comment was fair because it could be rationally justified from the underlying facts. What was fair involved an objective test. Applying common sense, not everybody

would take the pursuer's tweet to be a joke about homosexuality. The article was the kind of subjective, rational and honest public comment, which was protected as fair comment. The reasonable reader would be able to work out what the defender's reasoning had been and, therefore, whether it was fair. If a commentator showed rationally supportable working for a comment, it would be likely to be regarded as fair. A reasonable reader would be able to understand this from the article and come to his or her own judgment on the fairness of the defender's view.

[18] The pursuer had suffered no quantifiable financial or other loss. There was no evidential basis upon which to conclude that, in the two years since the article, the pursuer had lost any influence, reputation or credibility as a social media commentator or a campaigner for equal rights. There was no evidence of any loss of followers, loss of opportunity, diminished influence or of outrage amongst the public, beyond the customary exchange of robust views on his Twitter feed. There was no basis for an award beyond wounded feelings. The value of any loss would have been quantified at £100. The pursuer was not entitled to hold others to a higher standard of respect than he was willing to adopt himself. He had chosen insult and condemnation as his style. He had received these in return, after entering the political arena with a quiver of poisoned arrows. Receiving an arrow in return was no more than collateral damage; and not an unjust wound. The pursuer could not dismiss the feelings or reputations of his opponents cheaply, yet receive a high valuation of his own.

Submissions

Pursuer

[19] The pursuer submitted that the defence of fair comment was available only where

there was an opinion based on true facts (*Archer* v *Ritchie and Co* (*supra*); *Massie* v *McCaig (No. 1)* 2013 SC 343). The defender required to show that: each statement of fact was true; the matter was one of public interest (which was not in issue); and the comment on the facts was fair (*Fairbairn* v *Scottish National Party* 1979 SC 393; *Massie* v *McCaig (No. 1)* (*supra*)). Whether the comment was a fair inference was a matter of common sense (*Massie* v *McCaig (No. 1)* (*supra*)). The defence was not made out, for three reasons.

[20] First, the defender's statements were of fact. They were not comment. Before they could be comment, the content needed to be clearly identified as such (*Branson* v *Bower (No. 1)* [2001] EMLR 32 (p 800) at 806, citing *Hunt* v *Star Newspapers* [1908] 2 KB 309 at 319, adopted in *Wheatley* v *Anderson and Miller* 1927 SC 133 at 147; see also *London Artists* v *Littler* [1969] 2 QB 375 at 395-6). The issue was whether the content was "recognisable" as comment (*Joseph* v *Spiller* [2011] 1 AC 852, adopting *Tse Wai Chun* v *Cheng* [2001] EMLR 777 at para 17; *Wildcat Haven Enterprises* v *Wightman* [2020] CSOH 30 at para [29]) or "discernibly" comment (*Butt* v *Secretary of State for the Home Department* [2019] EMLR 23 at para 39). The allegation was that the pursuer was homophobic. Whether that was stated explicitly or through innuendo, the only defence available to a defamatory statement of fact was *veritas* (Norrie, *Defamation and Related Actions in Scots Law* at 140).

[21] The article's primary premise was the assumed fact that the pursuer was an abusive homophobe. The words would not strike the ordinary, reasonable reader (*London Artists* v *Littler* (*supra*)) as setting forth merely the defender's opinion of the pursuer's character. The sheriff erred in categorising the allegation as comment. He had concentrated on the defender's own views on the homophobic nature of the tweet.

[22] It was accepted that some words were redolent of opinion whilst others were not. The majority were in the middle ground and their categorisation would depend upon their

context. A description of someone as a homophobe could be a matter of opinion or a statement of fact. However, homophobes existed as did racists and holocaust deniers. It was accepted also that the article was on a page which contained the defender's comments on topical matters, and what was written was not being put forward as reportage. However, comment has to be about something. The ordinary reasonable reader would take it that the defender was commenting on the fact that the pursuer was an abusive homophobe. The article contained no explanation of why the defender thought that the tweet was homophobic (cf *Greenstein* v *Campaign Against Antisemitism* [2019] EWHC 281 (QB)). The defence failed at the first hurdle as it was not discernibly or clearly comment.

[23] Secondly, if the defamatory statements were comment, there were no sufficient and accurate facts upon which it was based. For a comment to be fair, it was necessary to state the reason for it clearly (*Archer* v *Ritchie & Co* (*supra*) at 727). The facts had to be substantially true (*Wheatley* v *Anderson and Miller* (*supra*) at 145). The basic facts were those which went to the "pith and substance of the matter" (*London Artists* v *Littler* (*supra*) at 391). Section 6 of the Defamation Act 1952 did not make any material change to the law in this respect (*ibid*). The rationale for the defence was to ensure that those reading the comments had the material upon which they could make up their own minds (*Tse Wai Chun* v *Cheng* (*supra*) at 788; *Wheatley* v *Anderson and Miller* (*supra*) at 147). Fairness required more than mere honesty. It was not fair, however honestly held, to describe someone as homophobic and to give no reason (*Fairbairn* v *Scottish National Party* (*supra*); *Massie* v *McCaig (No. 1)* (*supra*)).

[24] The article contained a number of factual errors, notably: the reference to the plurality of "tweets"; that people had "faced abuse"; and that the pursuer had "spouted homophobia". The statement that there had been more than one homophobic tweet was not

a minor inaccuracy. It was significant, when assessing the validity of an allegation, to know whether there had been a single solecism or a series of them. It was not an answer to say that the position could be checked by the modern reader by a Twitter search. There was no factual basis upon which to make the comment that the pursuer was homophobic. The article did not need to refer to the terms of the tweet but it had to contain sufficient reference to the facts.

[25] Thirdly, the comment was not fair. It was not enough for a comment to be fair, that its maker honestly believed it (*Wheatley* v *Anderson and Miller* (*supra*) at 145, 147). There has always been an objective element (*London Artists* v *Littler* (*supra*) at 392-3). Whether the comment was fair was a matter of common sense. The question was not whether it was fair to consider and describe the tweet as homophobic, but whether it was fair to consider and describe the pursuer as homophobic. The assessment of fairness required to take account not only of the subjective element of how the defender viewed the tweet, but also the objective questions of how reasonable or otherwise her views were, and whether she had any basis upon which she could go beyond the tweet to describe the pursuer as homophobic. She had made no effort to check the pursuer's prior publications to see if he was a homophobe. There was no rational basis for the defender's position that she honestly believed the tweet to be homophobic.

[26] Although in England, the law had moved towards subjective honesty (Defamation Act 2013, s 3), Scots law was clear. Fairness was a matter for substantive judgment applying common sense; whether the comment may have been said by a fair minded person. There were three factors to consider. First, the defender had made no effort to check the pursuer's earlier publications to see if the comment was justified. Secondly, in her evidence, the defender was not prepared to say that the pursuer was a homophobe, so she could not have

believed in the truth of what she had written. Thirdly, there was no rational basis for the view that the tweet was homophobic. For the comment to be fair, the tweet had to have some manifestation of a fear or dislike of homosexuals.

[27] Damages ought not to have been restricted. The sum of £25,000 was reasonable. For a person to be called homophobic was a serious imputation on character. The sheriff had accepted that the pursuer had been hurt by the allegation. There was no evidence that the pursuer had ever defamed anyone. For a supporter of equal rights, including gay rights, to be branded homophobic was particularly serious, irrespective of the pursuer's own general writing style. The defender's allegation was made in a national newspaper with a significant circulation by the leader of one of the country's largest political parties. The pursuer's writing style could not justify only a fraction of the £40,000 awarded in *McAnulty* v *McCulloch* 2019 SLT 449. A judge made award was not entitled to the same degree of circumspection as a jury award (*Purdie* v *William Allan & Sons* 1949 SC 477 at 480).

Defender

[28] The defender replied that the sheriff had correctly applied the defence of fair comment. There was no material difference between fair comment in Scotland and in England and Wales (*Wheatley* v *Anderson and Miller* (*supra*); *Joseph* v *Spiller* (*supra*); *Massie* v *McCaig (No. 1)* (*supra*); *Massie* v *McCaig (No 2)* [2013] CSIH 37). In any event, whether the approach to fair comment was to be derived solely from *Archer* v *Ritchie and Co* (*supra*) and *Massie* v *McCaig (No. 1)* or from *Joseph* v *Spiller* (*supra*), the sheriff upheld the defence.

[29] The words were comment and not fact. They were an "expression of an opinion", and thus fell within the ambit of fair comment (*Archer* v *Ritchie and Co* (*supra*); *Massie* v *McCaig (No. 1)* (*supra*)). Whether the words amounted to comment was a question of fact, in

respect of which there was no basis to overturn the sheriff (*Stocker* v *Stocker* [2019] 2 WLR 1033 at paras 58-59, applying *McGraddie* v *McGraddie* 2014 SC (UKSC) 12). The words were comment in the sense of being a value judgment (*Butt* v *Secretary of State for the Home Department* (*supra*) at paras 46-49). The test was how the words would appear to the ordinary reasonable reader (*ibid; Wildcat Haven Enterprises* v *Wightman* (*supra*) at para [22], referring to *Macleod* v *Newsquest (Sunday Herald)* 2007 SCLR 555 at paras [13]-[14]).

[30] Context was relevant. The words were published in a newspaper column which was devoted to opinion pieces and not breaking news. They were something that was or could reasonably be inferred to be a "deduction, inference, conclusion, criticism, judgment, remark or observation" (*Clarke* v *Norton* [1910] VLR 494; *Branson* v *Bower (No. 1)* (*supra*); *Curran* v *Scottish Daily Record and Sunday Mail* 2010 SLT 377; *Wildcat Haven Enterprises* v *Wightman* (*supra*) at paras [28]-[29]). The pursuer had not engaged with this leading definition of comment. The ordinary reader would readily understand that the defender was offering her opinion on the pursuer's tweet, as with an allegation of anti-Semitism (*Greenstein* v *Campaign Against Antisemitism* (*supra*) at paras 34-37) or extremism (*Butt* v *Secretary of State for the Home Department* (*supra*)). The language used was redolent of opinion.

[31] The law did not require a narrative of the underlying facts (*Wheatley* v *Anderson and Miller* (*supra*) at 143 and 147). For fair comment to apply, the comment had, explicitly or implicitly, to indicate, at least in general terms, the facts on which it was based (*Joseph* v *Spiller* (*supra*) at para 51, citing *Kemsley* v *Foot* [1952] AC 345 at 356, at para 72, citing *Lowe* v *Associated Newspapers* [2007] QB 580 at para 57, and at paras 96-98, 105; cf *Tse Wai Chun* v *Cheng* (*supra*) at para 19). Everyone knew what the article had been about. The subject matter was firmly in the public domain. There had been several other articles about the tweet. It had been covered by almost every newspaper and broadcaster in Scotland. It had

become notorious. There had been no need to set out exactly what it said. The only issue of accuracy was the reference to a plurality of tweets. That was a minor inaccuracy, which did not alter the basis for the comment (cf 1952 Act, s 6). In fact the original tweet would have been sent to all of the pursuer's followers and then re-tweeted by them. It was sufficient for there to be a true foundation. It was a derogatory joke based on homosexuality. There was a clear basis for it to be described as homophobic.

[32] The comment was fair, although "fair" was a misnomer. It was better described as "honest comment" (*Joseph* v *Spiller* (*supra*)). A critic did not need stick to what was objectively "fair". He or she could be prejudiced, exaggerated and obstinate. He or she could "dip his pen in gall", for the purpose of legitimate criticism (*Joseph* v *Spiller* (*supra*); *Tse Wai Chun* v *Cheng* (*supra*)). Fair comment deprived the words of actionability even when "couched in vituperative or contumelious language" (*Archer* v *Ritchie & Co* (*supra*) at 727; Walker: *Delict* (2nd ed) 841; Norrie (*supra*) at 146-7 citing *Caldwell* v *Bayne* (1936) 52 Sh Ct Rep 334). Fairness required honesty and relevancy, in the sense that the facts afforded a reasonable foundation for the comment (*Wheatley* v *Anderson and Miller* (*supra*); *Massie* v *McCaig (No. 2)* (*supra*)). The sheriff found the comment to be fair because it represented the defender's genuine opinion and was warranted by the pursuer's tweet. In referring to the defender's failure to investigate the pursuer's other work, the pursuer had conflated two issues; whether there was a factual basis for the comment and whether it was fair. Whether enquiries had been made fell into the former category and not the latter (*London Artists* v *Littler* (*supra*) at 392). When the pursuer made a derogatory joke with a gratuitous reference to homosexuality he left himself open to comment.

[33] The sheriff's assessment of damages should not be interfered with unless it appeared to be out of all proportion to the true sum (*Purdie* v *William Allan & Sons* (*supra*)). *Solatium*

was designed to repair loss to reputation and injured feelings. There was no damage to reputation. The sheriff had been entitled to take account of the pursuer's own public utterances and the time which he spent abusing others online.

Decision

[34] The law in relation to the defence of fair comment in defamation actions is set out in *Massie* v *McCaig (No. 1)* 2013 SC 343. There, it was said (LJC (Carloway), delivering the opinion of the court, at para [30]) that:

> "…Consistent with the general right of freedom of expression:
>
> > '[T]he law will not allow a person to recover damages from another for something the latter has said or published about him, although it may be disagreeable, if the utterance is nothing more than rational liberty of speaking would permit or common sense would support' (Cooper [*Defamation and Verbal Injury*] p 179).
>
> As it was put in *Archer* v *Ritchie & Co* (1891) 18 R 719 (Lord McLaren, p 727):
>
> > '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'.
>
> In more modern times, Lord Ross was content in *Fairbairn* v *Scottish National Party* [1979 SC 393 at 398] with defining the defence by quoting from Walker, *Delict* [1st ed] (p 841), that:
>
> > '…in fair comment the defender must show that each statement of fact is true, that the matter is one of public interest, and that the comment on the facts is fair'.
>
> The issue of whether something is a fair inference from the true facts is not elaborated upon and is left to be decided upon the basis of what Cooper describes as 'common sense'...".

[35] The analysis must start with a determination of what the facts that generated the comment actually were. The true fact is that the pursuer had tweeted that the nature of Oliver Mundell's public speaking was such that it would have been better if his father had declared his homosexuality earlier whereby, it is said, his son would not have been born.

The terms of the tweet are not stated in the article. It is not now disputed that the article was, in its reference to the pursuer as homophobic, defamatory. This is not a case of innuendo. The article was defamatory because it stated *inter alia* that the pursuer had sent out homophobic tweets; ie that he was homophobic. That is a straightforward direct defamatory statement. Had the homophobia been a matter of innuendo, it is not easy to see how fair comment would enter the equation (although cf *Massie* v *McCaig (No. 1)* (*supra*) at para [32]).

[36] Since the article was defamatory, the next question is whether the defamatory elements in it constituted comment, as distinct from fact. The test is how they would reasonably strike the fictitious "ordinary reasonable reader" (see *London Artists* v *Littler* [1969] 2 QB 375 Edmund Davies LJ at 398; *Koutsogiannis* v *The Random House Group* [2020] 4 WLR 25, Nicklin J at paras [16]-[17] cited by Lord Clark with approval in *Wildcat Haven Enterprises* v *Wightman* [2020] CSOH 30 at para [28]). This is simply an indication that the issue is to be approached as a jury question or, in this case, one for the sheriff to determine at first instance.

[37] A comment may, and often will, contain an allegation of fact. It will nevertheless be classified as comment, for the purposes of defamation, if, as it was put in the Australian case of *Clarke* v *Norton* [1910] VLR 494 (Cussen J at 499), it is:

> "…something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc.".

[38] A significant element in the decision may be whether what is said to be comment is readily identifiable as such and is not so intermingled with fact that it is not clear which is which (*Hunt v Star Newspapers* [1908] 2 KB 309 Fletcher Moulton LJ at 319; *Butt* v *Secretary of State for the Home Department* [2019] EMLR 23, Sharp LJ at para 39)). This will be less

important in a situation in which the adverse comment stems from a matter which, as here, is already in the public domain (*Joseph v Spiller* [2011] 1 AC 852, Lord Phillips at para 98).

[39] It is important then to look at both the visual and textual context in which the article appears. The defender's article is at the top of a page which is dedicated to the defender's views on political and other topics. It is not part of a news reporting section. It is accompanied by pieces on female equality, trades unions in supermarkets, the Conservatives' austerity programme and the fortunes of Hibernian FC. The context points towards the piece being one of opinion rather than fact.

[40] The defender set out the facts from which she drew the inference or conclusion which has been determined to be defamatory. This is the reference to the pursuer having sent "tweets" during the Tory conference which made reference to the Mundells. The defender did not detail the foundation of her remarks, by setting out exactly what had been said in the tweet. This may have been caused by a fear of compounding the effect of what she regarded as an abusive tweet. Rather, the article presupposes that the ordinary reader would have been aware, from other media outlets, of the general nature of the tweet and its attempt at humour through the reference to David Mundell's homosexuality. It was not disputed that the nature of the tweet had become widely known, if not public knowledge. In that sense, the terms of the article, coupled with the material in the public domain, are sufficient to draw the reader's attention to the existence of a tweet, or rather tweets, as the basis upon which the defender based her comment.

[41] What the defender said was that the pursuer had: sent "homophobic tweets"; engaged in "a Twitter tirade" against the Mundells, amounting to abuse; and spouted hatred and homophobia towards others. The sheriff has held that, in their context, these words are a commentary on the effect of what was a single tweet. The foundation of the defamatory

elements in the article; notably that the pursuer is a homophobe, was the tweet. These elements are correctly classified by the sheriff as comment on that tweet. They are an expression of a view about the pursuer's attitudes, which are based upon a reading of what he wrote in the tweet.

[42] The defender requires to demonstrate the substantial truthfulness of the underlying facts from which the inference or deduction of homophobia is drawn (*Wheatley* v *Anderson and Miller* 1927 SC 133 Lord Hunter at 145). There is undoubtedly an error in the defender's statement of her factual basis in its reference to tweets (plural). Although the prospect of a reader checking Twitter to ascertain whether there was more than one tweet is an unlikely one, in its context, this error is of no materiality. The relevant facts, which were true, were that a tweet had been sent. It had been sent by the pursuer. It contained material which was critical of David and/or Oliver Mundell.

[43] On whether the comment was fair, the question of whether homophobia and abuse was a fair inference from the true facts is to be decided as a matter of "common sense" (*Massie* v *McCaig* (*supra*) at para [30]). Put in those bare terms, this may not be particularly helpful guidance, in that common sense has a remarkable propensity to vary when introduced into legal disputes. The idea is clear enough. The question is: was it fair to say, on the basis of the single tweet, that the pursuer was homophobic and abusive? Another manner of expressing this is to ask whether the comment is:

> "warranted by the facts, in the sense that the latter afford a reasonable foundation for the former" *Wheatley* v *Anderson and Miller* (*supra*) Lord Hunter at 145).

[44] This, once more, is to be approached as a jury question. It is not simply one of whether the defender genuinely held the view that, given the terms of the tweet, the pursuer was homophobic and abusive. There is an objective element of whether a reasonable person

could reach that, albeit erroneous, view. The court agrees with the sheriff's conclusion that this was indeed fair comment The pursuer's tweet was a derogatory remark containing a gratuitous reference to Oliver Mundell's father's homosexuality. The defender's comments may have been expressed in strong, if not inflammatory, language. The fact that they are in "vituperative or contumelious language" (*Archer* v *Ritchie and Co* (*supra*) Lord McLaren at 726) does not avoid the defence.

[45] In determining whether the defamatory material was comment and not fact, and whether the comment was fair, the court has afforded the sheriff's opinion due respect. However, the court has not approached the matter by looking to see if the sheriff was "plainly wrong" in his determination. Where the primary facts (principally the terms of the article) are not in dispute, the court does not consider that the sheriff had any advantage over the court by reason of having seen and heard the witnesses. The court has therefore reached its own decision on the central matters in dispute, albeit that the conclusion matches that of the sheriff. On the matter of the fairness of the comment, the court has not approached the matter solely on the basis of whether the defender genuinely held the views which she expressed. An additional objective assessment was required.

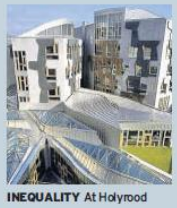
[46] Had the defender failed to establish that the defamatory comments were fair, a significant award well in excess of the nominal sum of £100, which was selected by the sheriff, would have been reasonable. The exercise which the court undertakes when assessing *solatium* in a defamation case is "a free standing exercise which requires the court to address the impact of the slander both to the feelings of the victims but also the damage to their reputation" (*Baigent* v *British Broadcasting Corporation* 2001 SC 281, Lord Johnston, delivering the opinion of the court, at para [26]). Although it has been said that "comparison with other decided cases… is of very limited value" (*ibid* para [22]), the court is entitled to

consider what a jury might have done (*ibid* para [24]). Jury awards where there has been substantial damage to reputation caused by newspaper reports are considerable (*Sheridan* v *News Group Newspapers* 2017 SC 63; *Winter* v *News Scotland* 1991 SLT 828). Judicial awards have been in a similar range (eg *Wray* v *Associated Newspapers* 2000 SLT 869). However, the sheriff has found that there was no loss of reputation, having regard to the pursuer's own activities, and that damages fell to be assessed on the basis of "wounded feelings". He was correct to do so. Cases where there has been a serious impact on a person's reputation, such as *McAnulty* v *McCulloch* 2019 SLT 449, are therefore of little relevance.

[47] The sheriff was right to regard an accusation of homophobia as a serious one in contemporary society. The article was published in a national newspaper with a substantial circulation. The sheriff appears to have accepted that the pursuer was a man of principle, who was genuinely offended by the article and regarded it as unpleasant to be referred to in this manner. Although there are examples of parsimony in judicial awards in such circumstances (eg *Anderson* v *Palombo* 1986 SLT 46, £200), the correct approach is to make an award of some substance, even when there has been no serious impact on a person's reputation (*Gilbert* v *Yorston* 1997 SLT 879, £1,500; *McCluskie* v *Summers* 1988 SLT 55, £7,500). The impact of a defamatory statement on a person's feelings should not be underestimated. Had the court found in favour of the pursuer, it would not have considered a nominal award to be appropriate. It would instead have awarded £5,000 as *solatium* to represent the pursuer's injured or hurt feelings.

[48] The court will accordingly refuse the appeal and affirm the sheriff's interlocutor of 16 April 2019. In terms of section 32(4) of the Court of Session Act 1988, it states that, with one minor exception, it finds the facts material to the cause to have been those found by the sheriff to have been established by the proof. The court proceeded on the basis of these

facts; the exception being the final sentence of finding in fact [15] for which should be substituted "A reasonable award of *solatium* would have been £5,000". The court's reasoning on matters of law is as described herein.



INEQUALITY At Holyrood

Parly must lead by example

SCOTLAND likes to think of itself as a country which is quickly making its way towards gender equality.

Certainly with three women leading political parties in Scotland it may look like that.

It would be easy to congratulate ourselves on how far we've come this International Women's Day.

But scratch the surface and it's obvious there's a long way to go.

This week, findings by Engender show how much work is still to be done to see real action when it comes to women's equality in the workplace.

The Parliament is culpable in this.

The closest we had to gender parity in Holyrood was in 2003 when just under 40 per cent of MSPs were female.

But in this current Parliament, only 35 per cent of MSPs are female – the same proportion as in 2011 – so things have gone backwards and are now stagnating.

We are trying to change that – Scottish Labour went into last year's elections with gender equality among our candidates, but not all other parties could say the same.

The Parliament as a whole needs to lead by example so we can show other public bodies and businesses how and why gender equality is vital to the way that we run our country and our economy.

And we also need more women in Parliament because so many of the spending decisions made there affect women disproportionately.

Engender's report says that there are 703 women missing from leadership roles across politics, the public sector, media, culture and business in Scotland.

These missing women must be found, and encouraged and supported, or Scotland will not be the equal country we all want it to be.

Shops have to change

OPENING new shops is quite rightly a cause for celebration. But that should not mean that we ignore where our retailers could be better.

Lidl and Aldi have been expanding their share of the retail market but are refusing to recognise trade unions in their businesses.

This is unacceptable and needs to change.

Twitter tirade highlights divisions

I WAS shocked and appalled to see a pro-independence blogger's homophobic tweets during the Tory conference.

Abuse and discrimination should have no part in our politics.

But the Twitter tirade against David Mundell and his son Oliver is sadly symptomatic of our divided politics.

People are welcome to disagree and challenge – indeed, it is healthy that we do so.

But it is utterly unacceptable for someone to face abuse because of their sexuality, or indeed race or religion.

Such comments are, of course, not unique to the man who tweets as Wings Over Scotland.

But it is depressing and disheartening that there are SNP politicians who promote his work.

As politicians, we have a responsibility to lead from the front and call out abuse for what it is – unacceptable. No elected member of any party should be endorsing someone who spouts hatred and homophobia towards others.

It runs entirely counter to the sort of progressive, welcoming country we all want to Scotland to be.

I hope Wings Over Scotland – and the SNP politicians who share his work – will reflect on what was said and recognise it as unacceptable.

We are divided enough.

Scottish Labour believe together we're stronger.

ABUSED David Mundell and his son Oliver

Kezia Dugdale

follow @kdugdalemsp

» **Kezia Dugdale is leader of Scottish Labour**

Most vulnerable will pay for Tory failures

TORY Chancellor Philip Hammond will tomorrow continue to pursue his failed austerity agenda.

Time and again, the Tories have been shown up for failing to grow our economy.

Real wages are down, while the cost of living is up. Hard-working families are being squeezed, while the Tories refuse to ask the richest in society to pay their fair share.

Society's most vulnerable are paying the price of Tory failures.

And Theresa May's pursuit of a hard Brexit will only make the situation worse.

The Chancellor will continue to try to balance the books at the expense of the worst-off, while his boss simultaneously wrecks our economy by pulling us out of the single market.

It doesn't have to be this way.

The last Labour government presided over the longest period of sustained economic growth since World War II.

We delivered tax credits and the minimum wage to name just a few of the policies which were designed to help – not punish – hard-working families.

That is the kind of agenda Philip Hammond should be pursuing – and I have written to him setting out Labour's demands.

With austerity having failed and Brexit a profound threat to the Scottish and UK economies, a change of course is not just necessary, it is vital.

I want more support for our North Sea oil and gas industry and action to end the anomaly which means the police and fire services in Scotland are required to pay VAT, at a cost of around £35million a year.

Policies that disproportionately affect women and lead to increases in child poverty are fundamentally unacceptable. That's why he should reverse planned social security cuts.

But here in Scotland, we have the powers to take a different path. Our Scottish Parliament has the ability to make the richest pay their fair share.

But we know that Nicola Sturgeon – the anti-austerity champion of the 2015 general election – has been found out.

Where she could tax the richest, she has chosen to cut £170million out of local services.

Where she could invest in education, she instead argues for a tax cut for air passengers.

Where she could focus on building a fairer, more progressive society, she instead obsesses over breaking up the UK.

The SNP have turned the Scottish Parliament into a conveyor belt for Tory austerity, with a Government whose only aim is to drive a wedge between us and our nearest neighbours.

I will always fight austerity economics and nationalist politics – be that from the Tories or the SNP.

I will always stand up for hard-working families, because that's what Labour politicians do.

It was pressure from Scottish Labour that finally forced the SNP into action over the bedroom tax.

Thousands of people are better off in Scotland today because we never gave up the fight, despite nationalist reluctance.

Just last week, I put forward our plan to use the new powers of the Scottish Parliament to top up child benefit – a move that could take 30,000 children out of poverty.

These are the kind of policies Labour will fight for.

I hope Philip Hammond and Nicola Sturgeon sit up, take notice and realise there is a better way.

UP FOR THE CUP Hibs stars have their sights on two in a row. Pic: Tony Nicoletti

» **MANY people who saw the Scottish Cup draw at the weekend will have made the mouthwatering Old Firm semi-final their pick of the two matches – but not me.**

Hibees know that promotion back to the top flight is their No1 priority this season, but after getting the monkey off their back last season, could they also go and make it two Scottish Cups in a row? I hope so. Here we go...

» **TOMORROW** DON'T MISS JOAN McALPINE'S COLUMN