

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Malicious publication

Actionable types of malicious publication

Sections 21 to 23: three forms of malicious publication

116. Sections 21 to 23 make provision for statutory equivalents of certain categories of the form of wrong known at common law as verbal injury. In summary, whilst equivalents of the forms of verbal injury relating to economic interests are placed on a statutory footing as actionable types of malicious publication, those categories relating to injury to a natural person's feelings are abolished outright.
117. In the context of a business or profession, verbal injury centres on the making of statements which, though not defamatory – in the sense of being likely to make people think less of the pursuer's business or professional position or ability – would nonetheless be expected to cause harm, predominantly of a financial nature. Sections 21 to 23 of the Act provide respectively for three forms of wrong relating to economic interests – statements causing injury to business interests, statements causing doubt as to title to property, and statements criticising assets. Given that the common law equivalents of these are abolished by section 27 of the Act (see further the explanation in paragraphs 122 and 123 below), the effect of this provision is to provide for the re-incarnation of these forms of wrong on a statutory footing under the new description of "malicious publication".
118. To provide an outline, first of all, as to how the three forms of wrong may arise in practice, causing doubt as to title to property (section 22) concerns the making of a false and malicious statement about the pursuer's title to land or other property.¹ This may be designed to jeopardise or at least delay a transaction involving the land or other property in question. Criticising assets (section 23) involves making a false and malicious statement criticising or denigrating the quality, condition, use or treatment of assets owned, possessed, or controlled by the pursuer. This is intended to cover anything with value to the pursuer's business and may include items manufactured or leased as part of a business. It also covers incorporeal assets (i.e. assets with no physical existence, such as different types of rights, for example intellectual property rights) as well as corporeal assets (i.e. physical assets). It may be motivated by a malicious intention to cause financial loss to the pursuer. The third category, causing injury to business interests (section 21), is designed to sweep up forms of wrong that do not fall under either of the other two categories. In essence, it involves making a false and malicious statement about the pursuer's business or business activities. An example

¹ The term "land" is used, alongside "property", to import the wide definition of the term "land" in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

*These notes relate to the Defamation and Malicious Publication (Scotland)
Act 2021 (asp 10) which received Royal Assent on 21 April 2021*

may be a false claim that the pursuer is about to go out of business, thereby causing loss of orders. This may be motivated by a malicious intention to cause harm to the business or business activities of the pursuer. Further explanation as to the meaning intended by the reference to “malicious intention” in this context is provided below.

119. Each of sections 21 to 23, in providing for the three new actionable types of malicious publication, sets out the detail of the requirements which must be satisfied in order to allow proceedings to be brought successfully. In short, one party may bring proceedings against the other party where the defender has made a false and malicious statement about the matter covered by the particular form of wrong, with that statement having been published to a person other than the pursuer. The statement must have caused, or be likely to cause, financial loss to the pursuer. The pursuer can only bring proceedings against the person who has actually made and published the statement complained of, and not any other person (for example, a secondary publisher such as an internet service provider). Unlike a defamation action, it is for the pursuer to prove that the statement complained of is a statement of fact, that the statement is false, and that the statement was made with malice as opposed to these being matters which the defender must prove (by way of a defence) in order to defeat a claim.
120. Subsection (2) of each of the sections then elaborates what is meant by “malicious” in each context. It sets out two matters which the pursuer must show. The first is that the imputation conveyed by the statement complained of was presented as being a statement of fact, rather than opinion, and was sufficiently credible so as to mislead a reasonable person. The second matter is for the pursuer to show that the defender knew that the imputation was false, or that they were recklessly indifferent as to whether it was true, and that the defender’s publication of the statement was motivated by a malicious intention to cause harm to business, to delay or jeopardise a land or property transaction or to cause financial loss through disparaging assets. The question of whether there is a malicious intention will turn on whether the defender was motivated predominantly by the aim of causing detriment to the pursuer, rather than by a wish to further their own economic interests.