

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.

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.

General provision

Section 24: Limit on requirement to show financial loss

121. Section 24 provides that a pursuer in proceedings under Part 2 does not need to show actual financial loss if the statement complained of is more likely than not to cause financial loss. This replaces an equivalent provision in section 3 of the 1952 Act, which is repealed by section 35 of the Act.

Section 25: Statements conveying two or more meanings

122. The effect of section 25 is to exclude the application of the single meaning rule from proceedings brought under Part 2. The effect of that rule, in relation to defamation proceedings, is to provide a mechanism to allow the judge or jury at a proof or trial to determine which of the meanings that may be attributed to a statement is the true meaning to be attributed to the statement in all the circumstances of a case. It is that meaning, and that meaning only, which will be considered from the point of view of determining whether the statement has been defamatory of the pursuer as a matter of fact.
123. Subsection (2) of section 25 provides that, where proceedings are brought under Part 2 in respect of a statement that is capable of conveying two or more distinct meanings, it will not be necessary, in deciding whether harm has occurred, for the court to determine either which of the meanings is conveyed by the statement in the circumstances or that one meaning should be preferred to the exclusion of all others. Subsection (3) clarifies that nothing in this section prevents the court from excluding or disregarding possible meanings where it considers it appropriate.

Section 26: Damages for anxiety and distress

124. Section 26 provides that, in determining the appropriate amount of damages to award in proceedings under Part 2, the court may take into account any distress and anxiety caused to the pursuer by the statement complained of. This is a subsidiary head of recovery; it can only be factored in, as part of the general head of damages, where there has been economic loss. Also, it does not affect any other basis of claim that may be available to a pursuer in proceedings under this Part (as per subsection (2)).

Abolition of common law verbal injuries

Section 27: Abolition of common law verbal injuries

125. Section 27 provides for all rules of law governing the right to bring proceedings in respect of the forms of verbal injury which exist at present in Scots common law to cease to have effect. This includes rules governing *convicium*, a delict which involves the disclosure of a false, or true, statement with the intention of exposing the person who is its subject to public hatred, ridicule or contempt. Reading this section in conjunction with sections 21 to 23, as described above, providing for statutory equivalents of forms of verbal injury relating to economic interests only, the result is that all forms of verbal injury relating solely to injury to a natural person's feelings are abolished outright in terms of the Act. The same is true of slander on a third party, relating to claims for loss, at least partly of a financial nature, arising from a defamatory attack on a third party.
126. Subsection (2) is a transitional provision which makes clear that the abolition of the rules relating to common law verbal injuries in terms of subsection (1) does not affect any right to bring proceedings which arises before subsection (1) comes into force.