

DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) ACT 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: General

Remedies

Section 28: Power of court to order a summary of its judgment to be published

127. Section 28 empowers the court to order an unsuccessful defender in defamation proceedings, or proceedings under Part 2 for a malicious publication, to publish a summary of the court's judgment.
128. Subsection (1) sets out the parameters of the power. It is exercisable only where the court has found in favour of the pursuer in defamation proceedings or proceedings under Part 2.
129. Subsection (2) makes clear that it is for the parties to agree (a) the wording of the summary and (b) the time, manner, form and place of its publication. Where, however, the parties cannot reach agreement on the wording of the summary, the court must determine it (see subsection (3)(a)). This may include, for example, substituting its own wording for that put forward by the parties. Where the parties cannot agree on a matter (or matters) identified in subsection (2)(b), the court may give such directions as it considers appropriate (see subsection (3)(b)).

Section 29: Making a statement in open court

130. Section 29 allows a statement to be made in open court at the point where settlement is reached in defamation proceedings or proceedings under Part 2 for a malicious publication. This may be either a bilateral statement, as agreed between the parties to the proceedings, or a unilateral statement made only by the pursuer. As Scots law currently stands there is not thought to be anything to prevent the reading out of a statement of this nature, commonly known as a settlement statement, although this is not done in practice in Scotland, unlike in England and Wales. The provision is intended to clarify the existence of this remedy as an option.
131. Subsection (1) sets out the basic power for the court to allow a statement to be made in open court.
132. Subsection (2) makes clear that it is for the parties to agree the wording of the statement and all other aspects of its terms. Failing such agreement, the wording may be determined by the pursuer. In terms of subsection (3) the court must, however, give its approval to the wording of a statement before it may be read out in open court. It cannot substitute new terms to replace any with which it does not agree. Its only power is to reject those terms. The parties may then propose alternative wording.

Section 30: Power of court to order display of notice or removal of statement etc.

133. Section 30 is intended to provide for the fact that it may not always be appropriate or possible for the author of material which is the subject of defamation proceedings or proceedings under Part 2 for a malicious publication to prevent further distribution of the material or orchestrate its removal.
134. Subsection (1) sets out two express powers of the court where a statement which is the subject of defamation or Part 2 proceedings is hosted on a website.
135. First, the court is empowered to order that a prominent notice is affixed to a statement on any website on which it appears. Subsection (2) requires this notice to be in a place or form that ensures that a person accessing the statement is made aware of the notice every time that they access the statement.
136. Second, the court is empowered to order the removal of material from any website on which it appears, as well as to order a person who was not the author, editor, or publisher of the material to stop distributing, selling, or exhibiting material containing the statement.
137. The exercise of these two powers is not confined to circumstances in which the final outcome of the proceedings has already been determined by the court. Accordingly, the court would be entitled in an appropriate case to grant an order for the display of a notice or the removal or cessation of distribution on an interim basis, before the final outcome of the proceedings is known.
138. Subsection (3) makes clear that the powers to make such an order do not constrain the court's exercise of other powers that are available to it. This may include the granting of an interdict or interim interdict.
139. Subsection (4) makes clear that the terms "author", "editor" and "publisher" have the same definition, for the purposes of section 30, as they have in section 3 (on secondary publishers).

Section 31: Remedies: transitional provision

140. Section 31 is a transitional provision which makes clear that nothing in sections 28 to 30 (i.e. the provisions on remedies) has effect in relation to defamation proceedings that have begun before the relevant section comes into force.