Making law for Scotland

Making Law for Scotland: The Defamation and Malicious Publication (Scotland) Act 2021

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A. INTRODUCTION

Legislating for the law of delict is notoriously problematic, not least when it comes to defamation.[1] The Defamation and Malicious Publication (Scotland) Act 2021 demonstrates not only the general difficulties of transposing of "inherently indeterminate"[2] common law to statute but also the particular complexities of the Scottish context. How closely should Scottish legislation align itself with comparable English reform? Is its distinctiveness an aid or a hindrance in modernising Scots law? This paper does not catalogue the provisions of the 2021 Act in detail, but instead looks at how those challenges were met and asks whether lessons may be drawn for future reform projects.

Up until the early years of the twenty first century the Scots and English laws of defamation, although distinct, had to a significant extent moved in parallel, and given that the Scots case law was relatively sparse, the English cases had proved to be an important resource for the Scottish courts. A Scottish response was therefore to be expected after the Westminster Parliament enacted the Defamation Act 2013. The 2013 Act made provision for certain areas of the common law that had been substantially similar in the two jurisdictions, but, with the exception of certain minor provisions,[3] it applied to England and Wales only. In turn the Defamation and Malicious Publication (Scotland) Act 2021 not only replicated various of the provisions of the 2013 Act but also went considerably further, by putting much of the pre-existing common law on to a statutory footing.

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[1] See e.g. G Spencer Bower, *A Code of the Law of Actionable Defamation* 2nd edn (1923). This draft code for England and Wales, never taken up, ran to 64 articles, each qualified by clusters of subsidiary rules and propositions, backed up by a further 200 pages of appendices.

[2] See P Gilliker, "Codification, consolidation, restatement? How best to systematise the modern law of tort" (2021) 70 ICLQ 271 at 274, on the difficulties of replicating the flexibility in key definitions that is essential in allowing the law to adapt to contemporary needs.

[3] Ss 6, 7(9), 15, 16(5), and 17 extend to Scotland, dealing in the main with qualified privilege for peer-reviewed statements in scientific or academic journals.

Before discussing the content of the 2021 Act, it is helpful to consider something of its historical context.[4] Early nineteenth-century terminology is confusing and was not uniform, but sources such as Borthwick's major treatise on the subject,[5] or Hume's lectures to his students,[6] show defamation to have been one of the strands in a broad category of verbal injury that included not just false allegations of dishonesty or promiscuity for example, but all forms of injurious statement, true or false or neither. Verbal injury therefore extended not only to false statements, but also to insults impugning the dignity of the victim, and to disclosure of an embarrassing truth such as illness or past misdemeanour, in other words, wrongs that would align with the law of privacy today. Civil liability for verbal injuries in general, like the other so-called "intentional" infringements of personality interests, had developed out of and alongside criminal liability, but while criminal prosecution for verbal injuries fell away in frequency,[7] the varied examples used by Hume, and the volume of civil claims in the new Jury Court in the early nineteenth century, indicated a lively litigation culture.

The latter part of the nineteenth century was a period of major development in the law of defamation. Although the numbers of reported cases declined, their content began to change with the growth of the newspaper industry.[8] While cases brought by individuals insulted by their friends or neighbours or customers had previously filled the reports, claims against newspapers steadily grew in prominence. That shift in subject matter increased the dominance of defamation, as compared with the other forms of verbal injury, and went hand in hand with substantive changes that shaped the law of defamation into the form recognisable today. In earlier times malice had been of the essence of liability,[9] but it had in effect been presumed, except in cases of privilege, subject to being rebutted where, for example, the defamatory remarks could be shown to be true.[10] By the late nineteenth century, the law had "slipped" into strict liability in defamation actions, so that malice had become irrelevant, except as a means of overturning privilege,[11] and in a parallel development, truth had developed into a complete defence. Thus defamation, by then the most significant of the verbal injuries, dealt with false statements only. In those aspects, defamation had drawn closer to English law. The fate of the other forms of verbal injury will be discussed further below.

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[4] For greater detail on the history of the Scots law and its relationship with English law see J Blackie, "Defamation", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000), vol 2, 631. For a summary see E Reid, *Personality Confidentiality and Privacy in Scots Law* (2010) paras 6.02-6.06.

[5] J Borthwick, *Treatise on the Law of Libel and Slander as Applied in Scotland in Criminal Prosecutions and in Actions of Damages* (1826).

[6] G D H Paton (ed), *Baron David Hume's Lectures*, vol 3 (Stair Society vol 15, 1952), 133-164.

[7] This coincided with the winding up of the separate system of Commissary Courts before which such cases had typically been brought. The jurisdiction of the local Commissaries was amalgamated with that of the Sheriff courts in 1823 (Commissary Courts (Scotland) Act 1823), and the separate Commissary Court for Edinburgh was finally abolished in 1836 (Act to Abolish the Commissary Court of Edinburgh, 6&7 Will, C 41).

[8] *The Scotsman* was first published in 1817, the *Glasgow Herald* a little earlier in 1783, and the *Aberdeen Press and Journal* was first published as a weekly in 1747.

[9] For Hume and for Bell, as for earlier Institutional writers, the essential elements of verbal injury were injury or loss for which reparation was given and insult and offence for which solatium was due. Malice was required, but could be inferred in most cases except in those cases where the law gave either absolute protection or presumed what was complained to "proceed from the impulse of duty" and required malice to be proved" (Bell *Prin* § 2044; see also Hume, *Lectures*, vol 3, 141).

[10] Hume says that it was "rather to be understood in a negative sense as a means of defence in those cases where it can be clearly shown by evidence on the part of the defender, both that there was no sort of purpose to injure, and that in truth no harm did, or was at all likely to ensue." (Hume, *Lectures*, vol 3, 141-142.)

[11] On the process by which "the law slipped into strict liability" over the course of the nineteenth century see J Blackie, "Defamation" (note 4 above) at 662-665.

Over the course of the twentieth century the Scottish case law was to become increasingly sparse, and English cases were frequently cited, without apology, to supplement native sources. This meant that English authority was freely assimilated, sometimes on major issues. Two key examples illustrate. In the 1936 House of Lords English case of *Sim v Stretch* Lord Atkin famously formulated a test for determining whether content should be regarded as defamatory. This was by asking the question "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally".[12] That test, universally applied in the English courts, was generally accepted to the same effect by the Scottish courts. The second example concerns the so-called "*Reynolds* defence".[13] This defence for media coverage of matters of public interest was formulated by the House of Lords at the very end of the twentieth century as a means of striking an appropriate balance, compliant with the European Convention on Human Rights, between protecting reputation and supporting media freedom of expression. Again, the "*Reynolds* defence" was readily taken up in the Scottish cases.[14]

On the other hand, there remained notable points of difference between Scottish and English law. First of all, although defamation was by far the dominant category, other types of actionable verbal injury continued to exist, with different rules of liability, and in principle those verbal injuries were broader in scope than the subsisting malicious falsehoods on the periphery of the English law of defamation. Secondly, the Scots did not make a formal distinction, as the English did, between slander and libel and the respective remedies available to them. A further crossborder difference was that, like the English criminal offence of libel,[15] but unlike the English civil wrong, Scots law did not in principle require publication to a third party,[16] although in practice it had been more than a century since a case had been brought successfully following publication solely to the person defamed.[17] Finally, but equally importantly, the context for litigation was different. The impetus behind the English reform that eventually took shape in the Defamation Act 2013 was a growing perception that London had become "the world's libel capital".[18] Significant numbers of persons resident outside England appeared to be bringing proceedings in the English courts in order to exploit a defamation regime perceived to be more claimant-friendly than in other jurisdictions, and much of the case load involved proceedings against the media. Edinburgh, on the other hand, did not even begin to rival London's status in this regard. At most only two or three defamation cases per year actually had their day in court. Of those few cases, many involved the media, but a significant part of the caseload continued to involve disputes between individuals, not unlike the cases that Hume had used as examples.[19] Of course a

[12] [1936] 2 All ER 1237 at 1240.
[13] As originally expounded by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
[14] See e.g. *Adams v Guardian Newspapers Ltd* 2003 SC 425 per Lord Reed at para 52.
[15] See *R v Adams* (1888) 22 QBD 66 in which the offending letter from the defendant was "of such a character as that it tended to provoke a breach of the peace". On abolition of criminal libel in 2010 see Coroners and Justice Act 2009 s 73.
[16] This was a legacy from an era when insult had been actionable as verbal injury: see e.g. Hume suggesting that solatium might be awarded for verbal injury where remarks had been communicated only between the parties, although he added that in these circumstances, "the malicious and injurious intent…must appear on the writing" (*Lectures*, vol 3, 156).
[17] *Thomson v Kindell* 1910 2 SLT 442.
[18] See e.g. K Rimell and C Curtis, "Defamation: forum shopping" (2000) 11(7) *Entertainment Law Review* N84-86.
[19] E.g. *Munro v Brown* [2011] CSOH 117, 2011 SLT 947 (successful claim by former captain of the Scottish ladies curling team alleged to have refused to play in a world championship match); *Cowan v Bennett* 2012

good deal of activity was no doubt going on regularly behind the scenes to head off litigation involving the Scottish media, but an influx of defamation tourists was never likely to be heading north.

B. RESPONSE TO THE DEFAMATION ACT 2013

Space does not permit a full account of the Defamation Act 2013, but, in brief, it set out to disincentivise libel tourism by conferring discretion upon the English courts to refuse to hear cases against non-UK-domiciled persons where they were not satisfied that England was "clearly the most appropriate place in which to bring an action in respect of the statement".[20] In addition, the balance was weighted further away from the claimant and towards freedom of expression by a new statutory requirement that a statement could not be regarded as defamatory unless it could be shown actually to cause "serious harm".[21] This "serious harm" requirement was over and above the common law test that looked at whether the offending statement tended to lower the claimant in the esteem of others; claimants now had to show not only that the defendant's words by their very nature had an inherent tendency to lower their reputation but also that they caused or were likely to cause measurable, "serious harm". The 2013 Act also scrapped the common law defences of truth and fair comment, and the "*Reynolds* defence", replacing them with statutory defences on broadly similar lines,[22] and it made provision to ease the position of operators of websites and persons who were not the authors or editors of the allegedly defamatory material.[23]

As previously noted, common law material from the English courts had been an important resource for the development of the law in Scotland, and it was therefore essential to consider the implications of the 2013 Act north of the border, in particular for those areas of the law that had all but converged. The Scottish Government initially resolved that reform was unnecessary and that the main provisions of the Defamation Act 2013 did not need to be extended to Scotland, on the basis that the Scottish law of defamation was "relatively robust" already and Edinburgh had not been troubled by "libel tourism".[24] However, the response to English developments was soon reassessed, on being taken up by the Scottish Law Commission (SLC) its Ninth Programme of Law Reform.[25] Thereafter the SLC produced a Discussion Paper on Defamation in 2016[26] and a Report in 2017[27] including the text of a Bill which was substantially reproduced in the 2021 Act.

GWD 37-738 (claim ultimately dismissed where allegations were deemed to have been a joke, albeit in "poor taste").

[20] Defamation Act 2013 s 9.

[21] Defamation Act 2013 s 1.

[22] Defamation Act 2013 ss 2, 3 and 4 respectively ("fair comment" was reformulated as "honest opinion", reflecting case law developments in this area).

[23] Defamation Act 2013 s 5.

[24] Proceedings of the Justice Committee (Scottish Parliament, Official Report col 1738 (18 Sept 2012)), response by the then Justice Secretary, Kenny MacAskill.

[25] Scot Law Com No 242 (2015).

[26] Discussion Paper on *Defamation* (Scot Law Com DP No 161, 2016).

[27] Report on *Defamation* (Scot Law Com No 248, 2017). The SLC engaged in extensive consultation with interested parties, including legal practitioners active in this area, and the 2021 Act was preceded by a public consultation on reform proposals (see *https://consult.gov.scot/justice/defamation-in-scots-law/*). The Justice Committee also took evidence from a range of interested parties at Stage 1 of the Bill's progress through the Scottish Parliament (report at *https://digitalpublications.parliament.scot/Committees/Report/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report*).

Although the Defamation Act 2013 provided the immediate impetus for reform, the task envisaged for the Scottish legislation was not simply to copy its provisions. The SLC regarded the reform initiative as a broader opportunity for "modernising and simplifying" the Scots law.[28] Its recommendations went considerably further than the Westminster Parliament had found necessary in 2013, making statutory provision for various areas of the common law thought to be "in need of reform".[29] On the other hand, it quite sensibly stepped back from making recommendations in certain areas that were ripe for reform, but where UK-wide provision was considered preferable, notably in relation to digital publication.[30]

Some of the challenges in drafting the Scottish legislation can readily be guessed at. Given the long-standing similarities between the laws of the two jurisdictions, and the undesirability of maintaining significantly different regimes for publications north and south of the border, were the provisions of the 2013 Act simply to be reproduced where relevant, or did Scottish distinctiveness demand a tailored response? And if the intention was to modernise the common law more extensively in the Scottish legislation, to what extent was concern for tradition to be sacrificed to pragmatism?

C. MEETING THE CHALLENGES

(1) Content of the 2021 Act

In summary,[31] the main provisions of the Defamation and Malicious Publication (Scotland) Act 2021 include the following:

- Unlike the 2013 Act, the Scottish legislation takes up and recasts the common law definition of defamatory, as tending "to lower the person's reputation in the estimation of ordinary persons".[32] Additionally, it copies the 2013 Act in introducing the requirement that in order to be actionable, a statement of this nature must cause, or be likely to cause, "serious harm" to the pursuer's reputation[33]. Non-natural persons trading for profit are obliged, more specifically, to show "serious financial loss" if they are to bring proceedings,[34] a stipulation similarly made by the 2013 Act.
- Overriding older case law, the Act stipulates that a statement can be defamatory only if it is made to a third party[35], thereby bringing the Scottish position into line with civil liability in the English common law.
- The Act makes express provision barring public authorities from bringing defamation proceedings.[36] There was no equivalent provision in the 2013 Act, but the Scottish statute parallels the common law position in English law on this point.

[28] Report on *Defamation* (Scot Law Com No 248, 2017) para 1.1.
[29] Report on *Defamation* (Scot Law Com No 248, 2017) para 1.8.
[30] Report on *Defamation* (Scot Law Com No 248, 2017) paras 4.2-4.6. The SLC recommended that any review of responsibility and defences for publication by internet intermediaries should be carried out on a UK-wide basis, although s 3 made provision on an interim basis to restrict the liability of secondary publishers. There had also been discussion on the scope of qualified privilege for publication of Parliamentary papers, but the Report similarly concluded that any reform of this area should be carried out on a UK-wide basis (para 5.32).
[31] For extended discussion see E Reid, *The Law of Delict in Scotland* (2022) ch 18.
[32] S 1(4)(a).
[33] S 1(2)(b).
[34] S 1(3).
[35] S 1(2)(a).
[36] S 2.

- The liability of "secondary publishers" is limited, in that proceedings may now be brought only against authors, editors and publishers who are responsible for both the content of the statement and the decision to publish it. Where a statement is made in electronic form no action can be brought against a person who takes no steps to edit it but simply "retweets" it, "likes" it or provides a hyperlink to it, unless that person's involvement has materially increased the harm caused by the publication.[37] This expands on the content of section 10 of the 2013 Act.[38]
- The common law defences of "veritas" and "fair comment" and the "*Reynolds* defence" have been abolished. New statutory defences of "truth", "honest opinion" and "publication of a matter of public interest" now apply,[39] all in substantially the same terms as the equivalent defences in the 2013 Act.
- The Act rationalises provision for the contexts in which absolute or qualified privilege applies.[40]
- Whereas previously defamation actions were subject to a three-year limitation period, the Act reduces this to one year, thus aligning Scots law with the English position.[41] Moreover, the 2021 Act follows the 2013 Act in providing for a "single publication rule", to the effect that where substantially the same content is republished on multiple occasions, the limitation period runs from the date of first publication.
- The Act draws together and amplifies provision previously made in the Defamation Act 1996 for "offers to make amends".[42]
- The Act abolishes the common law verbal injuries, aside from defamation, in their entirety, but reinstates in statutory form liability for statements causing harm to business interests, statements causing doubt as to title to property, and statements criticising assets.[43]

(2) Alignment with English law?

There was little dispute that the Scottish legislation should be closely aligned with the 2013 Act in certain areas where there had already been considerable overlap in the common law, notably the defences of veritas, *Reynolds*, and fair comment.[44] Reducing the limitation period from three years to one year, as in English law, was, by contrast, a significant change. It nonetheless commanded broad support among those with whom the SLC had consulted.[45] However, the new "serious harm" requirement introduced by the 2013 Act was more controversial. The introduction of the threshold of seriousness in the English legislation was driven by a concern to establish certainty in the law, as well as to reset the balance between

[37] S 3. (It is thus possible that well-known persons with large numbers of online followers are more likely than ordinary individuals to be caught by this material increase in harm test.)
[38] The SLC took the view that more ambitious reform was desirable in this area, but argued that a provision of this nature would serve as an "interim measure" pending a UK-wide initiative (Report on *Defamation* (Scot Law Com No 248, 2017) para 4.8).
[39] Ss 5-8.
[40] Ss 10-12 and Sch.
[41] S 32.
[42] Ss 13-18.
[43] Ss 21-27.
[44] It is striking that not only the text of the provisions themselves, but even the Explanatory Notes to the 2021 Act were in almost identical terms to those of the 2013 Act.
[45] This was on the basis that persons who were aware of harm to their reputation should not delay in seeking redress, and if harm to reputation was serious it would normally come to their attention quickly: see Report on *Defamation* (Scot Law Com No 248, 2017) para 7.16.

freedom of expression and the right to protect reputation, having particular regard to unwelcome libel tourism. On both issues the English and Scots perspectives differed.

Prior to 2013 in England, most categories of slander required proof of "special damage", while traditionally libel had been actionable per se. In recent years certain cases[46] had come round to applying a "threshold of seriousness" in determining whether libel was actionable, so as to discourage litigation arising out of "normal social banter or discourtesy".[47] According to the *Explanatory Notes* to the 2013 Act, the wording of section 1(1) purported to "build on" and rationalise these potentially confusing developments in the case law.

Scots law, by contrast, had not observed this formal distinction between libel and slander, so that in principle defamation by whatever medium has always been "actionable per se", meaning that a remedy is available both to vindicate reputation and to compensate derivative loss.[48] There was little evidence in the case law that the absence of a distinction between libel and slander, or of a formal threshold of actionability aside from the common law *de minimis* principle, had resulted in uncertainty. Nor had there been evidence in the reported cases of "trivial proceedings…being raised…in order to bring undue pressure…to prevent publication"[49] In some cases allegedly defamatory imputations were ultimately dismissed as "banter",[50] but there was little sign of vexatious litigation motivated primarily by the desire not to vindicate reputation but to bring undue pressure on the media. In short, therefore, the English reform was targeted at remedying mischiefs that had not been greatly in evidence on the Scottish scene, where the *de minimis* principle had acted as a satisfactory filter of trifling complaints, the "*Reynolds* defence" had provided an adequate shield for media defenders, and libel tourism was non-existent.

In endorsing the "serious harm" requirement the SLC had been reassured by a perception that the "costs and complexity" of adopting this test in England had not been as great as feared.[51] However, that perception was based upon the reasoning of the Court of Appeal[52] in the leading case of *Lachaux v Independent Print Ltd*, to the effect that this new requirement did not affect the common law presumption as to damage in libel cases. Subsequently, however, the Supreme Court upheld the decision of the Court of Appeal but strongly criticised its reading of the "serious harm" requirement in the 2013 Act. The Supreme Court held that the statutory wording: "not only raises the threshold of seriousness above that envisaged in [previous case law], but requires its application to be determined by reference to the *actual facts* about its impact and not just to the *meaning of the words*."[53] Consequently "a statement which would previously have been regarded as defamatory, because of its inherent tendency to cause some harm to reputation, is not to be so regarded unless it 'has caused or is likely to cause' harm which is 'serious'."[54] In other words, two distinct tests are involved. A statement must first be defamatory in the sense that it carries a meaning that has an inherent tendency to harm reputation. In addition, in order to meet the "serious harm" threshold, the pursuer must be able to show that its impact has been, or is likely to be, actual harm. The

[46] Notably *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414, [2011] 1 WLR 1985.
[47] *Cammish v Hughes* [2012] EWCA Civ 1655.
[48] See e.g. D M Walker, *The Law of Delict in Scotland* 2nd edn (1981) 785.
[49] *Defamation in Scots Law: A Consultation* (at *https://consult.gov.scot/justice/defamation-in-scots-law/*) para 50.
[50] E.g., *Cowan v Bennett* 2012 GWD 37-738; *Macleod v Newsquest* 2007 SCLR 555.
[51] Report on *Defamation* (Scot Law Com No 248, 2017) para 2.10.
[52] [2017] EWCA Civ 1334, [2018] QB 594.
[53] [2019] UKSC 27, [2020] AC 612 per Lord Sumption at para 12 (emphasis added).
[54] [2019] UKSC 27, [2020] AC 612 per Lord Sumption at para 14.

"serious harm" test has yet to come under scrutiny in the Scottish courts, but if the Supreme Court's reasoning is followed, the bar for all pursuers to surmount is therefore raised in a way that cannot fail to increase "costs and complexity" of legal proceedings. No matter how great the potential for affront, the requirement to prove actual harm in the terms suggested by the Supreme Court is a powerful disincentive to litigation for anyone other than the well-resourced. Moreover, it does not entirely square with the traditional Scottish view that attacks on reputation should be compensated by reparation for the "injury or loss suffered, actual or probable" and solatium for "the insult and offence to the individual".[55]

The question of Scottish distinctiveness did not figure large in discussion on the "serious harm" test. The model proposed had already been extensively scrutinised in England and it was accepted that there was virtue in maintaining uniformity in the law. Some of those commenting on the proposed legislation pointed to the risk of "chilling" media coverage on matters of public interest if the same test was not adopted in Scotland.[56] However, a counterargument might have been that the practical implications of the "serious harm" criterion had not yet been fully tried and tested in the English courts.[57] A comparative lawyer might further have queried whether the environment into which this legal transplant was to be grafted was sufficiently similar to that from which it had originated in England. In the end result, introduction of this new additional test, and its resultant increase in costs, has tilted the balance between freedom of expression and protection of reputation in such a way as to place remedies for defamation beyond the reach of anyone other than the wealthy, all in order to address problems from which Scotland had not suffered.

(3) Transposing common law to statute

As mentioned above, the 2021 Act did not simply replicate content from the Defamation Act 2013, but also took on the task of restating much of the Scots law of defamation. The aim in doing this was to make the law more accessible,[58] but there are obvious challenges in replacing formulations from the common law with fixed statutory definitions, and these proved awkward to negotiate, as illustrated by the three examples below.

(a) Defining defamatory

Although the SLC had made no such recommendation, the Scottish Government inserted into the 2021 Act a basic definition of the term "defamatory". This concept had previously rested upon its common law interpretation, but the Scottish statute now provided that "a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to

[55] Bell, *Prin* § 2043, noting: "In this last respect a material distinction is to be observed between the English and the Scottish law."

[56] The Policy Memorandum published with the Bill (*https://www.parliament.scot/bills-and-laws/bills/defamation-and-malicious-publication-scotland-bill*) declared, at para 20, that "The policy intention is to alleviate the chill on freedom of expression felt by many publishers in Scotland." See also summary of the evidence offered by journalists and representatives of the media to the Justice Committee at Stage 1 of the Bill's progress through the Scottish Parliament (report at *https://digitalpublications.parliament.scot/Committees/Report/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report* paras 95-98).

[57] For discussion of the English experience see e.g. D Erdos, "Serious harm to reputation rights? Defamation in the Supreme Court" (2020) 78 *CLJ* 510 at 512; C Sewell," More serious harm than good? An empirical observation and analysis of the effects of the serious harm requirement in section 1(1) of the Defamation Act 2013" 2020 *Journal of Media Law* 47.

[58] Report on *Defamation* (Scot Law Com No 248, 2017) para 1.1.

lower the person's reputation in the estimation of ordinary persons)".[59] No such provision was included in the 2013 Act, but, as the Policy Memorandum issued with the Bill explained, respondents to the Scottish Government consultation had suggested that a statutory definition would be helpful.[60] In this connection the Policy Memorandum referred to a definition in similar terms in the Irish Defamation Act 2009.[61] However, the Irish wording can in turn be traced back to the common law formulation originating in the 1930s case of *Sim v Stretch*, as already noted above, namely: words tending "to lower the plaintiff in the estimation of right-thinking members of society generally".[62] The Scottish Government's intention in going it alone by enshrining the common law definition in statute was to enhance the "clarity and accessibility of the law".[63] It would be uncharitable to suggest that the new statutory definition is little clearer than its common law predecessor, but the wording does illustrate some of the inherent difficulties in swapping the common law for fixed statutory definitions.

While the limitations of the English common law as a resource should be acknowledged, it is important to reckon with the extent to which it has become interwoven with the Scots law in aspects of the law of defamation. In order to accommodate changing perceptions of how reputation should be judged the common law interpretation of what is defamatory has been glossed and adapted over the years,[64] and the Scottish courts have been assisted in this regard by developments in the much more plentiful English case law. The relevance of that resource is now in danger of becoming progressively more distanced as time goes on. In other words, while the statutory format may on the face of things improve "accessibility", the disadvantage is that the definition now remains fixed in its 2021 statutory form, even as the common law continues to evolve south of the border. The *Explanatory Notes* expressed the hope that the "additional elements" to the definition could be "dealt with by the common law", but it is far from clear how this might work.

One crucial "additional element" is the question as to the "ordinary persons" whose "estimation" is key to the new statutory definition.[65] Should the courts look beyond the 2021 Act and do as they did previously, applying the modern judicial gloss on the common law *Sim v Stretch* test as it moves on south of the border? This attempts an objective construct of a notional reasonable reader and purports to gauge what, in the court's view, such a person *ought* to think?[66] Alternatively, does a literal interpretation of this statutory wording involve the court second-guessing what the ordinary person actually *does* think of imputations of the kind in question. The former approach is not what the text says, but if the latter means being

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[59] S 1(4)(a).

[60] Policy Memorandum, para 24 *(https://www.parliament.scot/bills-and-laws/bills/defamation-and-malicious-publication-scotland-bill)*..

[61] Defamation Act 2009 s 2, referring to "a statement that tends to injure a person's reputation in the eyes of reasonable members of society", as noted in Policy Memorandum, para 25 (*https://www.parliament.scot/bills-and-laws/bills/defamation-and-malicious-publication-scotland-bill*)..

[62] See note 12 above.

[63] Policy Memorandum, para 24 (*https://www.parliament.scot/bills-and-laws/bills/defamation-and-malicious-publication-scotland-bill*).

[64] In *Lachaux* for example, Lord Sumption prefaced discussion of the "serious harm" requirement with a brief explanation of the *Sim v Stretch* "working definition" ([2019] UKSC 27, [2020] AC 612 at para 6). On the necessarily open-ended definition of defamatory see the concluding section, "Rethinking the tests for what is defamatory", in L McNamara, *Reputation and Defamation* (2007) 229.

[65] S 1(4).

[66] E.g. the Supreme Court's most recent reading of the test the firm steer that an "objective assessment" is to be made of what "the notional ordinary reasonable reader" would have made of the imputation, disregarding the assessment "which other people may actually have attached to it" (*Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612 per Lord Sumption at para 6).

led by what ordinary people actually *do* think, the courts may find themselves in effect compensating victims of social prejudice and thereby endorsing the validity of that prejudice.[67] This seems unlikely to be an intended consequence of this legislative initiative, yet the statutory wording leaves the correct approach uncertain and offers no clear framework for the future development of the law.

(b) Actions against public authorities

The need for "clarity and accessibility"[68] was cited as the reason for introducing a provision barring public authorities from bringing defamation actions.[69] The lead for this was taken from the English common law rule as stated in *Derbyshire County Council v Times Newspapers Ltd*, in which the House of Lords held that the interests of freedom of expression required public authorities to be open to "uninhibited public criticism".[70] Although there was no reason to suspect that the Scottish courts would have adopted a different stance, there had been no Scottish authority directly in point,[71] and so the decision was made that, for the avoidance of doubt, provision for the "*Derbyshire* principle" should be included in the 2021 Act. The policy rationale for such a rule is unexceptionable, but an obvious difficulty in transposing the flexible common law rule to statute was arriving at a fixed definition of public authority, especially without an English or UK statute on which to model it.[72] The statutory wording was subjected to extended scrutiny by the Justice Committee at Stage 1 of the legislative process, resulting in a recommendation that the Bill's wording should be redrafted to provide greater clarity.[73] However, the revised definition is not free of difficulty.

Section 2(2) lists institutions of central and local government, courts and tribunals, and any person or office "whose functions include functions of a public nature". This last residual category parallels that found in section 6(3)(b) of the Human Rights Act 1998,[74] but an open-ended definition that is acceptable for the purposes of imposing a general obligation to adhere to the rights and freedoms set out in the European Convention on Human Rights is not necessarily appropriate for the purposes of imposing an absolute bar on bringing defamation

[67] See e.g. *Cowan v Bennett* 2012 GWD 37-738, a sheriff court case in which the (heterosexual) pursuer alleged that he had been defamed by the defender's insinuation that he was homosexual. The case failed in any event for other reasons, but Sheriff KJ McGowan also took the view, on the basis of previous common law authority, that such an imputation could not be regarded as likely to harm reputation because, in essence, reasonable people ought not to regard it as diminishing his standing in any way (para 107; on the same point see also L McNamara, *Reputation and Defamation* (2007) 232). But looking to the 2021 Act it is arguable that a literal reading of section 1(4)(a)'s definition allows a litigant falsely alleged to be homosexual to bring a claim, if that person managed to assemble empirical evidence that a number of "ordinary" people in the community, as a matter of fact, would think less of an individual known to be homosexual.

[68] Report on *Defamation* (Scot Law Com No 248, 2017) para 2.26.

[69] S 2.

[70] [1993] AC 534 per Lord Keith at 547.

[71] *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 had previously been referred to, with no allusion to crossborder difference, in several Scottish cases against public authorities (e.g. *Gibson v Orr* 1999 SC 420; *T, Petitioner* 1997 SLT 724), but none involving defamation.

[72] The Irish Defamation Act 2009 makes no comparable provision, although the New South Wales Defamation Act 2005 s 9 defines a public body as "a local government body or other governmental or public authority constituted by or under a law of any country".

[73] Report at *https://digitalpublications.parliament.scot/Committees/Report/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report* para 127.

[74] This brings within the definition "any person certain of whose functions are functions of a public nature".

proceedings.[75] It remains unclear, for example, whether "functions of a public nature" should include the activities of universities, and whether they are caught by the prohibition as non-natural persons over which the Scottish Government has "significant influence"?[76] But to place defamation actions out of the reach of universities would be a definite departure from the practice south of the border where, although the universities are in receipt of large sums of public money, they are not "equated with central or local government" for these purposes.[77] Likewise, the common law did not exclude charities from defamation actions,[78] but their status under the 2021 Act is potentially anomalous. Some charities may well be engaged by public authorities to perform welfare functions, for example, of a "public nature".[79] They escape the public authority definition if they are not controlled by a public authority and if they perform such functions only "from time to time", but what exactly does "from time to time" mean?[80] In short, while the basic rule consolidated in section 2 is not controversial, important questions of detail have not been eliminated.[81]

(c) Legislating for "malice"

The 2021 Act provides both for defamation and for malicious publication. More is said below about the common law verbal injuries in general terms, their abolition, and the new beginning for the statutory delicts. In brief, the Act salvaged from the common law only those verbal injuries that related to business interests, and it recast them as delicts of malicious publication. However, the statutory formulation of the concept of malice serves here as a further illustration of the problems of achieving workable statutory definitions. Malice is a slippery term in the common law,[82] and it is far from straightforward to pin down a single meaning, even for the limited purposes of malicious publication.

In the common law verbal injuries from which the new statutory delicts originated, the pursuer had been required to establish that the defender's statement was false and was maliciously motivated. However, it was generally sufficient for the pursuer to aver facts and circumstances from which such motivation could be inferred,[83] typically that the defender

[75] As commented in R Parkes et al (eds), *Gatley on Libel and Slander*, 13th edn (2022) para 9-020: "the mere fact that the body concerned is in receipt of public money and may be a public authority for the purposes of the Human Rights Act 1998 is not enough to mean that it should not be entitled to sue in defamation".
[76] As per s 2(4).
[77] See *Duke v University of Salford* [2013] EWHC 196 (QB) per Eady J at paras 4-5. Similarly, there is an exclusion for non-natural persons trading for profit or with primarily charitable purposes, and performing public functions from time to time, where such an entity is *not* owned or controlled by a public authority (s 2(3)), but should "functions of a public nature" include the activities of schools and colleges owned or controlled by public authorities, thereby excluding them from litigation? If so this would be a change from the common law position: see observations by Langstaff J in *Hill v Governing Body of Great Tey Primary School* [2013] ICR 691 at para 61.
[78] See e.g. *Hewitt v Grunwald* [2004] EWHC 2959 (QB); *Goldsmith v Bhoyrul* [1998] QB 459 per Buckley J at 462.
[79] S 2(2)(d).
[80] S 2(3).
[81] The Justice Committee had noted that this was an area in which it was "important that developments in the common-law can be incorporated in the future" but the mechanism for achieving this was not explained (Report at *https://digitalpublications.parliament.scot/Committees/Report/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report* para 130).
[82] See further Reid, *Law of Delict in Scotland* paras 15.09-15.16.
[83] *Steele v Scottish Daily Record and Sunday Mail Ltd* 1970 SLT 53 per Lord Fraser at 65.

knew that the statement was false[84] or was "recklessness" in regard to its truth.[85] English law adopts a similar approach in regard to malicious falsehood.[86] The formulation in the 2021 Act is more exacting, however. The pursuer requires to show *both* that the defender knew the statement was false or was recklessly indifferent as to its truth *and* that publication was motivated by a malicious intention to cause harm to the pursuer's business.[87] In effect, rather than allowing malicious motivation to be inferred from absence of honest belief in the truth of the statement, the statute requires proof of malicious motivation over and above proof of knowledge of that the statement was false. It is unclear why the statute should have been worded in such a way as to present a hurdle for litigants that is significantly more challenging than was usual in the common law, but given that successful claims had already become vanishingly rare, the utility of these new statutory delicts in the commercial world is doubtful.

(4) "Modernisation and simplification": malicious publication

Following the SLC's stated aims to modernise and simplify the law, opportunity was taken in the 2021 Act to rationalise areas of clutter or confusion. Thus the occasions of qualified privilege were listed,[88] and the procedure for making offers of amends,[89] previously found in the Defamation Act 1996, was restated and amplified, and so on. There was a more radical, although similarly uncontroversial, departure from tradition, with a new rule that publication to a third party was now to be required.[90] The pre-existing rule, recognising a defamatory statement to be actionable in principle even if communicated only to the pursuer, was anomalous in regard to defamation as now defined. In the scheme of the Act the wrong is characterised by reference to whether the allegedly defamatory statement lowered reputation in the estimation of others,[91] and so it is difficult to see how a false statement communicated only to the pursuer could be regarded as injurious in that sense.[92] It does not follow that insult should not be subject to separate sanction as an affront, but that is a different matter. In this instance, therefore, the argument for preserving Scottish distinctiveness would have been weak.

The Act's replacement of the common law verbal injuries with the statutory delicts of malicious publication was a further exercise in rationalisation. By the late twentieth century the common law verbal injuries were in a state of great confusion and rarely litigated, so this reform was long overdue. It is perhaps unreasonable therefore to suggest that its scope might have been even more ambitious, but in this part of the reform some may regret a missed opportunity to revisit the Scottish sources. As mentioned above, defamation had become by far the most commonly litigated category of verbal injury by the latter part of the nineteenth century, requiring truth to be proved by the defender, not disproved by the pursuer, and disregarding malice except where qualified privilege was asserted. Other categories of verbal

[84] *Craig v Inveresk Paper Merchants Ltd* 1970 SLT (Notes) 50.
[85] *Barratt International Resorts Ltd v Barratt Owners' Group* 2003 GWD 1-19 per Lord Wheatley at para 32; *Lamond v The Daily Record (Glasgow) Ltd* 1923 SLT 512 per Lord Constable at 517. See also Reid, *Law of Delict in Scotland* para 18.137.
[86] I.e. malice requires the defendant to have had an improper motive, but knowledge of or recklessness as to the falsity of the statement are generally conclusive as to such motive (see R Parkes et al (eds), *Gatley on Libel and Slander*, 13th edn (2022) para 22-103).
[87] Ss 21(2)(b), 22(2)(b), 23(2)(b).
[88] Ss 10, 11 and Schedule.
[89] S 13-18.
[90] S 1(2)(a).
[91] S 1(4)(a).
[92] See Report on *Defamation* (Scot Law Com No 248, 2017) para 2.4.

injury, requiring proof of malice, survived into the twentieth century, but these had become mired in uncertainty and came to the courts only infrequently. A mere handful of cases had been heard in recent years, all involving injuries to business, rather than personal, interests.[93] Other categories of verbal injury including slander on a third party, and injury to feelings by exposure to public hatred, contempt or ridicule, remained in the textbooks but had in effect fallen into desuetude by the late twentieth century.[94] A lingering controversy as to whether a surviving category included statements that were true had also more or less played itself out by this point.[95] The SLC's recommendation to rationalise the verbal injuries was plainly sensible therefore. This was done by abolishing them in their entirety in their common law form,[96] and only the injuries relating to business interests were recast in the legislation, as "statements causing harm to business interests", [97] "statements causing doubt as to title to property", [98] and "statements criticising assets.[99] These three statutory delicts of "malicious publication" were all framed in similar wording, requiring proof of falsity, malice, and business loss, and they mapped broadly on to the English malicious falsehood torts,[100].

This reform certainly clarified the law for those previously bewildered by the arcane common law categories, and given recent case law, the decision to legislate only for business interests was a pragmatic one. It would have been hard to make a case for rescuing the verbal delicts as they stood. On the other hand, the survival of the verbal injuries until 2021, even as an untidy postscript to the law of defamation, was a reminder that historically this area of law had more to offer than simply protection against false statements. In earlier times, as mentioned above, verbal injury had extended to insults more generally, and to affront suffered where "some secret matter, known only to the defender, has been officiously and unnecessarily circulated to the world".[101] In considering how the verbal injuries should be replaced, and how new statutory delicts were to sit alongside defamation, that legacy was overlooked and an opportunity passed over to "modernise and simplify" protection for reputation in a more integrated way. Simple insult is perhaps best left now to the Protection from Harassment Act 1997, and in serious cases to the criminal law.[102] Liability for intrusion into the private sphere is a different matter. Recent Scottish authority seems to support recognition of a delict of misuse of private information,[103] but there has been no reported

[93] I.e. slander of title, slander of property, and falsehood about the pursuer causing business loss (with broad equivalents in the English malicious falsehoods): see E Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010) ch 7.
[94] See E Reid, *Personality, Confidentiality and Privacy in Scots Law* (2010) chs 8-9. In regard to the latter, Lord Wheatley effectively shut down discussion in *Steele v Scottish Daily Record* 1970 S.L.T. 53 at 60: "We had an interesting perambulation throughout the developing history of defamation, convicium and verbal injury and the different elements which are said to be required to support each of these different types of action, and while we are indebted to counsel for their painstaking research and admirable presentation, I do not propose to follow them into the labyrinth."
[95] See Reid, *Personality, Confidentiality and Privacy in Scots Law* paras 8.01-8.15.
[96] S 27.
[97] S 21.
[98] S 22.
[99] S 23.
[100] See see R Parkes et al (eds), *Gatley on Libel and Slander*, 13th edn (2022) ch 22 on malicious falsehood, disparagement of title and disparagement of goods.
[101] Hume, *Lectures,* vol 3, 160.
[102] E.g. Communications Act 2003 s 127 in regard to improper use of public electronic communications network.
[103] See e.g. *BC v Chief Constable Police Service of Scotland* [2020] CSIH 61, 2020 SLT 1021 per Lady Dorrian at para 83, and other sources as discussed in Reid, *Law of Delict in Scotland* paras 20.16-20.19.

decision directly in point.[104] This moment might usefully have been seized therefore to make provision at least for informational privacy, thus complementing the protection of reputation provided by defamation law, as well as ensuring appropriate safeguards for freedom of speech in this sphere.[105]

D. CONCLUSION

The Defamation and Malicious Publication (Scotland) Act 2021 is, in its way, a major achievement. A codifying statute for a complex area of the law was produced in a relatively short time-frame, and the SLC's objective of modernising and simplifying the law was certainly realised. Yet the Act also demonstrates some of the difficulties of legislating for the law of delict, especially in the Scottish context. In areas such as defamation, it is impossible to ignore the role played by the English common law as a resource for Scottish legal development. If on certain issues the link with the jurisprudence of the English courts is to be broken, careful consideration is required as to statutory formulations capable of taking the law forward independently. On the other hand, close parallels in the common laws of both jurisdictions do not remove the need for caution in importing new statutory constructs devised to deal with policy issues specific to England; legal transplants tend to flourish only where there has been proper comparison between the environment of origin and the environment for which they are destined. Finally, while there is little to be said for distinctiveness for its own sake, there may be instances where reference to Scotland's distinctive legal history can assist creativity in devising modern solutions to what are, fundamentally, old problems.

[104] Moreover, the question whether delictual protection of privacy should extend beyond the informational sphere remains open. See Reid, *Law of Delict in Scotland* paras 20.74-20.88.

[105] In this regard an Irish model was again available for comparison purposes. The Privacy Bill 2006 lapsed with the dissolution of the then Dáil and Seanad, but its text remains available (at *https://www.oireachtas.ie/en/bills/bill/2006/44/*).