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Defamation and Malicious Publication (Scotland) Bill

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The Bill is aimed at updating the Scots law on defamation and on verbal injury - both of which provide legal remedies to those damaged by false statements. It implements recommendations made by the Scottish Law Commission in its 2017 Report on Defamation.

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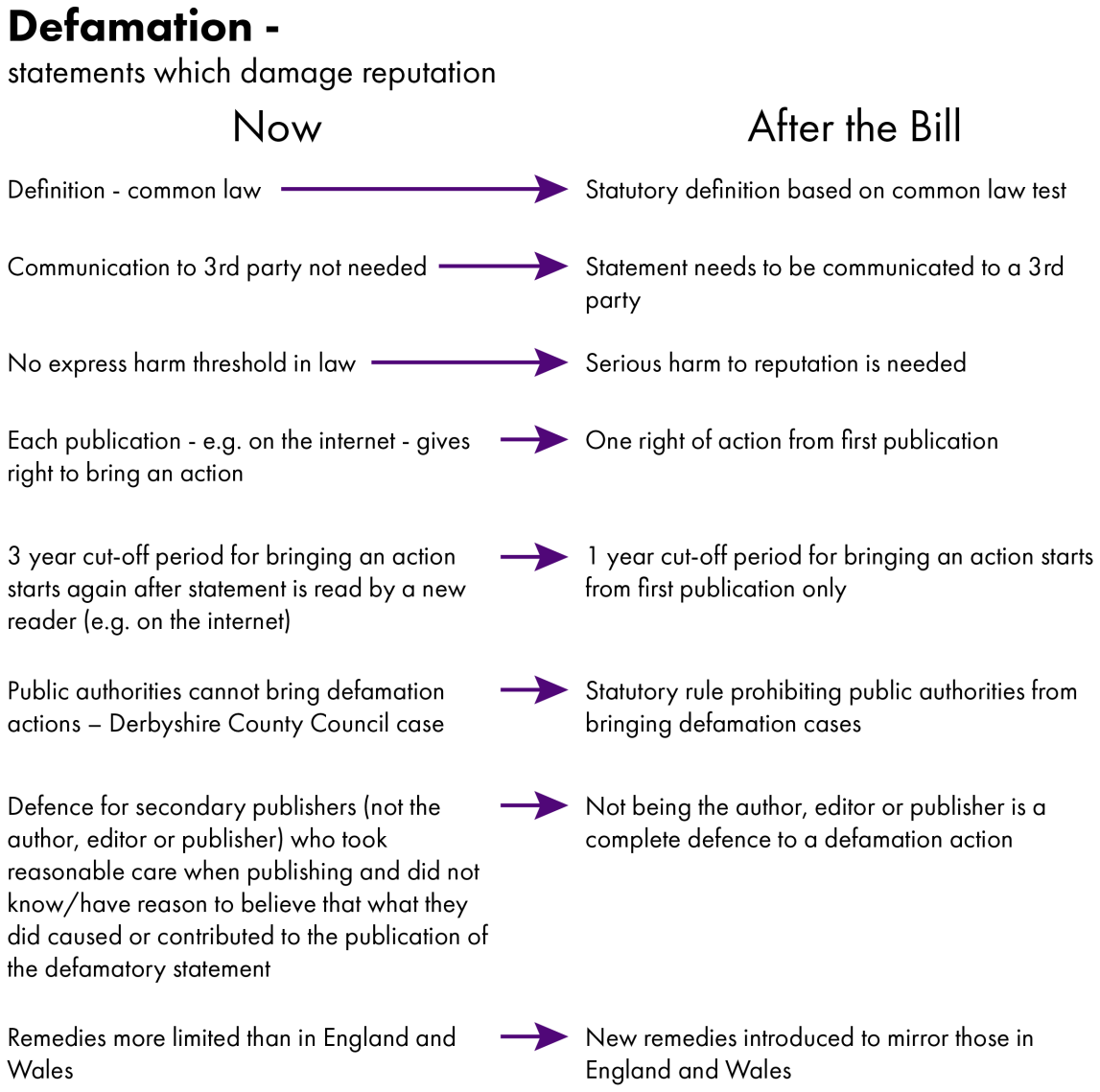
The main issues

Defamation is the civil wrong of causing damage to a person or body's reputation. It occurs when someone makes a false statement which tends "to lower the plaintiff in the estimation of right-thinking members of society generally".

The Scottish Law Commission is responsible for proposing reforms to the law. It examined the law in this area in its Report on Defamation in 2017. This followed on from significant reform of the law in England in Wales by the Defamation Act 2013. The Bill's proposals follow, broadly, the Scottish Law Commission's recommendations.



The main issues the Bill is designed to address are:

The "chilling effect" on freedom of speech of the current law

The appropriate balance between the right to freedom of expression and the right to protection of private life is an important consideration when reforming defamation law. The current law has been argued to protect reputation at the expense of freedom of expression.

The Bill seeks to address this by:

- **Clarifying the law** - much of the current law is obscure and based on judge's decisions in previous court cases. The Bill aims to make the law easier to understand by setting it out in legislation. It strengthens existing defences eg. in relation to publication in the public interest.

- **Raising the threshold for bringing defamation actions** - various proposals, including a serious harm test, a single publication rule and a one year time limit to raising court action, will create a higher threshold for taking court action. This is argued to help rebalance the law towards protecting freedom of expression.

The challenges created by increased online publication

Defamation law has been developed with a focus on print publications. Some of the rules are difficult to adapt to online publication. The Bill would seek to address some concerns - eg. increasing protection to internet intermediaries who are secondary publishers. However, it is impossible to fully future-proof the law in this area.

The Bill would not adopt some of the changes made in England and Wales to address online publication concerns. The Scottish Law Commission recommended a UK-wide review of the law in this area.

The Bill also reforms the law in relation to verbal injury

This is a form of legal action in relation to false statements which do not meet the legal definition of defamation. The Bill would abolish previous types of action relating to personal reputation but restate those relating to economic interests - such as false statements about the quality of goods.

Terminology

Discussion of the law often involves the use of technical language. Common terms are defined below.

Advocate - an advocate is a lawyer with expertise in making legal arguments. Where a case is heard in the Court of Session, a solicitor must use an advocate or solicitor-advocate (or similar professional with rights of audience) to present it. Advocates are also referred to as counsel.

Common law - the traditional law as developed by judges' decisions in individual cases. Legal rules may also be created by legislation.

Counsel - see advocate.

Damages - the legal term for an award of compensation.

Defender - the party defending court action. The party bringing court action is the pursuer. The English term for defender is defendant.

Jurisdiction - a court's jurisdiction is the geographical areas or subject matters over which it has the power to make a decision. For example, sheriff courts have exclusive jurisdiction in Scotland to hear claims with a monetary value of up to £100,000.

Legal person - an organisation, including companies and various public sector bodies, which can take legal action in its own right. Bodies which are not recognised as legal persons must rely on their office bearers to take legal action in a personal capacity. See also natural person.

Libel - in England, written statements which are defamatory are called libel. Verbal statements which are defamatory are called slander. Scots law does not differentiate on the basis of the mode of delivery.

Legal expenses - the costs involved in taking court action. These will usually include the costs of engaging a solicitor, fees for using court services and costs for collecting and presenting evidence. The English term is legal costs. The usual rule is that the winner in a court action can recover (most of) their legal expenses from the loser.

Natural person - an individual - to be contrasted with a legal person.

Patrimonial loss - the Scots law term for compensation awarded for economic loss - such as loss of profits. See also solatium.

Pursuer - the party bringing court action (also known as the "claimant" under Simple Procedure court rules). The party defending court action is known as the defender. The English term for pursuer is claimant (or, more traditionally, plaintiff).

Secondary publisher - as defined in the Defamation Act 1996 - someone who is not the author, editor or commercial publisher of the statement in question.

Slander - in England, verbal statements which are defamatory are called slander. Written statements which are defamatory are called libel. Scots law does not differentiate on the basis of the mode of delivery.

Solatium - the Scots law term for compensation awarded for pain and suffering. See also patrimonial loss.

The Bill - important dates and documents

The Defamation and Malicious Publication (Scotland) Bill was introduced in the Scottish Parliament on 2 December 2019 by Humza Yousaf, Cabinet Secretary for Justice. It is a Scottish Government bill.

All documents relating to the Bill can be found on the Scottish Parliament's Defamation and Malicious Publication (Scotland) Bill webpage. These include:

- the Defamation and Malicious Publication (Scotland) Bill (as introduced) [1]
- the Policy Memorandum [2]
- the Financial Memorandum [3]
- the Explanatory Notes [4] .

The Justice Committee is the lead committee for Stage 1 scrutiny of the Bill. This involves the Justice Committee listening to the views of stakeholders and considering whether the general principles of the Bill should be supported.

The Justice Committee issued a call for views, which closes on 13 March 2020.

What are the Bill's main objectives?

The Bill implements recommendations which the Scottish Law Commission (SLC) made in its Report on Defamation in December 2017.

The Policy Memorandum explains that the current Scots law of defamation and verbal injury is no longer fit for purpose. Verbal injury is referred to as "malicious publication" in the Bill.

It indicates that the existing law:

- is "scattered across aged common law rules and several statutes";
- does not strike the right balance between freedom of speech and protection of reputation; and
- has not kept up with the rise of societal changes, such as online publication [5] .

The Policy Memorandum states that the Bill's two main objectives are therefore:

1. to clarify and improve the accessibility of the current common law; and
2. to strike a more appropriate balance between freedom of expression and individual reputation.

Balancing human rights

The Human Rights Act adds an additional dimension to balancing rights in defamation cases

Scots law was grappling with issues around freedom of expression, individual privacy and protection of reputation well before human rights came into the frame. However, the requirement to uphold the rights contained in the European Convention on Human Rights brought an additional dimension to this balancing act.

The Human Rights Act 1998 requires the UK courts to administer the law in a manner which is compatible with the rights set out in the European Convention.

Separately, the Scottish Parliament is required by the Scotland Act 1998 to only pass legislation which is compatible with the rights in the European Convention.

In defamation cases, this can involve considering the correct balance between the right to freedom of expression (Article 10 of the Convention) and the right to respect for private life (Article 8 of the Convention).

The right to freedom of expression protects the right to hold and exchange information and opinions

The media are considered to have a particularly important role in this. The European Court of Human Rights has recognised its role in facilitating public debate and allowing the exchange of views between politicians and the electorate.

However, the right to freedom of expression is not absolute. The European Convention recognises grounds for restrictions, where these are "necessary in a democratic society". Those grounds specifically include:

- the protection of the reputation or rights of others, and
- preventing the disclosure of confidential information.

The right to respect for private and family life encompasses a right to protection of reputation

Article 8 encompasses much more than a right to protection of reputation. However, a right to protection of reputation has been found by the European Court of Human Rights to be part of the right to respect for private life [6] . Reputation is considered to form part of the personal identity and psychological integrity of the individual - which is what the right to respect for private life is intended to protect.

The right to respect for private life is also not absolute. It can also be restricted, where this is "necessary in a democratic society". The grounds include the protection of the rights and freedoms of others, which could include the right to freedom of expression.

Balancing human rights

The right to freedom of expression and the right to respect for private life are equally important. Rather, courts (and governments in their formulation of the law) have to balance the rights on the basis of the circumstances.

Generally, the right to hold and express political opinions is protected more than the right to insult or offend. Individual reputations are protected against excessive criticism, but only where the effects of criticism are particularly severe. Public figures - such as politicians and public servants - can expect to put up with more criticism than ordinary citizens.

Importantly, where the exercise of one right infringes the other, the role of courts and governments is to ensure that the interference is proportionate.

What is the background to the Bill?

This section of the briefing looks at the following issues:

- reform in England and Wales
- the position in Scotland in relation to the English reforms
- the Scottish Law Commission review, and
- the Scottish Government consultation.

Reform in England and Wales

Much of the background to the Bill lies in changes made to English libel law in 2013.

These followed from a long-running campaign against:

1. "libel tourism" - i.e. rules which allow cases to be brought in the English courts which have a tenuous link to England and Wales; and
2. the use of English libel law against third sector organisations, academics and investigative journalists in a way which was said to stifle free speech and legitimate debate. [7]

The campaign had various threads, but some of the main issues were related to:

Online publication

Online publication had become the norm. However, the existing "multiple publication rule" did not sit easily with this. The rule meant that that each defamatory statement gave rise to a separate right to bring court action - essentially, each “hit” on a webpage created a new publication against which a claim can be made . This meant that there was often no obvious end to the threat of litigation.

The high costs of losing defamation actions in England and Wales

High costs were seen as putting third sector organisations, academics and investigative journalists at a disadvantage. The consequences of losing a case were so great that people were potentially being forced into not publishing - or removing published content - by the threat of court action by wealthy individuals or businesses.

In England and Wales, courts can award "punitive damages" in certain defamation cases. This is compensation which goes beyond the loss actually suffered, with the intention of deterring the wrong-doing.

In addition, defamation cases in England and Wales were, at that point, commonly heard by a jury. Juries tend to make more generous compensation awards than judges.

Finally, at the time, arrangements supporting "no win, no fee" court action allowed for significant legal costs to be recovered from defendants who lost their case.

These factors all fed into the high costs associated with defamation cases.

The lack of clarity on common law defences available to third sector organisations, academics and investigative journalists whose publications are in the public interest

Although certain defences existed, these were seen as not providing sufficient protection for freedom on expression.

The overall argument was that the English rules had a "chilling effect" on free speech in England and Wales and, due to libel tourism, the rest of the world.

The issues were examined by the Commons' Culture Media and Sport Committee. It recommended reform in its 2010 report "Press Standards, Privacy and Libel" as did a Ministry of Justice Working Group. [8] After the May 2010 general election, the UK Government committed to review the law.

The movement to reform the law ultimately led to the Defamation Act 2013 (2013 Act). Changes included:

- requiring people to show “serious harm” to be able to sue for defamation
- replacing common law defences with statutory ones, including a defence of "publication in the public interest"
- introducing a new defence protecting online hosts from defamation actions, provided they follow a procedure designed to resolve the matter with the poster of the comments
- introducing a "single publication rule" to replace the "multiple publication rule"
- tightening up the jurisdictional rules with the aim of preventing libel tourism
- limiting those against whom a defamation action can be brought to the author, editor or publisher – unless it is not reasonably practicable to sue one of this group.

Most of the English reforms were not followed in Scotland

The majority of the 2013 Act was not extended to Scotland

With the exception of certain defences against defamation in the academic and scientific fields, the Scottish Government decided in 2012 not to use a legislative consent motion (LCM) to extend the full scope of the 2013 Act to Scotland.

It argued that the Scottish law on defamation was “relatively robust” and that the issues which had arisen in England and Wales did not exist in Scotland. [9]

Referral to the Scottish Law Commission

The Justice Committee recommended approving the Scottish Government's limited LCM.

However, it also heard evidence raising more general concerns about defamation law in Scotland and concluded in its 2012 report on the LCM that the Scottish Law Commission should be asked for "its views on whether it considers that the law of defamation in Scotland requires to be reviewed." [10]

Scottish Law Commission review

The Scottish Law Commission (SLC) consulted with interested parties and, in March 2016, published a Discussion Paper on Defamation.

The Discussion Paper stressed that there were arguments for having similar defamation laws across the UK. However, there were also arguments that one should not simply follow rules made in a different legal system, noting that:

> " The issues and concerns that led to the Defamation Act 2013 may not apply (at least with the same force) in Scotland; for instance, there has been little evidence of libel tourism here, and the extent to which there is evidence that publication of information has been restricted is open to question. "
>
> Scottish Law Commission, 2016[11]

The SLC, therefore, decided to take a broad approach. This examined most aspects of the Scottish law of defamation (including the connected law of verbal injury), whilst taking into account developments in England and Wales.

The Discussion Paper was followed by a SLC Report on Defamation in December 2017 which made recommendations for reform of the law, including a draft Bill.

Justice Committee work and Scottish Government consultation

Following the SLC Report, the Justice Committee carried out a short inquiry into the proposals. It heard from the SLC on 23 January 2018 and other stakeholders on 12 June 2018.

The Convener of the Justice Committee, Margaret Mitchell, also wrote to the Cabinet Secretary for Justice on 22 February 2018. The letter requested an update on whether the Scottish Government would bring forward legislation in this parliamentary session to implement the SLC's recommendations.

The then Minister for Community Safety and Legal Affairs responded on 6 June 2018. She indicated that the intention was to consult on the proposals with a view to bringing forward legislation.

The Scottish Government published its consultation - Defamation in Scots Law - in 2019, which sought further views on reform of the law.

What exactly are defamation and verbal injury?

Both defamation and verbal injury are what lawyers sometimes refer to as "civil wrongs" or "delicts"

In essence, they allow people and some organisations to bring court actions against those who make false statements of fact which damage their reputation and/or financial interests. Both written and spoken statements are covered, as well as images.

Although defamation and verbal injury are both aimed at providing legal remedies against damaging statements, there are important differences between these two areas of law.

The main difference is that defamation is aimed at situations where a statement unfairly damages a person's or organisation's reputation. Examples would include a newspaper report making a false allegation about someone's private life or an allegation that a company has been involved in fraud, corruption or some other illegal activity.

In contrast, the law on verbal injury deals with statement which are not defamatory *per se*. Instead, the focus is on other sorts of damage, for example the economic loss caused to a business by the spread of malicious rumours about the quality of its products.

Another major difference is that defamatory statements are presumed to be both false and made maliciously (i.e. with the intention of causing injury). It is, however, open to the defender to prove that a statement is true or (in certain limited circumstances) was not made maliciously. If they do this successfully, the case will fall.

By comparison, in an action based on verbal injury, the pursuer has to prove that a statement is false and that the defender acted maliciously.

Although they are different, defamation and verbal injury are not completely separate concepts. Some types of behaviour can be both defamatory **and** result in verbal injury.

In addition, both areas of law recognise that the rights in question are not absolute ones but have to be balanced with other rights, most importantly the right to freedom of expression.

In practice though, someone would be unlikely to choose to sue for verbal injury if they could sue for defamation. This is because of the assumptions which benefit the pursuer in defamation cases, and because there have been very few verbal injury cases, making the law uncertain. The Scottish Law Commission's Discussion emphasises this point stating that:

> “ There seems little to be gained by opting for an action for verbal injury rather than defamation as the pursuer in a defamation action has the benefit of the presumptions of malice and falsity.”
>
> Scottish Law Commission, 2016[12]

Defamation - what are the sources of law?

The Scots law of defamation is a mix of common law (case law) and legislation, with recent additions from EU and human rights law

The common law is the source of most of the key principles. The SLC's Discussion Paper indicates though that it is poorly developed in Scotland due to a lack of cases. This has:

> " sometimes given rise to a tendency for Scottish courts and practitioners simply to adopt decisions by the English courts"
>
> Scottish Law Commission, 2016[12]

Key UK statutes include:

- **The Defamation Act 1952** - although many provisions have been repealed, this includes rules still relevant to defamation actions in Scotland.
- **The Defamation Act 1996** - this includes rules on offering amends, secondary publishers and privileges (i.e. principles protecting certain statements from defamation actions)
- **The Defamation Act 2013** - in Scotland this is limited to rules which extend qualified privilege (see below) to certain academic and scientific activities

There are also UK regulations[i] implementing the EU's e-Commerce Directive [ii]. These provide defences against defamation actions for internet intermediaries which host or transmit third party content. This includes many websites and social media companies.

Finally, the European Convention on Human Rights (Convention) also has an important role to play. The "Balancing human rights" section discusses this in more detail.

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i The Electronic Commerce (EC Directive) Regulations 2002

ii Directive 2000/31/EC)

Online content and free speech

The biggest challenge to the law of defamation since it was last reformed has been the advent of the internet

The internet has made content creation cheap and easy. This has led to a huge increase in things like citizen journalism, blogging, review sites and the use of social media sites (which allow users to share content with each other).

In many ways, sharing views and opinions has never been easier. This contributes to democratic debate.

However, the dissemination of views takes place outwith the traditional frameworks - and safeguards - of the print media. For example, traditional journalists undergo training and editors have access to legal advice, but this will often not be the case for those publishing online. It has become easier to spread unsubstantiated rumours, or to deliberately damage someone's reputation.

This has put website operators on the frontline of the battle over freedom of expression. Decisions to remove online content are usually made on the basis of the publication guidelines of the website operator rather than by a judge's consideration of the rights at stake.

This part of the briefing will look at:

- the current limits on liability for website operators
- the "take-down" procedure which exists in England and Wales
- the SLC recommendations in this area.

The current law limits the liability of internet intermediaries for defamation

The current law contains rules which limit the liability of secondary publishers and information society service providers - which covers many internet intermediaries. This is discussed in more detail in the "Internet intermediaries" section.

However, new ways of delivering content blur the boundaries of the traditional definitions. Does the fact that Google ranks its search results make it an editor? Can discussion forum hosts be considered to be publishers, or do they merely provide a service which allows information to be retrieved?

The Bill would update the law to take account of more recent developments, including concepts such as liking and re-tweeting. However, it is impossible to entirely future-proof the law in this area.

The "take-down" procedure in England and Wales

The Defamation Act 2013 was used to introduce what is commonly referred to as a "take-down" procedure in England and Wales. Similar procedures exist in many other countries, including the USA, although the way they work in practice varies.

The 2013 Act works to remove an internet intermediary's liability for content posted by users if it follows a procedure set down in regulations to deal with potentially defamatory material.

A complainant is able to contact the website operator with details of why they believe material is defamatory. The website operator must then attempt to contact the poster of the material. The poster can agree to having their contact details shared with the complainer, allowing the complainer to pursue the matter directly. Alternatively, if the poster cannot be contacted, or refuses to share their details, the website operator must remove the content.

The procedure acts as a low cost option for challenging defamatory material without the need to go to court. This is exactly what many people who have had their reputation damaged online are looking for.

However, it can also be argued to contribute to the chilling effect on freedom of expression discussed in the Policy Memorandum. A poster may prefer to have their post removed - even if they stick by its contents - than face the risk of direct legal action.

The English take-down procedure tackles the issue of online anonymity

The provisions in the Defamation Act 2013 are also intended to tackle the problem of online anonymity. People usually post online content under usernames which do not indicate their true identity. Without further information - usually only held by the website operator - it is not possible to take legal action.

Unless there is some system in place to deal with online anonymity, it remains possible for people to post defamatory content online without fear of legal consequences.

The SLC recommendations for online content

The Bill would make provision for the courts to require a website to remove content (and to require other people or bodies to stop distributing or showing material). However, this involves the expense of taking legal action. In addition, it does not deal with the issue of online anonymity.

The SLC Report (chapter 4) looks at the options for dealing with website operators, including replicating the English take-down procedure. It concludes that the liability and defences of internet intermediaries in the context of defamation should be considered in a UK-wide review. In particular, it notes that the English procedure is little used and is considered burdensome by online businesses.

Defamation - summary of the main legal principles

The following section includes short overviews of the main legal principles which form the law of defamation in Scotland. These are not meant to be an exhaustive summary of the law, but are instead aimed at giving a general impression of how the law currently works.

Further details can be found in the SLC's Discussion Paper.

It explains:

- how defamation is defined in law
- the presumptions of falsehood and malice
- that there is no need for communication to a third party
- that there is no threshold for harm before a court action for defamation can be raised
- who can bring court actions for defamation
- which courts can hear defamation cases
- time limits for defamation court action and the multiple publication rule
- the costs involved in court actions for defamation
- defences available against a court claim for defamation
- what remedies a court can order.

How is defamation defined in law?

Whether something is defamatory is based on common law rules, not statute. The classic test is in the decision of the House of Lords in Sim v Stretch.[iii] In that case, Lord Atkins stated that the key question is whether:

> " ... the words tend to lower the plaintiff in the estimation of right-thinking members of society generally."

The SLC's Discussion Paper explains that the test which courts use is an objective one. It considers whether a reasonable person, reading the statement, would think that it defamed the pursuer. This means that a case will not be successful just because a sensitive pursuer's feelings were hurt, or because "unreasonable" people considered a statement to be defamatory.

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iii [1936] 2 All ER 1237

The presumptions of falsehood and malice - there is no need for intention to defame

For a court action to succeed, defamatory statements have to be:

1. false; and
2. made with "malice", in other words with the intention of causing harm.

Crucially though, if a statement relates to the pursuer and also fulfils the test for defamation then the law presumes it to be false and made maliciously.

If the defender (the person defending the case) can prove that the statement is true the case will fall. There are also scenarios where a statement will be considered to be "privileged", which means that the case will fall unless it is proved that the statement was made maliciously.

As a result, someone can end up making a defamatory statement purely on the basis of an error or a misunderstanding. The actual intention behind the statement is largely irrelevant, provided that the defamatory statement is false. [13]

No need for communication to third parties

Unlike in most jurisdictions, in Scotland, defamatory statements do not need to becommunicated to third parties (i.e. published in some way). The SLC Discussion Paper notes that:

> “ In Scots law defamation can arise if an imputation is communicated merely to the person who is the subject of it; in other words if it is seen, read or heard only by its subject and no one else. ”
>
> Scottish Law Commission, 2016[12]

The SLC Discussion Paper suggests that this principle is difficult to rhyme with the current focus on reputation, but indicates that it:

> “ may be traceable to the origins of the law of defamation as an offshoot of the general law of verbal injury which, up until around the mid-nineteenth century, encompassed insult as well as falsehood ”
>
> Discussion Paper on Defamation (para 3.2), 2016[14]

No threshold for harm before court action for defamation can be raised

In England and Wales, there is a rule in the 2013 Act which means that defamation cases can only be brought if a statement has caused or is likely to cause "serious harm" to a person's reputation.

In contrast, in Scotland, there are no statutory tests or clear precedents from case law which allow courts to examine the impact of defamation in this way. [15]

Who can bring a defamation action?

Individuals can bring defamation actions

Individuals are referred to as natural persons in law to distinguish them from legal persons, such as companies. By definition, individuals have a reputation and are therefore able to bring defamation actions.

Businesses, charities and similar organisations can bring defamation actions

Legal entities such as companies and partnerships can also bring defamation actions, provided that they can show that their reputation has been damaged. Common examples of statements which may be defamatory include claims of fraud, corruption or poor business practices against companies.

Damages can, however, only be claimed for financial loss not damage to feelings (known as "solatium") as, by definition, there are no feelings to be hurt. [16]

Public bodies cannot bring defamation actions

In England and Wales, public bodies are prohibited from bringing defamation actions. This rule stems from a House of Lords decision in the Derbyshire County Council case[iv]. This is sometimes known as "the Derbyshire principle".

The rationale for the court's decision was that public bodies should be open to "uninhibited public criticism" and that reputation should be protected by political rather than legal means.

The SLC's Discussion Paper indicates that, although there is limited Scottish case law on the Derbyshire principle, one should assume that Scottish courts would follow the general principles. [17]

Individuals holding public office can, however, still bring cases in a personal capacity, as distinct from their capacity as an office-holder. A recent example of this in England and Wales is the defamation action taken by the chief executive of Carmarthenshire council against a blogger.

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iv Derbyshire County Council v Times Newspapers Ltd and Others [1993] AC 534

Public bodies can, at least in principle, provide financial support for actions by office-holders. However, this is a controversial area of policy. There have been cases in England and Wales which have held that financial support can be unlawful if the true purpose behind a defamation action is actually to protect the reputation of the public body. [18] In addition, there have been cases where providing financial support to officials has been challenged under local government legislation [19] .

Defamation actions cannot be taken after someone has died

Although there has been considerable activity in this field, including a Scottish Government consultation in 2011 (see Chapter 12 of the SLC Discusion Paper), it is not possible for actions to be taken in Scotland in relation to defamatory statements made after someone has died. This means, for example, that a deceased's family cannot take an action on the deceased's behalf.

Which courts can deal with defamation actions?

Defamation actions can be raised in either the sheriff courts or the Court of Session in Scotland

Traditionally, defamation cases tended to be raised in the Court of Session - which is Scotland's most senior civil court. However, changes to court rules in 2015 prevented cases being raised in the Court of Session unless they had a value of at least £100,000. This means that more defamation cases are being raised in the sheriff courts.

The Scottish Courts and Tribunals Service does not collect statistics on how many defamation cases are raised in Scotland. It can therefore only provide very broad estimates on this point.

It is estimated that approximately 25 defamation cases are raised in the sheriff courts each year, and around 12 per year in the Court of Session [20] .

England is often regarded as a more favourable jurisdiction in which to raise defamation proceedings

It is possible to raise defamation proceedings in England rather than Scotland if the statement complained of was published there.

In most cases, a statement published in Scotland will also have been published in England. For example, most newspapers circulate in England as well as Scotland, and most online statements will be read in both nations too.

Legal rules in England allow for larger damages awards in certain cases (called "punitive damages"). They previously allowed for more of the expenses of taking court action - including insurance against having to pay the other side's legal costs - to be recovered from the loser. Thus, where the option was available, a pursuer may have chosen to sue in England rather than Scotland.

However, recent reforms in England - both to defamation law and the rules about claiming legal expenses - may have changed this position.

EU rules

The EU has rules in the Brussels I Regulation which determine which Member State courts have jurisdiction over civil law cases (including defamation cases). There are similar rules in the Lugano Convention involving EU Member States and Iceland, Switzerland and Norway. These rules apply in the UK up until the end of the Brexit transition period (31 December 2020).

Cut-off periods for actions and the multiple publication rule

The Prescription and Limitation (Scotland) Act 1973 provides cut-off periods (known as "limitation periods") within which court actions need to be taken.

For defamation cases it lays down that:

- an action has to be commenced within a period of three years after the date on which the cause of action accrued;[v] and that
- the cause of action accrues on the date on which the publication or communication first comes to the notice of the pursuer.[vi]

On its face, the three year rule provides a clear time limit on actions being brought. However, there is a rule derived from case law (known as the "multiple publication rule"). This means that each individual publication, even if the same/substantially the same material has been published previously, gives rise to a separate cause of action.

The Policy Memorandum explains that the result is that:

> " each time a publication is read by a new reader, sold or otherwise republished, a new limitation period will begin. This exposes the publisher to a risk of litigation without end."

The multiple publication rule has a significant impact on online publications as each "hit" on a webpage by a new reader amounts to a republication. A new limitation period starts each time the website is accessed.

What costs are involved in bringing and defending defamation actions?

The fees charged by solicitors are a private matter between the solicitor and their client

v section 18A(1)
vi section 18A(4)

This means that there is little publicly available information on the costs of defamation actions. Solicitors can charge in a range of different ways - for example, an hourly rate or a fixed fee.

They can also work on a "no win, no fee" basis - where the client pays an increased fee if the case is won, but no fee at all if they lose. However, the complexity of defamation actions means that this type of arrangement is less likely to be available.

Note that, as well as solicitors' fees, someone taking court action for defamation is also likely to have further costs, including:

- court fees, for using court facilities; and
- expenses associated with collecting and presenting evidence, such as witness travel costs.

It is relatively common to engage an advocate as well as a solicitor when dealing with a defamation claim

An advocate is a lawyer who specialises in presenting legal arguments to the court. Using an advocate as well as a solicitor increases the costs of court action.

Advocates (and related legal professionals) have the exclusive right to appear in the Court of Session. Solicitors cannot address this court directly. This means that it is necessary to use an advocate if the case is raised in the Court of Session.

However, because defamation cases are complex and unusual, and the law in this area is not always clear, it is also relatively common for advocates to appear in defamation cases in the sheriff courts.

What are the defences to a defamation action?

This section discusses the main defences against defamation actions in Scotland:

- truth or "veritas"
- fair comment
- public interest
- absolute and qualified privilege
- internet intermediaries.

Truth or "veritas"

For a defamation action to succeed a statement has to be false.

Consequently, the defence of truth (also known as *veritas*) is a complete defence to a defamation action. If what was said is true then the question of whether it was motivated by malice is irrelevant and the case will fail.

Fair comment

Where comments and opinion can be separated from factual statements, there is a defence to a defamation action that the comments in question are fair ones. The SLC Discussion Paper notes that there are uncertainties as to the scope of this defence, but that comments need to be based on a true statement of facts and on a matter of public interest.

Recent examples where this defence has been used include:

> The 2013 case of Massie v McCaig where the Court of Session stated that it was fair comment for a politician to point to a potential conflict of interest. In this case, a local property developer had donated money to a political party whose councillors were asked to vote on the developer's development proposals.[vii]

> The 2019 case of Campbell v Dugdale where the Sheriff Court held that it was fair comment for the former MSP, Kezia Dugdale, to express the opinion that the author of a tweet was homophobic. Even though this was found by the court to be incorrect, it was one way of reading the tweet in question. [21]

Public interest

In the Reynolds case[viii], the House of Lords introduced a defence which protected the publication in the media of untrue defamatory allegations. The case related to publication by the Times of a story which alleged that the previous Taoiseach of Ireland, Albert Reynolds, had misled the Irish Parliament.

The main principle in the Reynolds case is that publishers may have a defence to a defamation action if they have published on a matter of public interest and it can be shown that the publication was “responsible”. [22]

The Reynolds decision emphasised that the core issue is the balancing of free speech. To assess this, it laid down an non-exhaustive checklist of ten factors which have to be weighed up. These have been developed further by subsequent cases. [23]

In England and Wales, section 4 of the 2013 Act repealed the Reynolds defence and set up a new statutory public interest defence. In contrast, in Scotland the Reynolds test still applies.

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vii Allan Massie v Callum McCaig and others [2013] CSIH 14 at para. 33
viii Reynolds v Times Newspapers Ltd [2001] 2 AC 127 (HL)

Absolute and qualified privilege

As outlined in the SLC Discussion Paper, there is a need for rules (known as "privileges") which recognise that there are situations where the right of an individual to the protection of their reputation is outweighed by the benefits which publication brings to the public and to free speech.

There are two types of privilege - "absolute privilege" and "qualified privilege".

Absolute privilege

Absolute privilege provides complete protection from a defamation action even for a false statement made with malice. It covers the following limited situations:

- **Judicial proceedings** - defamatory statements made in the course of judicial proceedings by judges, lawyers and witnesses
- **Proceedings in Parliament and parliamentary papers -** this includes the Scottish Parliament (Section 41 of the Scotland Act 1998)
- **Reports of court proceedings -** the 2013 Act extended this to certain additional non UK courts, but only as regards England and Wales.

Qualified Privilege

If a defence of qualified privilege is effective, the presumption that a defamatory statement is made maliciously is removed. The pursuer therefore has to prove malice in order to be successful.

Both the common law and legislation create situations where qualified privilege applies.

The SLC Discussion Paper explains that there are a very large number of situations where a statement will be covered by qualified privilege under common law. A common example is "a reference for a former employee given by a former employer to a potential new employer." [24]

> In the 2013 case of Lyons v Chief Constable of Strathclyde involved communications between a chief constable and a council's licensing committee, stating that a prospective licensee had links with serious, organised crime. The Court of Session held that the communications were privileged. As no malice could be shown, the defamation case against the chief constable failed.

The Defamation Act 1996 also includes a list of situations which fall under qualified privilege. In England and Wales, the 2013 Act extended the scope of certain of these provisions to statements issued anywhere in the world, but only in relation to England and Wales.

The 2013 Act also created two new forms of qualified privilege which apply in Scotland:

1. **statements in a scientific or academic journal which have been subject to peer review by academic experts** (section 6 of the 2013 Act)

2. **fair and accurate reports of proceedings of scientific or academic conferences held anywhere in the world** - including copies, extracts from and summaries of material (section 7(9) of the 2013 Act)

Internet intermediaries

The publication of defamatory statements on the internet can lead to defamation in the same way as has always been the case for print media. The SLC Discussion Paper explains the rules as follows:

> " Each person who communicates, transmits or temporarily stores defamatory material online, or uses a hyperlink to, or aggregates such material, is potentially liable under defamation law."
>
> Scottish Law Commission, 2016[25]

However, internet intermediaries don't tend to have editorial control of the content they host in the same way as newspapers. The use of internet intermediaries - such as social media businesses, search engines, blog hosts, product and service review pages, chat rooms etc. - has grown hugely in recent years. One of the big questions is, therefore, the extent to which these internet intermediaries are responsible for defamatory statements made by others on their websites.

In the case of Scotland, two pieces of legislation provide potential defences: section 1 of the Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations 2002.

Section 1 of the Defamation Act 1996

Under this provision, a person has a defence in a defamation action if they can show that:

- they were not the author, editor or publisher of the statement complained of (these terms are defined further in the Act);
- they took reasonable care in relation to its publication: and
- they did not know, and had no reason to believe, that what they did caused or contributed to the publication of a defamatory statement

The Electronic Commerce (EC Directive) Regulations 2002

The 2002 Regulations bring into UK law an EU Directive on "information society services" (defined to cover most online commercial services) and provide certain defences against defamation actions for intermediaries:

- who act as "mere conduits" - i.e. transmit electronic information
- who “cache” information - i.e. store electronic information to aid future transmission
- who “host” information - i.e. store electronic information.

To benefit from the defence, in the case of bullet points 2 and 3, the provider must remove information quickly if concerns are brought to its attention.

Defamation - what legal remedies exist?

In Scotland, the main remedies available to a successful pursuer are compensation and prohibition on further publication

The purpose of compensation is to put, to the extent that money can, a person into the same position they would have been in if the defamatory statement had not been made. The legal term for compensation is "damages".

Compensation awards in defamation cases involving individuals usually contain an element to represent hurt feelings. The technical term for this type of compensation is "solatium". The law assumes that a defamatory statement causes hurt to feelings, so there is no need to provide evidence of this.

The compensation award may also contain an element to represent economic loss - such as to professional or business interests - where this is relevant. However, it will be up to the pursuer to provide evidence that loss has been caused. This type of compensation is called "patrimonial loss".

A court can also order a defender to stop making or circulating defamatory statements. This could include removing existing copies from circulation.

Defamation - what would the Bill change?

The Bill would implement all of the SLC's substantive recommendations. This part of the briefing summarises the main changes proposed:

- statutory definition of defamation
- need for communication to a third party
- introduction of a serious harm threshold
- bodies trading for profit and the serious harm threshold
- single publication rule and one year limitation period
- treatment of public authorities
- treatment of secondary publishers/internet intermediaries
- defences
- privileged publication
- remedies
- jurisdiction
- defamation of deceased people.

Statutory definition of defamation

The SLC's draft Bill did not define defamation. Instead, it worked on the basis that courts should rely on the existing common law test in the House of Lords case of Sim v Stretch.

The Scottish Government consultation explained that a statutory definition would improve accessibility as the law would be in one place. [26] However, it also noted the risk that some of the nuances of what constitutes defamation may be lost. It therefore asked for respondents' views on this issue.

The Policy Memorandum states that an "overwhelming number of respondents" indicated that there should be a statutory definition.

> Section 1 of the Bill therefore restates the test as follows: "a statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons)" - see section 1(4)(b)

Bodies which were against a statutory definition included the Faculty of Advocates and the Guardian News and Media Group. The lack of flexibility in a statutory definition was seen as one downside. Another was the risk of the statutory definition of defamation in Scotland diverging from the case law test used in the rest of the UK.

Need for communication to a third party

The SLC Report took the view that defamation should be limited to situations where a statement is communicated to a third party.

Defamation's focus is argued to be on damage to reputation, which can only happen where someone else knows about the statement. Thus, the SLC argues that requiring communication to a third party was a proportionate balance to the right to free speech.

Section 1 of the Bill follows this approach and provides that defamation actions can only be brought where a statement has been communicated to a person other than its subject.

Introduction of a serious harm threshold

The SLC Report recommended the introduction of a statutory harm test in line with the law in England and Wales. This would create a minimum threshold for damage, below which court action for defamation could not be raised.

The SLC stressed that there was a lack of Scottish case law on when courts can dispose of trivial claims. It argued that a statutory test would create a solution to this problem whilst ensuring that similar rules apply across the UK. Some of the respondents to the Scottish Government's consultation took a different view. For example, the Faculty of Advocates stated that:

> " We remain unclear what the problem is which the introduction of this statutory threshold addresses? In England, as we understand it, the desire was to reduce an unmanageable volume of cases and filter those of no merit. That may be an appropriate response to the English legal system, ... It could not be suggested that the Scottish courts are currently struggling to deal with either an unwelcome volume of defamation cases or cases of dubious merit. Accordingly, the rationale for the English threshold simply does not exist in Scotland. "
>
> Faculty of Advocates, 2019[27]

The SLC also played down arguments that the English threshold had created additional costs and complexity for those bringing actions. It mentioned the English Court of Appeal case (Lachaux v AOL (UK) Ltd)[ix] which accepted that serious harm could be proved by inference from the nature of the words used.

Section 1 of the Bill follows the SLC's approach. It provides that defamation actions can only be brought where, "the publication of the statement has caused (or is likely to cause) serious harm" (see section 1(2)(b)).

Since the SLC published its report, the UK Supreme Court has ruled on an appeal in this case.

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ix [2017] EWCA Civ 1334

In its decision the Supreme Court departed from the Court of Appeal's reasoning on the meaning of "serious harm". It held that the 2013 Act created an additional test beyond the common law requirement that the words were capable of having a defamatory meaning. In essence, as well as showing that the words were capable of causing serious harm, someone bringing an action has to show that they did in fact cause harm (or were at least likely to). [28] [29] As a result of the Supreme Court decision, it is not clear whether the SLC's comments on the Lachaux case are still relevant.

More generally, it is not clear what level of evidence will be needed in the Scottish courts to satisfy the "serious harm" test. The Scottish Law Commission consulted on the question of proof, but concluded in its Report on Defamation (para. 2.15) that it was better to deal with the issue through procedural rules rather than in the Bill itself.

Bodies trading for profit and serious harm

The SLC Discussion Paper (paras 3.25-3.27) raised two questions:

1. whether bodies whose primary purpose is making a profit should continue to be allowed to bring defamation actions; and, if so
2. what harm threshold should apply.

On the first question, the SLC Report stressed that companies such as Google had contacted the SLC to argue for the status quo. On the other hand, bodies such as the Libel Reform Campaign had argued that prohibiting businesses from bringing actions would support free speech. This was because they would not be able to use the threat of defamation actions to avert publicity about illicit practices.

The SLC ultimately concluded that bodies whose primary purpose is to make a profit should retain the right to bring defamation actions on the basis that:

> " Insufficient justification has, in our view, been advanced for the radical step of stripping away the rights currently enjoyed by trading companies and other entities existing for the primary purpose of trading for profit under the existing law. This is particularly the case against the background that to introduce such a limitation would largely set Scots law apart from other systems.[x] Such bodies should continue to be entitled to protect their reputations, which can be of great value to them, against defamatory attacks. "
>
> Scottish Law Commission, 2017[30]

The Bill follows the SLC's approach, with the Policy Memorandum emphasising the value of a business's reputation (paras 41-42) . Section 1 would therefore apply to "persons" which, by definition, also covers profit-making bodies.

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x It appears that Australia is the only jurisdiction which limits businesses from bringing defamation actions (profit-making corporations in Australia with ten or more full time staff cannot bring actions).

On the second question, the SLC Report also argued that Scots law should follow English law where profit making bodies have to show "serious financial loss" or the likelihood of such loss in order to bring an action.

Section 1(4)(b) of the Bill follows the SLC's approach and states that for a "non-natural person which has as its primary purpose trading for profit", harm to reputation is not “serious harm” unless it has caused (or is likely to cause) "serious financial loss".

Single publication rule and one year limitation period

The SLC Discussion Paper stressed that the multiple publication rule might contribute towards a chilling effect on free speech. [31] This is because, for both online and hard copy publications, it means that liability is almost perpetual.

It did note though that there were counter-arguments to changing the law. For example, there is an argument that what is significant is not when material is first published, but rather the potential impact on reputation each time material is read.

The SLC Report recognised that there were arguments against the introduction of a single publication rule, but came to the conclusion that these were outweighed by the need to rebalance the rules in favour of free speech. It also took the view that a one year limitation period (i.e. cut off period for bringing actions) was needed for this reason. This would replace the current three year cut-off period.

Section 32 of the Bill follows the SLC's recommendations. It provides that the right to bring a defamation action starts on the date of the first publication with a one year cut-off period for bringing actions kicking in on the same date.

This rule does not, however, apply when subsequent publications are "materially different" from the first publication. "Materially different" is defined broadly to cover:

- the level of prominence that the statement is given
- the extent of subsequent publication, and
- "any other matter that the court considers relevant."

Section 33 of the Bill also includes a rule whereby periods where the parties are involved in mediation will not count towards the one year cut-off period for bringing action.

Public authorities

The SLC Discussion Paper did not examine the common law principle that public bodies cannot bring defamation actions (the Derbyshire principle).

However, in response to comments by the Libel Reform Campaign, the SLC took the view in its Report that the principle should be included in legislation in order to enhance the clarity and accessibility of the law. The SLC included proposals to do this in its draft Bill.

Section 2 of the Bill follows the approach proposed by the SLC. It would:

- prohibit public authorities from bringing defamation actions
- define public authority to include any "persons" whose "functions include functions of a public nature"
- carve out from this definition of "persons" those "non-natural persons" who are: (1) for profit bodies (e.g. companies) or (2) charities, where these are not controlled or owned by a public authority but carry out public functions "from time to time". Such bodies would therefore be able to bring defamation actions.
- give the Scottish Ministers the power to make regulations (under the affirmative procedure) specifying persons which are not to be treated as public authorities - and hence which will be able to take defamation actions. The Scottish Government has indicated to SPICe that this power is designed to give it the flexibility to respond to possible future developments rather than to immediately create a list of bodies which are not to be seen as public authorities
- include a rule stating that nothing prevents individuals from taking defamation actions in a personal capacity (as distinct from in their capacity as an office holder).

Note that the Bill does not contain a detailed definition of "public authority". The Policy Memorandum explains that this will be a matter for the courts to decide based on the facts of each case. In the past, for example, English courts have held that universities are not public authorities. [32]

Although courts will look to definitions linked to defamation cases in first instance, there are also human rights cases which may be of relevance. For example, in 2019, the Court of Session held that Serco, which was contracted to provide housing to asylum seekers, was not a "public authority" under the Human Rights Act 1998. [33]

Private companies carrying out public functions

During the SLC consultation process, campaigners argued that the Derbyshire principle should not only be restated in legislation but should also be extended to cover private bodies such as companies which are contracted by government to provide public services. The argument was that many public functions are now outsourced to private bodies. Without a change in the law companies would, therefore, be able to use defamation law to restrict public criticism of their public functions.

The SLC concluded that extending the law in this way would not be appropriate. It argued that it would not make sense to change the law in Scotland alone and that it would be difficult to lay down which private bodies act in a similar way to public bodies and which do not.

The Scottish Government consulted further on this issue and came to the same conclusion. The Policy Memorandum explains the reasoning for this as follows:

> " The range of measures already included in the Bill will provide effective protection for consumers and others with limited means to ensure that they are not inhibited from criticising bodies exercising public functions. These provisions include the serious harm test, which requires such bodies to show serious financial loss, and the new defence of publication on a matter of public interest. Further, as noted by one respondent to the Scottish Government's consultation: "The use of [this definition] implies that, if the company undertakes more than [just carrying out functions of a public nature "from time to time"], it will be caught by the principle"."
>
> Scottish Parliament, 2019[34]

The Bill would not extend the Derbyshire principle to all organisations which provide public functions. Some would therefore still be able to sue for defamation.

However, it is important to note that the drafting of section 2(3) of the Bill leaves open the possibility that private companies which do more than provide public functions from time to time (i.e. sporadically) may still be viewed as "public authorities". Organisations which are caught by this definition may therefore be prohibited from bringing defamation actions. [35]

Importantly though, the Bill doesn't define what types of private bodies might be viewed as "public authorities" (or what "time to time" means). Ultimately this will be a matter for the courts.

In summary:

- The Bill wouldn't stop all private bodies which provide public functions from suing for defamation.
- However, certain private organisations can still be viewed as "public authorities". In that case , which will be a matter for the courts, they would not be able to sue for defamation
- Private organisations which only provide public functions from time to time (i.e. sporadically) are, however, specifically stated not be public authorities and so can't be stopped from suing for defamation.

Public authority funding for defamation actions by officials

The Scottish Government also consulted on arguments that allowing public authorities to fund defamation actions by officials could allow them to circumvent the Derbyshire principle. However, it concluded that this was not necessary, noting in the Policy Memorandum that:

> “ ... were an individual able to raise an action of this type (which would not be the case in all circumstances), success would vindicate the reputation of the individual and not necessarily the local authority. In addition, any amount of reward recoverable would be attributable to the damage done to the individual’s reputation, not that of the local authority.”
>
> Scottish Parliament, 2019[36]

Secondary publishers and internet intermediaries

The Bill would increase protection for secondary publishers, including internet intermediaries

As explained above, there are rules which restrict the ability of people to take defamation actions against those who are not the author, editor or publisher of a statement. These rules are particularly important to online platforms (i.e. internet intermediaries) which act as a conduit or forum for third party posts.

This is one area where the Scottish Government, in line with the SLC's recommendations, has chosen not to follow the approach in England and Wales. It has also moved away from the existing rules in the Defamation Act 1996.

Consequently, the Bill doesn't include a "take down procedure" as set up in England and Wales by section 5 of the 2013 Act.

It also doesn't include a "reasonableness test" like section 1 of the Defamation Act 1996. This provides that, to stop court action being taken against them, secondary publishers must show:

- that they took reasonable care when publishing, and
- that they did not know, and had no reason to believe, that what they did caused or contributed to the publication of the defamatory statement.

Instead, the Bill would repeal the rules in section 1 of the 1996 Act and replace them with a new rule (section 3 of the Bill). This simply states that court action will not be possible except against the author, editor or publisher of the statement (or in certain circumstances their agent or employee).

The Bill would modernise some definitions to reflect online developments

Section 3(3) of the Bill also includes a more detailed definition of "editor" for electronic statements. It states that someone will not be viewed as an editor of an electronic statement if they are only involved in:

- publishing it or providing a means to access it (e.g. by hyperlink) which does not alter the statement; or
- marking their interest, approval or disapproval of the statement in a manner which does not alter the statement (e.g. by using a symbol), **and**

- that involvement does not materially increase the harm caused by publication.

These rules are aimed at clarifying, for example, that people who retweet twitter posts or like Facebook posts, will not normally be editors and therefore can't be sued for defamation.

Section 4 of the Bill would also give the Scottish Ministers a general power to specify persons to be treated as publishers in regulations. SPICe understands from the Scottish Government that this power to make regulations is intended to deal with unforeseen circumstances which may arise in the future (e.g. due to technological change.)

Defences

The Bill follows the approach recommended by the SLC and would:

- put the common law defence of *veritas* on a statutory footing, re-naming it “truth” - section 5
- put the common law defence of fair comment on a statutory footing, re-naming it “honest opinion” and reforming certain aspects of it - section 7
- introduce a statutory defence of publication on a matter of public interest - section 6
- abolish the common law version of each of these defences - section 8

Honest opinion

To fulfil the current test of fair comment, comments need to be based on true statements of fact and on a matter of public interest. The most important change which the new defence introduces is the abolition of the need for comment to be on a matter of public interest. In addition, the new defence would be extended to cover comments made on facts which someone reasonably believed to be true when the statement was made.

Public interest defence

The new public interest defence is in essence a word for word copy of the English public interest defence in section 4 of the 2013 Act.

According to the Policy Memorandum, the main change is that, "the defence will no longer operate on the basis of the responsibility of the journalism." Instead, the key question will be whether defendants can show that they reasonably believed that the publication was in the public interest. In establishing this a court must, "have regard to all the circumstances of the case" and, "make such allowance for editorial judgment as it considers appropriate."

The scope of the defence will be something which develops through case law.

Privileged publication

The main approach taken by sections 9 to 11 the Bill is to restate the current legislative rules.

However, the schedule to the Bill would also extend certain privileges to publication made anywhere in the world, thus following the approach taken by the 2013 Act.

The Policy Memorandum states that the reason for this is as follows:

> "Aided by social media and the internet, information more easily flows across territorial borders than ever before. The Bill modernises the law of privilege to take account of this. It “internationalises” the occasions to which privilege attaches."

Remedies

The Bill would increase the options available to a pursuer to vindicate their reputation

The usual remedy for defamation in Scotland is compensation.

In its report, the SLC noted that, in some cases, vindication of reputation was more important to the pursuer than compensation. [37] It therefore recommended that several remedies available in England were incorporated into Scots law too.

The Bill would introduce the following options for Scottish courts:

- **ordering the publication of a summary of the court's judgment by the defender** - it would be up to the parties to agree the contents and means of publication, but the court could intervene if required.
- **requiring a statement to be read out in open court** - this was considered to be a particularly useful way of vindicating the pursuer's reputation. It would be up to the parties to agree a statement, with the consent of the court - but a pursuer would be able to make a statement themselves if no agreement was forthcoming.

The courts would be given the specific power to require secondary publishers to remove statements, or to stop circulating them

It is unclear what powers the courts have at present to prevent further publication. It is possible that these are limited to the parties involved in court action.

The Bill's provisions would make it clear that the court could order a website or other secondary publisher (such as a bookshop or distributor) to stop circulating the defamatory statement.

Note, however, that there are still significant issues around jurisdiction. It is not possible for the courts in Scotland to enforce the law outside Scotland. While the process for enforcing court orders in other parts of the UK is relatively simple, taking action beyond the UK depends on the rules of the country the person or body is based in. There are, however, EU rules which streamline and simplify enforcement in EU Member States. [38]

Jurisdiction

Section 19 of the Bill follows the approach in England and Wales in the 2013 Act. This was aimed at reducing the incidence of libel tourism (i.e. defamation actions brought in England by people without a sufficient link to England).

The Bill would change the rules so that Scottish courts would not have jurisdiction to hear defamation cases against a person who is not domiciled in the UK, an EU Member State or a state which is a contracting party to the Lugano Convention, unless Scotland is clearly the most appropriate place to bring the proceedings.

Defamation of deceased people

The SLC Report recommended that no changes should be made to the rule that defamation actions cannot be raised after the person who has been alleged to be defamed has died. It mentioned that changes could lead to a serious risk that legitimate investigative journalism and research would be stifled and that the wider public interest would thereby be damaged. It also stated that

> " Defamation law is designed to protect the feelings of the defamed person; this cannot be easily reconciled with the idea of introducing a cause of action for a person who is no longer alive"
>
> Scottish Law Commission, 2017[39]

The Bill follows this recommendation and does not change the law in this area.

Verbal injury - what are the main legal principles?

Verbal injury describes a range of legal actions which can flow from damaging statements which are not defamatory

If someone shows that a statement is defamatory, they benefit from presumptions that it is both false and made maliciously. Thus, it will generally be in a pursuer's interests to raise court action for defamation if they can.

However, defamation requires that a particular set of words cause damage to a person's reputation. It is therefore not available where:

- the general impression could be argued to damage reputation, but no particular words have a defamatory meaning; and
- it is the reputation of products or services which are damaged, rather than a person's reputation.

Scots law recognises five categories of verbal injury

The Policy Memorandum (paragraph 125) suggests that Scots law currently recognises five categories of verbal injury. These are:

- slander of title (to own property)
- slander of property (referring to the quality of goods)
- falsehood about the pursuer causing business loss
- exposure to public hatred, contempt or ridicule (mainly involving newspaper articles which attributed unfavourable views or habits to the pursuer, but which were not defamatory); and
- slander on a third party (where attacks on the character of one person affect another).

The law in this area is old and unclear. It is therefore not possible to say how a modern court would treat these types of action.

However, the law is clear about what elements are necessary to pursue a claim of verbal injury. A pursuer needs to prove that:

- a statement is false
- that it was made with the intention to injure them, and
- some loss requiring compensation has occurred.

It has been argued that, as long as these elements are present, a pursuer will have a legal claim, regardless of what it is called.

Verbal injury - what would the Bill change?

The Bill would limit the types of verbal injury actions to those involving damage to economic interests

The Bill would abolish the common law right to bring proceedings for verbal injury. This would be replaced by three types of action relating to what the Bill calls "malicious publication". These are:

- statements causing harm to business interests (section 21)
- statements causing doubt as to title to property (section 22), and
- statements criticising assets (section 23).

In each case, the pursuer would have to prove that the statement in question was false and malicious, and that it had been made to a third party. The statement must be presented as a statement of fact rather than an opinion and be sufficiently credible to mislead a reasonable person.

Brexit

As the Bill was introduced before it was clear that Brexit was a fact, the following two sections of the Bill rely on elements of existing EU law and are based on the assumption that the UK will remain an EU Member State:

- Section 19 on jurisdiction
- Section 34 which gives the Scottish Ministers regulatory powers in relation to the liability of "information society services" for defamation.

Given that the UK's transition period with the EU ends on 31 December 2020, it seems that changes will have to be made to these provisions in due course. The degree to which this is necessary will depend on the outcome of the UK's ongoing negotiations with the EU about the future framework post Brexit.

The Scottish Government has informed SPICe that it thought it best to introduce the Bill in December 2019 on the basis of existing EU law. This avoided than trying to second guess the effect on Brexit of the UK general election or negotiations with the EU.

According to the Scottish Government, the latter approach would have meant that Scottish Ministers would have been required to take on more delegated powers to safeguard against future uncertainty. The Scottish Government has indicated that this was seen as undesirable on scrutiny grounds.

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