41

Media Law in Scotland

Chapter summary

The law of Scotland affects journalism in different ways from that in England and Wales. This chapter briefly outlines the Scottish legal system and its judiciary and shows how reporting restrictions affect coverage of criminal proceedings, especially cases involving children. Media organisations based in other parts of the UK may need to pay special consideration to what they publish in Scotland, because contempt laws are interpreted differently.

41.1 The law and legal system

Scotland's legal system differs greatly from that of England and Wales in the structure of the courts, the judiciary, procedure and terminology. But these nations share some law.

Distinctive Scots law - parts of the common law, legislation passed by the Scottish Parliament, Acts of Parliament which apply only in Scotland, and consequent case law – place limitations on journalism. But several Acts of the Westminster Parliament which restrict reporting do not apply in Scotland.

The High Court of Justiciary, sitting as an appellate court, is the final court of appeal for Scottish criminal cases, while the Supreme Court in London is the highest appeal court for Scottish civil cases and for criminal cases in which appellants claim their human rights have been breached.

Because Scotland's civil law is bound by precedent set by the Supreme Court, the nation's civil law of privacy is aligned with that of England and Wales (see ch. 27)– so, for example, a media organisation in Scotland should in most circumstances avoid publishing the identity of someone under police investigation, including an arrested person, unless they have been charged (see 5.11 in *McNae*'s). The UK's full adoption in 2000 of the European Convention of Human Rights has a great effect in law in all three nations, including in cases concerning privacy

disputes. For example, the Court of Session may by interdict (what is called an injunction in England and Wales) order that a person must not be identified in media reports of some aspect(s) of their life, or that no such report should be published, because of the person's rights to privacy under Article 8 of the Convention. For 'cross-border' issues in privacy law, see 41.19.

This chapter focuses on important differences between the laws of England and Wales and those of Scotland which affect journalists, including about what statutory law applies. But the chapter will continue to point when appropriate to content in the *McNae's* book which applies for journalists in Scotland as well as for those in England and Wales.

Useful Websites
Statutory law referred to can be seen on www.legislation.gov.uk

41.2 Prosecutions

The Lord Advocate, who is appointed by the Scottish Government, is responsible for the prosecution of crime in Scotland through the Crown Office and Procurator Fiscal Service (COPFS). High Court prosecutions are prepared by the Crown Office and are conducted by an advocate depute, known as Crown Counsel. In lower courts, prosecutions are prepared and conducted by a local Procurator Fiscal or Depute Fiscal.

Section 52A of the Crime and Disorder Act 1998, which – as ch. 8 of *McNae's* explains - in England and Wales affects how 'allocation' and 'sending' hearings in magistrates' courts are reported, does **not** apply in Scotland. Committals for trial in serious criminal cases take place in private before a sheriff, and little more than the name of the accused and the nature of the charges can be published.

Scots law does not distinguish formally between indictable-only and either-way offences. Although the most serious offences – including murder, culpable homicide (equivalent to manslaughter), rape and incest – may be tried only in the High Court, other offences are effectively either-way in that they may be prosecuted following either solemn or summary procedure. The decision on which procedure to use, and in which court the case should be tried, rests with the Crown as prosecuting authority. Trials following solemn procedure will take place in either a sheriff court or the High Court with a jury of 15. In Scotland there are no opening speeches to the jury in solemn trials.

41.3 The High Court of Justiciary

The High Court deals with serious offences and all trials follow solemn procedure. It sits mainly in Edinburgh, Glasgow and Aberdeen but regularly goes on circuit in other main Scottish centres. There are 34 High Court judges, headed by the Lord Justice General, and his deputy the Lord Justice Clerk. The judges are styled

'Lord ------'. Lord is an honorary title. Appeals brought to the High Court will be heard before a panel of at least three High Court judges.

The same High Court judges may also sit as judges in the Court of Session dealing with civil matters. When they do, the Lord Justice General is known as the Lord President.

41.4 The Sheriff Court

The Sheriff Court is in effect two courts in one. In summary procedure the sheriff sits alone. In solemn procedure the sheriff sits with a jury of 15. Sheriff courts also deal with the early stages of all prosecutions following solemn procedure, where the proceedings take place in private.

Scotland is divided into six sheriffdoms, each headed by a sheriff principal. Each sheriff is either an advocate (barrister) or a solicitor.

Appeals from summary trials will be dealt with by the Sheriff Appeal Court, which sits in Edinburgh. Appeals from solemn trials go to the High Court sitting as a court of appeal.

The Sheriff Court also deals with civil cases, and sheriffs conduct Fatal Accident Inquiries – roughly equivalent to, but not as frequent as, inquests south of the border.

Cross Reference
Ch. 17 of *McNae's* explains the English and Welsh inquest system.

41.5 The Justice of the Peace Court

The Justice of the Peace Court deals with minor offences following summary procedure, and some minor administrative matters. Unpaid justices of the peace (magistrates) sit with no jury.

41.6 Open justice

The fundamental rule in common law that justice should be conducted openly, unless an exceptional circumstance or the nature of the case necessitates a departure from the rule, applies throughout the UK. This means that any restriction which a court imposes in common law- or by using a discretionary, statutory power - on journalists and the public having access to a court hearing, or on what can be reported from it, must be necessary for the administration of justice or to protect a person's legitimate rights in some other way. Case law recognising the open justice principle includes *Richardson v Wilson* (1879) 7 R 237, *Scott v Scott* [1913] AC 417 (see 15.1 in *McNae's*, and the Additional Material for ch. 15 on www.mcnaes.com) and *MH v Mental Health Tribunal for Scotland* [2019] CSIH 14.

Useful Websites
The Scottish Courts and Tribunals Service (SCTS) has issued a 'Media Guide' for its staff on what information it can supply to journalists about cases - see Useful Websites at the end of this chapter. The guide refers to the open justice principle.

41.7 Journalists' access to case material

In *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC (a case often referred to as *Dring*), the Supreme Court ruled that, because of the open justice principle, non-parties have a presumptive right of access to see case material referred to in a court's public proceedings. The Court set out principles for courts to apply when they consider requests by non-parties, including journalists, for copies of case material, and that judgment should be cited by a journalist applying for such access. The right is not dependent on whether the journalist attended the hearing in which the sought-after material was referred to. NB: An important ruling in England and Wales was the High Court's judgment in 2021 that case material can be disclosed to a journalist when the open justice principle can be advanced by disclosure of information which may be 'germane' to a 'serious journalistic story' – such as an investigation by the journalist which is not merely the reporting of the case in which the material featured. See 15.19.3 in *McNae's*. For context, see too 15.28 on privilege.

41.8 Bans on photography, filming and audio-recording in courts and their precincts

The SCTS Media Guide, see earlier, says:

> "'Photography (whether still or in moving format) within a court building or its precincts is not permitted without judicial approval following application to the Lord President or relevant sheriff principal. Precincts normally include the immediate area around a court building including its car park, but you will need to check your court specifically.'"

This warning reflects the fact that uncontrolled photography or filming in or around any type of court, including tribunals which are courts, could disrupt proceedings, make witnesses reluctant to give evidence and humiliate them, or the accused, or a pursuer involved in a case. Such activity can be punished as a contempt of court in common law. England and Wales have a statutory ban on such photography or filming, but judges there too may punish it using common law powers to impose a fine and/or jail term.

Scotland's courts have allowed media organisations to film proceedings on some occasions.

41.9 Ban on audio-recording in court

Section 9 of the Contempt of Court Act 1981 applies throughout the UK to automatically ban audio-recording in any type of court, unless authorised by the court, and bans any broadcasting of such an audio-recording, or any playing of it to the public, even when the recording was permitted. See 12.1.4 in *McNae's*.

41.10 Ban on recording or broadcasting of sounds or images from virtual hearings

Courts can hold 'physical' hearings, in which all participants are in a courtroom, or 'hybrid' hearings, in which one or more of the participants uses an audio-visual electronic link or telephone link to take part from a remote location (such as their home or an office) in the courtroom hearing, or 'virtual' ('remote') hearings, in which all those participating, including the judge(s), communicate using such 'live links' (in which circumstance there may be no need for any of the participants to be in a physical courtroom). The use of virtual hearings increased greatly throughout the UK in the coronavirus pandemic, to help curb the spread of the virus.

In Scotland, journalists have been allowed to join hearings remotely to report them. But guidance from the Scottish Courts and Tribunals Service (SCTS) has warned that anyone failing to obey or respect the authority of the court may be subject to contempt of court proceedings. The SCTS added that in particular, those accessing a hearing remotely must not 'screengrab', record or store the proceedings and must not broadcast the proceedings and that the re-use, capture, re-editing or redistribution of the material in any form is not permitted.

Cross Reference

See the case study in 12.1.8 in *McNae's* of the BBC being fined £28,000 by the High Court in London for contempt of court after BBC journalists recorded and broadcast footage from a court's transmission of its proceedings.

41.11 Ban on seeking or disclosing a jury's deliberations

Throughout the UK it is a contempt of court to seek or to disclose any detail of statements made, opinions expressed, arguments advanced, or votes cast by jurors during their deliberations. In Scotland, this ban in section 8 of the Contempt of Court Act 1981. It applies whether the jury was or is in a criminal or civil case. For further explanation, see 12.3 in *McNae's* about law in England and Wales which is almost identical. Anyone who breaks the ban, including a juror who discloses such information, could be jailed for up to two years and/or fined an amount unlimited by statute.

✻ Remember

A journalist anywhere in the UK who approaches a juror with questions or photographs a juror could be ruled to have committed a contempt of court in common law. For context, see 12.4.

41.12 Orders made under the Contempt of Court Act 1981

Courts throughout the UK can make:

- an order under section 4(2) of the Contempt of Court Act 1981 to postpone reporting of all or part of proceedings to avoid a substantial risk of prejudice to those proceedings or other proceedings imminent or pending – for detail see 19.11 in *McNae's*, and 16.7 for grounds on which to challenge such an order
- an order under section 11 of the 1981 Act to permanently ban publication of a name or matter in connection with the proceedings - see 12.5 in *McNae's*, and 16.10-16.11 for grounds of challenge

The cases referred to in *McNae's* are mainly from England, but the grounds of challenge may well be relevant for cases in Scotland.

Cases in which orders have been made under section 4(2) and section 11 are listed on the Scottish Courts website at https://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders.

41.13 The Contempt of Court Act's strict liability rule

Although the Contempt of Court Act 1981 was supposed to operate uniformly throughout the UK, it was often applied more strictly in Scotland as regards the strict liability rule in the Act's sections 1 and 2. The effect of those sections is ban the publication of anything which creates a substantial risk of serious prejudice or impediment to an 'active' case. A main concern is that a jury may be influenced in its verdict in a criminal trial by the media's pre-trial coverage of a case, or by what is published during the trial, so that the accused's conviction is unjust. The Act is covered in ch. 19 of *McNae's* (and for context, see too below, 41.19 Cross-border publication.

Courts have taken the right to freedom of expression under the European Convention on Human Rights into account. In 1998 a High Court judge, Lord Prosser, said juries were healthy bodies which did not need a 'germ-free' atmosphere.

Proceedings become active, for example, upon arrest or when a warrant to arrest is granted, and cease to be active at more or less at the same point as in England and Wales. In Scotland, the 1981 Act does not have a category whereby cases remain active if 'under investigation', but the equivalent category is that cases remain active unless and until the proceedings are expressly abandoned by the prosecutor or are deserted *simpliciter*.

Case study:

In 2018 the *Scottish Daily Record* was fined £80,000 for contempt of court after it admitting breaching the 1981 Act in two articles. One revealed an arrested man's criminal past and the other included a photograph of a man charged with offences as well as material which could have featured in his trial. Explaining in the written Opinion of the Appeal Court why it fined the *Record*, Lady Dorrian, the Lord Justice Clerk, said the first article had associated the arrested man with drug trafficking and dealing, and with shootings of members of organised crime. She added: 'It used phrases such as "gang boss", "cocaine kingpin" and "cocaine baron", and suggested that he had been "involved in a violent turf war with rival gangsters". In addition, it revealed detailed information about his criminal history, including previous convictions and prison sentences. It referred to other live proceedings against him, suggesting that he had gone into hiding in connection therewith and describing him as "one of Scotland's most wanted men"'. She said the article in the Court's view had carried a severely prejudicial risk. The other article was about a man who had appeared in court, two days before it was published, on charges of attempting to abduct two girls, both aged 9, whilst he was subject to a sexual offences prevention order. It named him and included photographs. Lady Dorrian said he could have been identified from one of these, adding: 'The photographs and captions were sensational in nature, showing him being pinned down to the ground and in handcuffs, one bearing the caption "GOT HIM". The article referred to the photograph on the ground with the words "Dramatic moment cops restrain man accused of attempting to abduct two young girls in the woods"..There is detail of the allegations that may form part of the evidence at trial…The article contained quotations from a Facebook posting said to have been made by the mother of one of the children saying "This absolute beastie scum tried to get my daughter and her friend to go into the woods with him in broad daylight". This is a phrase suggestive of offending of a sexual or indecent nature.' Lady Dorrian also said the article linked him by name with the offences of which he was charged, and implied he was guilty. She said case law made clear that publishing a photo of an accused before his trial could lead to serious issues arising if evidence from a witness about identification of the accused could feature, as was the case in his trial. The photo had been published against the advice of a solicitor who had warned of the contempt risk, she added, saying the photo's publication was a particularly serious matter. The delivery of the Court's reasons for the fine, in which it did not name the two men, is believed to have been delayed for several months to avoid causing prejudice to the men's cases (*Petitions and complaint by the Lord Advocate against the Scottish Daily Record and Sunday Mail Ltd* [2018] HCJAC 32; *Press Gazette*, 6 June 2018).

41.13.1 Images of the accused

There has been a strict approach in Scotland to the publication of photos or footage of an accused, at least before the Crown completes its case, in all cases (solemn and summary). It has become the usual practice for media organisations, to avoid being accused of creating a substantial risk of serious prejudice, not to publish a photo of an accused until the Crown's prosecution case is completed, unless it is absolutely clear that visual identification evidence will not be an issue in the trial. For context, see 19.6.4 in *McNae's* about visual identification evidence (NB: the term defendant is used in England and Wales for the accused).

41.14 Sexual offences

Scotland for many years relied almost entirely on a voluntary code adopted by the editors, on the Editors' Code of Practice as applied by Ipso, and on the Ofcom Broadcasting Code (and more recently on the Impress Code) to ensure anonymity for victims/alleged victims of sexual offences. This reliance appears to have worked well, in that there have been few complaints that such code anonymity has been breached (although any breach is traumatic for the person). See 11.7 in *McNae's* about relevant parts of the regulators' codes. In 2004 the Sexual Offences (Amendment) Act 1992 was extended to Scotland, but there it only bans publication of the identities of victims/alleged victims of sexual offences actually or allegedly committed in other parts of the UK, not the identities of the victims/alleged victims of sexual offences actually or allegedly committed in Scotland. For the anonymity provision in the Act as it applies to offences actually or allegedly committed in England and Wales, see ch. 11 in *McNae's*.

Sometimes judges in Scotland make an order under section 11 of the Contempt of Court Act to give anonymity to such a victim/alleged victim in coverage of court proceedings.

Case study:

In May 2021 former diplomat Craig Murray, 62, was sentenced to eight months in jail for contempt of court because he breached a section 11 order imposed to protect the identity of eight women who had accused Alex Salmond, former First Minister of Scotland, of sexual offences, including of attempted rape. Mr Salmond was acquitted in the trial at the High Court in Edinburgh in March 2020. Mr Murray had attended it in the court's public gallery but – as is usual in Scotland –the public, including Mr Murray, was excluded from the courtroom when the women gave evidence (journalists remained there). He posted articles on his website which suggested Mr Salmond was the victim of a conspiracy. The High Court ruled that in a number of these, including several published during the trial, and in a tweet, Murray had published detail likely to identify four of the women. For example, he specified the job held by one at the time in question. He denied breaching the order and told the High Court he was 'arguably

the most read journalist in Scotland'. At 31 March 2020 his Twitter profile had 77,000 followers. One of the three High Court judges who ruled Murray had breached the order, Lady Dorrian, said after it jailed him: 'It appears from the posts and articles that he was relishing the task he set himself which was essentially to allow the identities of complainers to be discerned, which he thought was in the public interest, in a way which did not attract sanction. In that he failed. This is a serious contempt of court, relating to four complainers, albeit in relation to jigsaw rather than positive identification.' Mr Murray appealed the contempt ruling and the sentence, but both were upheld by Appeal Court, High Court of Justiciary (by which time he had served his sentence). The judgment of that Court - delivered by Lord Carloway, the Lord Justice General, in March 2022 - said of Murray, a former UK ambassador to Uzbekistan:

> "'The petitioner attempts to portray himself as a journalist 'in new media', thereby securing what may be thought to be the added protections afforded to the press where a contempt of court has occurred. This is unconvincing. A journalist is a person who writes for or edits a newspaper or periodical; whether in hard copy or on-line. The petitioner is not such a person, nor is he an NGO or campaign group. An individual does not become a journalist merely by publishing his or her thoughts on-line, whether by operating a website, running a blog or tweeting. If it were otherwise almost everyone would be a journalist. That is not the case. .. It is one thing to maintain, and disseminate, a view that the allegations against Mr Salmond were a criminal conspiracy...and to face any consequences of so doing. It is quite another to subject other persons, whether identified or identifiable, to the risk of abuse and to having their dignity and privacy invaded in a manner which the courts strive to protect.... Notwithstanding the petitioner's personal circumstances, but taking into account his apparent total lack of remorse, and perhaps insight, in relation to the consequences of his actions, the court is unable to conclude that a sentence other than one of imprisonment would have been appropriate... the petitioner is an intelligent person whose actions were deliberate and calculated. They clearly showed contempt for the court's order and for the rule of law' (*Craig Murray v Her Majesty's Advocate* [2022] HCJAC 14)."

41.14.1 Exclusion of public for parts of sexual offence trials

Section 92(3) of the Criminal Procedure (Scotland) Act 1995 allows a judge to order in cases 'of rape and the like' that the court should be cleared of the public when the alleged victim gives evidence. The normal practice is for journalists to be allowed to remain on the understanding that the alleged victim remains anonymous.

41.15 Anonymity for victims/alleged victims of trafficking cases in England and Wales

The identification in a Scottish publication of a victim/alleged victim of an offence of 'human trafficking for exploitation', as defined by section 2 of the Modern Slavery Act 2015, which was allegedly or actually committed in England and Wales, is a normally criminal offence under the Sexual Offences (Amendment) Act 1992, even when there is no sexual element in the offence. For how this anonymity applies too in England and Wales in respect of such cases, see ch.11 in *McNae's*.

41.16 Children in court proceedings

Scotland has its own law relating to reporting of court cases in which children are involved.

41.16.1 Children in criminal proceedings

Reporting restrictions under the Children and Young Persons Act 1933 and Youth Justice and Criminal Evidence Act 1999 which, as chapter 10 of *McNae's* explains, can provide anonymity for children and 'young persons' in England and Wales in reports of court cases, do not apply in Scotland. Instead, section 47 of the Criminal Procedure (Scotland) Act 1995 automatically bans reports of criminal cases in Scotland's courts which are published in the UK from including any detail likely to identify any child (aged under 18) as being 'concerned' in the case, whether as the accused, a witness or as someone 'in respect of whom the proceedings are taken' (a definition which would include the victim/alleged victim of the crime if she or he is aged under 18).

Section 47 also specifically bans such reports from including the child's address or school or any 'picture' of him or her (photo or footage).

However, if no accused in the case is aged under 18, the automatic ban does not apply as regards anyone under 18 who is only concerned as a witness and who is not a person 'in respect of whom the proceedings are taken'. But the court can under section 47 make an order banning identification of a child witness if the automatic ban does not apply.

The court has the power to lift the automatic ban if lifting is 'in the public interest' – so can, for example, decide to allow reports to identify an accused who is under 18. The media may wish to apply for it do so where there are special circumstances, possibly through the Crown advocate.

Lord Brand ruled in the High Court in Edinburgh in 1983 that the ban on identification cannot apply to a dead child (such as a murder victim). Rulings to this effect have been made in England and Wales too, in respect of law there – see in 16.12.3.6 in *McNae's*. There is no power in the 1995 Act to prevent identification of a young person who is 18 or older.

The 1995 Act does not apply to cases tried outside Scotland.

In Scotland's law, the age of criminal responsibility was eight – although no child under 12 could be prosecuted, under section 52 of the Criminal Justice and Licensing (Scotland) Act 2010.

In 2019 the Scottish Parliament passed the Age of Criminal Responsibility (Scotland) Act 2019, raising the age of criminal responsibility to 12 years (it is 10 years in England and Wales).

In practice, children aged under 16 were not taken before the criminal courts except on serious charges such as homicide. Instead, the Reporter, a public official, usually refers their cases to a Children's Hearing, a social work tribunal at which a three-member Children's Panel of lay-persons decides on what action should be taken. The public is barred but bona fide representatives of the media may attend these hearings. The Scottish Government also pledged that from autumn 2019 no child would be referred to a Children's Hearing on the ground that they had committed an offence if the relevant behaviour took place when they were under the age of 12.

Appeals from Children's Hearings to the Sheriff Court must be heard in chambers (that is, the public cannot attend), but the sheriff may allow reporters to attend. In 1985 Sheriff Principal Caplan at Paisley suggested that a sheriff should normally do so unless satisfied there were grounds for excluding reporters from a case.

Section 44 of the Children (Scotland) Act 1995 automatically bans the publication of any detail which identifies or is likely to identify a child as being concerned in Children's Hearing proceedings, or appeals from them, and specifically bans the inclusion of the child's address and identification of her or his school in any such report. The High Court ruled in 1993 that even publishing in such a report a picture showing such a child which does not identify him or her nevertheless contravenes the law.

✻ Remember

Proceedings where orders have been made under section 46 of the Children and Young Persons (Scotland) Act 1937, see earlier, to give a child anonymity in reports of the case are listed on the Scottish Courts website at https://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders.

✻ Remember

Regulatory codes have anonymity provisions for children who are crime suspects or witnesses or victims – see 5.14 in *McNae's*.

41.16.2 Children in civil proceedings

There is no automatic ban on identifying a child concerned in custody proceedings, etc., in the Sheriff Court or the Court of Session. But section 46 of the Children and Young Persons (Scotland) Act 1937 gives civil courts the power to order that no report shall reveal the name, address, school or particulars calculated to lead

to identification of any child under 17 concerned in the proceedings and that no picture of the child should be published.

A practice direction from the Lord President suggests to the courts that where such proceedings are held in public, no names should be mentioned in open court.

The court has power to hear such cases in private, where the hearing will take place in chambers. Reporting on a child case which *is* heard in chambers could be a contempt. There is likely to be contempt if a newspaper goes beyond picking up the bare results of a case in private and publishes details of the hearing, thus frustrating the court's wishes.

41.16.3 Fatal Accident Inquiries

Section 22 of the Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Act 2016 is now in force, and allows a sheriff to make an order prohibiting the publication of anything which would identify of a child under 18 in relation to the Inquiry. This specifically covers the name, address or school of any child under 18 involved in the proceedings, and anything else which might identify the child.

Remember

A breach of reporting restriction could also, if thereby a person who should have anonymity was identified to the public, lead to that person successfully suing for damages in civil law and/or successfully complaining to one of the media regulators – Ipso, Ofcom or Impress - about breach of its code of ethics. For context see and 27.12.1 in *McNae's*.

41.17 Defamation

Defamation law in Scotland is moving closer to that in England and Wales (and Northern Ireland). The Defamation and Malicious Publication (Scotland) Act 2021 is due to be in force on 8 August 2022. It codifies some of Scotland's existing defamation law, but in other respects radically changes it.

The Act defines a defamatory statement as being one that tends to lower someone's reputation in the estimation of ordinary persons – an existing definition. Under the Act, the right to sue for defamation in respect of such a statement accrues only if it has been published and if has caused or is likely to cause serious harm to the reputation of a person or organisation (that is, the pursuer's reputation). The Act says that that if the pursuer is an organisation which has as its primary purpose trading for profit, harm to its reputation is not serious harm unless it has caused (or is likely to cause) serious financial loss. Media organisations hope this law will make companies less likely to sue – for example, if investigative journalists have probed their activities - because this definition of the 'serious harm' threshold could be a barrier for companies. The Act also reduces the 'limitation period' from three years to one. This is the period, after the publication of the complained-of statement, within which in all but very exceptional circumstances the pursuer must commence the

defamation action for the court to allow it to proceed. This shorter period means, for example, that media organisations are less likely to be taken by surprise by an action being suddenly launched over an article published many months ago which it did not expect to be problematic, and for which its records of research and decisions have been mislaid or lost with staff turnover.

Also, under the new legislation, the presumption in Scotland's law that a jury should decide the outcome of a defamation trial will be abolished, and so a judge alone will make that decision in all but a very exceptional case. The Defamation Act 2013 abolished in England and Wales the presumption of jury trial, but jury trials were already rare. A main reason was that jury trials tend to be of longer duration, and so more costly for the parties than trials decided by a judge. For example, use of a jury tends to limit what pre-trial rulings the judge can make to simplify the trial, because major decisions on the meaning of words are left for the jury. Also, juries need explanations of defamation law. When this edition of *McNae's* went to press, there had been no jury trial in a defamation case in England and Wales since the 2013 Act came into force. In general, the prospect of a jury trial should there be a defamation case is seen as having a 'chilling effect' on what the media publish, even when there may be a public interest in publishing allegations. Also, the prospect makes media organisations more likely to settle a case, because of the cost factors and unpredictability in what the jury might decide.

When fully in force, the new statute will:

- in its section 5 create a statutory defence of 'truth', to replace the common law defence of 'veritas'
- in its section 6 create a statutory defence of publication on a matter of public interest, to replace the common law, Reynolds defence
- in its section 7 create a statutory defence of 'honest opinion', to replace the common law defence of 'fair comment' (which was also referred to as 'honest comment')
- in its section 9 extend the scope of the defence of absolute privilege so that it covers fair and accurate reports of the proceedings held in public of official courts anywhere in the world, whereas the version of the defence being replaced was only for reporting of courts in the European Union a few international courts.
- extend the scope of the statutory defence of qualified privilege, in a new defence created in section 10 for the publication of peer-reviewed statements in scientific and academic journals, and of fair and accurate extracts from, and copies and summaries of such statements; and because of extension of the privilege in other ways in the Act's Schedule, which replaces Schedule 1 of the Defamation Act 1996 (that is, it replaces the version of the 1996 Act's Schedule applying in Scotland – see later)

In all these respects, this new law for Scotland in essence or wording replicates the law in the Defamation Act 2013, which implemented similar or identical reforms in England and Wales.

Therefore, the essence of these elements of the new law for Scotland can be understood by reading chs. 22 and 23 on defamation defences – for example, how the

truth defence requires a publisher to prove that the statement complained-of was 'substantially true'. Good evidence is needed for that proof. Also, Supreme Court judgments mentioned in those chapters (for example, those concerning the operation of the 'public interest' defence in England and Wales) will shape the common law interpretations by Scotland's judges of the public interest defence in the 2022 Act.

There is no definition in the new legislation (or in the Defamation Act 2013) of what material is 'in the public interest' to publish, but various definitions exist in common law – see ch. 23.

Because of some shared heritage in law what is set out in many passages of chs. 20 and 21 applies for Scotland as well as for England and Wales – for example, about the repetition rule and why media organisations may choose to settle a case rather than it proceed to trial.

The Defamation Act 2013 extended in England and Wales the scope of statutory qualified privilege in various ways by amending Schedule 1 of the 1996 Act - see Appendix 2 in *McNae's* for the current version applying in those two nations, with those amendments. Scotland did not make those amendments to its version of the 1996 Act's Schedule 1. However, the 2021 Act's Schedule, because the Scottish Parliament wanted this, achieves the same result for Scotland as those amendments did for England and Wales. This means, for example, qualified privilege will protect the fair and accurate reporting of statements issued for the information of the public by a legislature, government or governmental authority anywhere in the world, whereas Scotland's version of the 1996 Act's Schedule 1, which the 2021 Act repeals, only provided the privilege for such reports if the issuing body was in a European Union state. Also, qualified privilege bestowed by the 2021 Act's Schedule will protect fair and accurate reports of a public meeting or press conference held anywhere in the world for the discussion of matter of public concern, not merely those held in the European Union. For context, see the explanation in 22.7 of this law in England and Wales, which Scotland's law now replicates more closely.

The 2021 Act also adopts for Scotland a version of the 'single publication rule' (see 21.2.3.6 in *McNae's* about the version applying in England and Wales).

41.18 Readers' postings and 'notice and take down' protection

Website operators throughout the UK, including media organisations publishing online in Scotland, have some protection in law, in addition to some protection in defamation statute, against liability for material posted on their sites by readers which is in breach of civil or criminal law. For detail of this protection if 'notice and take down' procedures are followed, see ch. 30 in *McNae's*.

41.19 Cross-border publication

Publishers, broadcasters and website operators can face problems if publishing material which is likely to be read or viewed on both sides of the Scotland-England border, particularly in relation to contempt of court.

Material published in England and Wales, and therefore intended to keep within the restrictions imposed by the law of those two nations, might amount to a contempt in Scotland, for example because it carries a photograph of an accused person in a Scottish prosecution. There might also be problems in relation to websites – during Peter Tobin's 2008 trial for the murder for schoolgirl Vicky Hamilton, Scottish police contacted the Wikipedia website and arranged for it to take down the page about him, which detailed his previous convictions for raping two teenaged girls and for the murder of Polish student Angelika Kluk, whose body he hid in the Catholic church where he was working as a handyman.

Publishers whose editions or magazines are published outside Scotland should be safe in relation to contempt as long as the publication is not actually distributed in Scotland. Scottish editions, of course, must meet the requirements of Scottish law. The same applies to broadcasters – so, for example, BBC Scotland's coverage of a court case might differ considerably from that which the same case would receive from the BBC south of the border or in Northern Ireland. The Press Association has on occasion run two versions of a story, one intended for publication in England and Wales, and bearing a warning that Scottish subscribers should check with their own lawyers before using it, and one for the Scottish services and written to comply with Scots law.

Websites which are run from outside Scotland are beyond the jurisdiction of the Scottish courts. Websites run from within Scotland must ensure that they abide by Scots law.

The occasionally odd result of having two jurisdictions side-by-side is demonstrated by the 2011 case of the footballer who obtained an injunction from the High Court in London to stop the media identifying him in accounts of his adulterous relationship with a reality TV star. But he was identified on the front page of the Glasgow-based *Herald* newspaper, which, being within the Scottish jurisdiction, was not bound by the High Court's order. Liberal Democrat MP John Hemming later named Ryan Giggs in the House of Commons as the individual who obtained the gagging order. The UK media then quoted the MP.

The equivalent of the injunction in Scotland is an interdict. The terms of an injunction obtained from the courts in England and Wales can effectively be extended to Scotland if an application for an interdict is made to the Court of Session. Ch. 27 in *McNae's* covers privacy injunctions in England and Wales.

41.20 UK law

Some law described in other chapters of this book, as regards actual or potential effects on journalistic activity, applies throughout the UK – for example, the Human Rights Act 1998 (see ch. 1 in *McNae's*, including about the European Convention on Human Rights); the Data Protection Act 2018 (ch. 28), the Copyright, Designs and Patents Act 1988 (ch. 29), the Official Secrets Acts 1911 and 1989 (ch. 32), the Investigatory Powers Act 2016 (referred to in ch. 33, about protection in law of the identities of journalists' confidential sources), and the major counter-terrorism laws (see the online ch. 40). The Computer Misuse Act 1990 and Bribery Act 2010

also apply throughout the UK, containing offences which investigative journalists may risk being accused of (see ch. 34).

Scotland has its own freedom of information statute – the Freedom of Information (Scotland) Act 2002. The University of Edinburgh has published guidance on differences between that statute and the Freedom of Information Act 2000, the similar law in England and Wales, which is described in the online chapter 37 of *McNae*'s. For the guidance, see Useful Websites at the end of this chapter.

41.21 Codes of regulators

As this chapter has already made clear, the Editors' Code of Practice applies to media organisations which are Ipso members in Scotland, and the Impress Code applies to Impress members there. These codes are introduced in ch. 2 in *McNae's*. See the book's index for parts of these codes covered in other chapters. Ofcom regulates broadcasters throughout the UK – see ch. 3 in *McNae's*, and see the book's index for parts of the Ofcom Broadcasting Code covered in other chapters.

Recap of major points

- Scotland has its own legal structure and court proceedings.
- Some aspects of media law are governed by Acts of Parliament unique to Scotland and by associated case law.
- In Scotland an accused person aged under 18 cannot normally be identified in reports of a criminal case..

Useful Websites

http://www.legislation.gov.uk/browse/scotland

Legislation applicable in Scotland

www.scotland-judiciary.org.uk

Information about Scottish judges and their work

www.scotcourts.gov.uk/docs/default-source/scs---taking-action/guide.pdf

Scottish Courts and Tribunals Service 'Media Guide'

http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders

Information on court announcements, including reporting restrictions

http://www.copfs.gov.uk/

Crown Office and Procurator Fiscal service

https://www.ed.ac.uk/records-management/guidance/information-legislation/foi/scotland-uk

University of Edinburgh Guidance on FOI law