These notes refer to the Defamation Act (Northern Ireland) 2022 (c.30) which received Royal Assent on 6 June 2022

Defamation Act (Northern Ireland) 2022

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Defamation Act (Northern Ireland) 2022 which received Royal Assent on 6 June 2022. They have been completed by the Northern Ireland Assembly Bill Office. They do not form part of the Act and has not been endorsed by the Assembly.

2. The Notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. The aim of the Act is to reform the law of defamation to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation. The Act makes a number of substantive changes to the law of defamation, but is not designed to codify the law into a single statute.

4. Policy Objectives

- Make it easier and less expensive to take legal action when you have been defamed;
- Make it harder for the rich and influential to chill free speech;
- Protect the rights of scientists and academics to engage in robust debate;
- Protect the right of journalists to conduct responsible and necessary investigations;
- Protect the work of Non-Governmental Organisations;
- Remove the current presumption in favour of a jury trial;
- Introduce a defence of “responsible publication on matters of public interest”;
- Introduce new statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment.

OVERVIEW

5. The Act is designed to ensure Northern Ireland is not disadvantaged by having less favourable defamation laws than other parts of the United Kingdom.

COMMENTARY ON SECTIONS

Section 1: Truth

This section replaces the common law defence of justification with a new statutory defence of truth. The section is intended broadly to reflect the current law while simplifying and clarifying certain elements.

Subsection (1) provides for the new defence to apply where the defendant can show that the imputation conveyed by the statement complained of is substantially true. This subsection reflects the current law as established in the case of *Chase v News Group Newspapers Ltd*[1], where the Court of Appeal indicated that in order for the defence of justification to be available "the defendant does not have to prove that every word he or she published was true. He or she has to establish the "essential" or "substantial" truth of the sting of the libel".

There is a long-standing common law rule that it is no defence to an action for defamation for the defendant to prove that he or she was only repeating what someone else had said (known as the "repetition rule"). *Subsection (1)* focuses on the imputation conveyed by the statement in order to incorporate this rule.

In any case where the defence of truth is raised, there will be two issues: i) what imputation (or imputations) are actually conveyed by the statement; and ii) whether the imputation (or imputations) conveyed are substantially true. The defence will apply where the imputation is one of fact.

Subsections (2) and (3) replace section 5 of the 1955 Act (the only significant element of the defence of justification which is currently in statute). Their effect is that where the statement complained of contains two or more distinct imputations, the defence does not fail if, having regard to the imputations which are shown to be substantially true, those which are not shown to be substantially true do not seriously harm the claimant's reputation. These provisions are intended to have the same effect as those in section 5 of the 1955 Act, but are expressed in more modern terminology. The phrase "materially injure" used in the 1955 Act is replaced by "seriously harm" to ensure consistency with the test in section 1 of this Act. *Subsection (4)* abolishes the common law defence of justification and repeals section 5 of the 1955 Act. This means that where a defendant wishes to rely on the new statutory defence the court would be required to apply the words used in the statute, not the current case law. In cases where uncertainty arises the current case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

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1 *[2005] EWCA Civ 75.*

Section 2: Honest opinion

This section replaces the common law defence of fair comment[2] with a new defence of honest opinion. The section broadly reflects the current law while simplifying and clarifying certain elements, but does not include the current requirement for the opinion to be on a matter of public interest.

Subsections (1) to (4) provide for the defence to apply where the defendant can show that three conditions are met. These are condition 1: that the statement complained of was a statement of opinion; condition 2: that the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and condition 3: that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published or anything asserted to be a fact in a privileged statement published before the statement complained of.

Condition 1 (in *subsection (2)*) is intended to reflect the current law and embraces the requirement established in *Cheng v Tse Wai Chun Paul*[3] that the statement must be recognisable as comment as distinct from an imputation of fact. It is implicit in condition 1 that the assessment is on the basis of how the ordinary person would understand it. As an inference of fact is a form of opinion, this would be encompassed by the defence.

Condition 2 (in *subsection (3)*), reflects the test approved by the Supreme Court in *Joseph v Spiller*[4] that "the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based". Condition 2 and Condition 3 (in *subsection (4)*) aim to simplify the law by providing a clear and straightforward test. This is intended to retain the broad principles of the current common law defence as to the necessary basis for the opinion expressed but avoid the complexities which have arisen in case law, in particular over the extent to which the opinion must be based on facts which are sufficiently true and as to the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based. These are areas where the common law has become increasingly complicated and technical, and where case law has sometimes struggled to articulate with clarity how the law should apply in particular circumstances. For example, the facts that may need to be demonstrated in relation to an article expressing an opinion on a political issue, comments made on a social network, a view about a contractual dispute, or a review of a restaurant or play will differ substantially.

Condition 3 is an objective test and consists of two elements. It is enough for one to be satisfied. The first is whether an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published (in *subsection (4)(a)*). The subsection refers to "any fact" so that any relevant fact or facts will be enough. The existing case law on the sufficiency of the factual basis is covered by the requirement that "an honest person" must

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2 The Supreme Court in Spiller v Joseph [2010] UKSC 53 referred to this as honest comment.
3 (2000) 10 BHRC 525.
4 [2010] UKSC 53 (at para 105).

have been able to hold the opinion. If the fact was not a sufficient basis for the opinion, an honest person would not have been able to hold it.

The second element of condition 3 (in *subsection (4)(b)*) is whether an honest person could have formed the opinion on the basis of anything asserted to be a fact in a "privileged statement" which was published before the statement complained of. For this purpose, a statement is a "privileged statement" if the person responsible for its publication would have one of the defences listed in *subsection (7)* of the section if an action was brought in respect of that statement. The defences listed are the defence of absolute privilege under section 14 of the 1996 Act; the defence of qualified privilege under section 15 of that Act; and the defences in sections 4 and 6 of the Act relating to publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal.

Subsection (5) provides for the defence to be defeated if the claimant shows that the defendant did not hold the opinion. This is a subjective test. This reflects the current law whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice.

Subsection (6) makes provision for situations where the defendant is not the author of the statement (for example where an action is brought against a newspaper editor in respect of a comment piece rather than against the person who wrote it). In these circumstances the defence is defeated if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion.

Subsection (8) abolishes the common law defence of fair comment. Although this means that the defendant can no longer rely on the common law defence, in cases where uncertainty arises in the interpretation of section 3, case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

Subsection (8) also repeals section 6 of the 1955 Act. Section 6 provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. This provision is no longer necessary in light of the new approach set out in *subsection (4)*. A defendant will be able to show that conditions 1, 2 and 3 are met without needing to prove the truth of every single allegation of fact relevant to the statement complained of.

Section 3: Publication on matter of public interest

This section creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers*[5] and is intended to reflect the

5 [2001] 2 AC 127.

principles established in that case and in subsequent case law. *Subsection (1)* provides for the defence to be available in circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention in this provision is to reflect the existing common law as most recently set out in *Flood v Times Newspapers*[6]. It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.

In relation to the first limb of this test, the section does not attempt to define what is meant by "the public interest". However, this is a concept which is well-established in the common law. It is made clear that the defence applies if the statement complained of "was, or formed part of, a statement on a matter of public interest" to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.

Subsection (2) requires the court, subject to subsections (3) and (4), to have regard to all the circumstances of the case in determining whether the defendant has shown the matters set out in *subsection (1)*.

Subsection (3) is intended to encapsulate the core of the common law doctrine of "reportage" (which has been described by the courts as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper"[7]. In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture. In determining whether for the purposes of the section it was reasonable for the defendant to believe that publishing the statement was in the public interest, the court should disregard any failure on the part of a defendant to take steps to verify the truth of the imputation conveyed by the publication (which would include any failure of the defendant to seek the claimant's views on the statement). This means that a defendant newspaper for example would not be prejudiced for a failure to verify where *subsection (3)* applies.

Subsection (4) requires the court, in considering whether the defendant's belief was reasonable, to make such allowance for editorial judgement as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of Flood, but is not limited to editors in the media context.

Subsection (5) makes clear for the avoidance of doubt that the defence provided by this section may be relied on irrespective of whether the statement complained of is one of fact or opinion.

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6 [2012] UKSC 11. See, for example, the judgement of Lord Brown at 113.
7 Per Simon Brown in Al-Fagih [2001] EWCA Civ 1634.

Subsection (6) abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is intended essentially to codify the common law defence. While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied. It is expected the courts would take the existing case law into consideration where appropriate.

Section 4: Peer-reviewed statement in scientific or academic journal etc

This section creates a new defence of qualified privilege relating to peer-reviewed material in scientific or academic journals (whether published in electronic form or otherwise). The term "scientific journal" would include medical and engineering journals.

Subsections (1) to (3) provide for the defence to apply where two conditions are met. These are condition 1: that the statement relates to a scientific or academic matter; and condition 2: that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned. The requirements in condition 2 are intended to reflect the core aspects of a responsible peer-review process. *Subsection (8)* provides that the reference to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned. This may be relevant where a board of editors is responsible for decision-making.

Subsection (4) extends the protection offered by the defence to publications in the same journal of any assessment of the scientific or academic merit of a peer-reviewed statement, provided the assessment was written by one or more of the persons who carried out the independent review of the statement, and the assessment was written in the course of that review. This is intended to ensure that the privilege is available not only to the author of the peer-reviewed statement, but also to those who have conducted the independent review who will need to assess, for example, the papers originally submitted by the author and may need to comment.

Subsection (5) provides that the privilege given by the section to peer-reviewed statements and related assessments also extends to the publication of a fair and accurate copy of, extract from or summary of the statement or assessment concerned.

By *subsection (6)* the privilege given by the section is lost if the publication is shown to be made with malice. This reflects the condition attaching to other forms of qualified privilege. *Subsection (7)(b)* has been included to ensure that the new section is not read as preventing a person who publishes a statement in a scientific or academic journal from relying on other forms of privilege, such

as the privilege conferred under section 7(9) to fair and accurate reports etc of proceedings at a scientific or academic conference.

Section 5: Reports etc protected by privilege

This section amends the provisions contained in the 1996 Act relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used.

Subsection (1) replaces subsection (3) of section 14 of the 1996 Act, which concerns the absolute privilege applying to fair and accurate contemporaneous reports of court proceedings. Subsection (3) of section 14 currently provides for absolute privilege to apply to fair and accurate reports of proceedings in public before any court in the UK; the European Court of Justice or any court attached to that court; the European Court of Human Rights; and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party. *Subsection (1)* replaces this with a new subsection, which extends the scope of the defence so that it also covers proceedings in any court established under the law of a country or territory outside the United Kingdom, and any international court or tribunal established by the Security Council of the United Nations or by an international agreement.

Subsection (2) amends section 15(3) of the 1996 Act by substituting the phrase "public interest" for "public concern", so that the subsection reads "This section does not apply to the publication to the public, or a section of the public, of matter which is not of public interest and the publication of which is not for the public benefit". This is intended to prevent any confusion arising from the use of two different terms with equivalent meaning in this Act and in the 1996 Act. *Subsection (6)(b)* makes the same amendment to paragraph 12(2) of Schedule 1 to the 1996 Act in relation to the privilege extended to fair and accurate reports etc of public meetings.

Subsections (3) to (10) make amendments to Part 2 of Schedule 1 to the 1996 Act in a number of areas so as to extend the circumstances in which the defence of qualified privilege is available. Section 15 of and Schedule 1 to the 1996 Act currently provide for qualified privilege to apply to various types of report or statement, provided the report or statement is fair and accurate, on a matter of public concern, and that publication is for the public benefit and made without malice. Part 1 of Schedule 1 sets out categories of publication which attract qualified privilege without explanation or contradiction. These include fair and accurate reports of proceedings in public, anywhere in the world, of legislatures (both national and local), courts, public inquiries, and international organisations or conferences, and documents, notices and other matter published by these bodies.

Part 2 of Schedule 1 sets out categories of publication which have the protection of qualified privilege unless the publisher refuses or neglects to publish, in a suitable manner, a reasonable letter or statement by way of explanation or

correction when requested to do so. These include copies of or extracts from information for the public published by government or authorities performing governmental functions (such as the police) or by courts; reports of proceedings at a range of public meetings (e.g. of local authorities) general meetings of UK public companies; and reports of findings or decisions by a range of associations formed in the UK or the European Union (such as associations relating to art, science, religion or learning, trade associations, sports associations and charitable associations).

In addition to the protection already offered to fair and accurate copies of or extracts from the different types of publication to which the defence is extended, amendments are made by *subsections (4), (7)(b) and (10)* of the section to extend the scope of qualified privilege to cover fair and accurate summaries of the material. For example, *subsection (4)* extends the defence to summaries of notices or other matter issued for the information of the public by a number of governmental bodies, and to summaries of documents made available by the courts.

Currently qualified privilege under Part 1 of Schedule 1 extends to fair and accurate reports of proceedings in public of a legislature; before a court; and in a number of other forums anywhere in the world. However, qualified privilege under Part 2 only applies to publications arising in the UK and EU member states. *Subsections (4), (6)(a), (7),* and *(8)* extend the scope of the defence to cover the different types of publication to which the defence extends anywhere in the world. For example, *subsection (6)* does this for reports of proceedings at public meetings, and *subsection (8)* for reports of certain kinds of associations.

Subsection (5) provides for qualified privilege to extend to a fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest. Under the current law as articulated in the case of *McCartan Turkington Breen v Times Newspapers Ltd*[8], it appears that a press conference would fall within the scope of a "public meeting" under paragraph 12 of Schedule 1 to the 1996 Act. This provision has been included in the Act to clarify the position.

Currently Part 2 qualified privilege extends only to fair and accurate reports of proceedings at general meetings and documents circulated by UK public companies (paragraph 13). *Subsection (7)* of the section extends this to reports relating to public companies elsewhere in the world. It achieves this by extending the provision to "listed companies" within the meaning of Part 12 of the Corporation Tax Act 2009 with a view to ensuring that broadly the same types of companies are covered by the provision in the UK and abroad. It also extends a provision in the 1996 Act (which provides for qualified privilege to be available in respect of a fair and accurate copy etc of material circulated to members of a listed company relating to the appointment, resignation, retirement or dismissal of directors of the company) to such material relating to the company's auditors.

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8 *[2001] 2 AC 277.*

Subsection (9) inserts a new paragraph into Schedule 1 to the 1996 Act to extend Part 2 qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences. It is possible in certain circumstances that Part 2 qualified privilege may already apply to academic and scientific conferences (either where they fall within the description of a public meeting in paragraph 12, or where findings or decisions are published by a scientific or academic association (paragraph 14)). The amendments made by *subsection (9)* will however ensure that there is not a gap.

Subsection (10) substitutes new general provisions in Schedule 1 to reflect the changes that have been made to the substance of the Schedule. The provision relating to paragraph 13(5) no longer has any application in the light of the amendments made to that paragraph by *subsection (7)*, while the power in relation to paragraph 11(3) has never been exercised and the amendment leaves the provision to take its natural meaning.

Section 6: Action against a person not domiciled in the UK

This section aims to address the issue of "libel tourism" (a term which is used to apply where cases with a tenuous link to Northern Ireland are brought in this jurisdiction). *Subsection (1)* focuses the provision on cases where an action is brought against a person who is not domiciled in the UK.

Subsection (2) provides that a court does not have jurisdiction to hear and determine an action to which the section applies unless it is satisfied that, of all the places in which the statement complained of has been published, Northern Ireland is clearly the most appropriate place in which to bring an action in respect of the statement. This means that in cases where a statement has been published in this jurisdiction and also abroad the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only. This would mean that, for example, if a statement was viewed 100,000 times in Australia and only 5,000 times in Northern Ireland, that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than Northern Ireland. There will however be a range of factors which the court may wish to take into account including, for example, the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere, the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere, and whether there is reason to think that the claimant would not receive a fair hearing elsewhere.

Subsection (3) provides that the references in *subsection (2)* to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of. This addresses the situation where a statement is published in a number of countries but is not exactly the same in all of them, and will ensure that a court is not

impeded in deciding whether Northern Ireland is the most appropriate place to bring the claim by arguments that statements elsewhere should be regarded as different publications even when they are substantially the same. It is the intention that this new rule will be capable of being applied within the existing procedural framework for defamation claims.

Subsection (4) is a technical legal definition of the meaning of being domiciled in the United Kingdom.

Section 7: Trial to be without a jury

This section removes the presumption in favour of jury trial in defamation cases.

Currently section 62 (1) of the Judicature (Northern Ireland) Act 1978 provides for a right to trial with a jury in certain civil proceedings (namely libel, slander, malicious prosecution, and false imprisonment) on the application of any party unless the court considers that the trial requires any "protracted examination of documents or accounts or any technical, scientific or local investigation which cannot conveniently be made with a jury".

Section 7 removes libel and slander from the list of proceedings where a right to jury trial exists. The result will be that defamation cases will be tried without a jury unless a court orders otherwise.

Section 8: Power of court to order a summary of its judgment to be published

In summary disposal proceedings under section 8 of the 1996 Act the court has power to order an unsuccessful defendant to publish a summary of its judgment where the parties cannot agree the content of any correction or apology. The section gives the court power to order a summary of its judgment to be published in defamation proceedings more generally.

Subsection (1) enables the court when giving judgment for the claimant in a defamation action to order the defendant to publish a summary of the judgment. *Subsection (2)* provides that the wording of any summary and the time, manner, form and place of its publication are matters for the parties to agree. Where the parties are unable to agree, *subsections (3) and (4)* respectively provide for the court to settle the wording, and enable it to give such directions in relation to the time, manner, form or place of publication as it considers reasonable and practicable. *Subsection (5)* disapplies the section where the court gives judgment for the claimant under section 8(3) of the 1996 Act. The summary disposal procedure is a separate procedure which can continue to be used where this is appropriate.

Section 9: Powers of the Court

This section is self-explanatory

Section 10: Actions for slander: special damage

This section repeals the Slander of Women Act 1891 and overturns a common law rule relating to special damage.

In relation to slander, some special damage must be proved to flow from the statement complained of unless the publication falls into certain specific categories. These include a provision in the 1891 Act which provides that "words spoken and published… which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable". *Subsection (1)* repeals the Act, so that these circumstances are not exempted from the requirement for special damage.

Subsection (2) abolishes the common law rule which provides an exemption from the requirement for special damage where the imputation conveyed by the statement complained of is that the claimant has a contagious or infectious disease. In case law dating from the nineteenth century and earlier, the exemption has been held to apply in the case of imputations of leprosy, venereal disease and the plague.

Section 11: Review of Defamation Law

This section recognises that the laws of defamation in other jurisdictions change continually; examples include the introduction of the Defamation and Malicious Publications (Scotland) Act 2021, and recent advice to the Cabinet of the Government of Ireland from their Minister for Justice, Helen McEntee TD, regarding defamation law reform in their jurisdiction.

Subsection (1) places a duty on the Department of Finance to keep under review developments in other jurisdictions.

Subsection (2) requires the Department of Finance to publish a review with recommendations of both their assessment of developments in other jurisdictions and on the operation of this Act.

Subsection (3) defines the timescale for laying the review report before the Assembly.

Section 12: Interpretation

This section is self-explanatory

Section 13: Consequential amendments and savings etc

Subsections (1) to (3) make consequential amendments to Article 9 of the Rehabilitation of Offenders (Northern Ireland) Order 1978 to reflect the new defences of truth and honest opinion. Article 9 of the 1978 Order applies to actions for libel or slander brought by a rehabilitated person based on statements made about offences which were the subject of a spent conviction.

Subsections (4) to (8) contain savings and interpretative provisions.

Section 14: Commencement

This section is self-explanatory

Section 15: Short title

This cites the Act as the Defamation Act (Northern Ireland) 2022.

HANSARD REPORTS

6. The following table sets out the dates of the Hansard reports for each stage of the Act's passage through the Assembly and the date Royal Assent was received.

STAGE	*DATE*
First Stage	7 June 2021
Second Stage	14 September 2021
Committee Stage - Dr Andrew Scott, London School of Economics and Political Science	3 November 2021
Committee Stage - Department of Finance	10 November 2021
Committee Stage - Dr Mark Hanna, Queen's University Belfast	24 November 2021
Committee Stage - Mr Paul Tweed, and Mr David Attfield and Mr Sam McBride	1 December 2021
Committee Stage - National Union of Journalists, Index on Censorship; English PEN and Mr Peter Girvan	8 December 2021
Committee Stage – Department of Finance	15 December 2021
Committee Stage – Mr Mike Nesbitt, MLA	5 January 2022
Committee Stage – Clause-by-clause consideration	12 January 2022
Committee Stage – Clause-by-clause consideration	19 January 2022
Committee Stage - Clause-by-clause Consideration; Committee Report	26 January 2022
Consideration Stage	2 March 2022
Further Consideration Stage	14 March 2022
Final Stage	22 March 2022
Royal Assent	6 June 2022