

2. Other actions protecting reputation and other overlapping interests

- Where a claim involves mere loss of reputation, the proper course of action is defamation, and cannot ordinarily be sustained by means of any other form of action - Foaminol Laboratories Ltd v British Artid Plastics [1941] 2 ALL ER 393, 399 (Hallett J).

2.1 Injurious Falsehood

Elements: Palmer Bruyn & Parker v Parsons (2001) 208 CLR 388, 393 (Gleeson CJ); 404, 407 (Gummow J) ('Palmer').

- There must be a false statement made by the defendant about the plaintiff's goods or business.
 - There must be a publication of that statement to a person other than the plaintiff.
 - There must be 'malice' proven on the part of the defendant.
 - There must be actual damage (which may include a general loss of business) proven by the plaintiff as a result of the defendant's false statement.
- It is for the plaintiff to establish falsity, malice and special damage, burdens not placed upon the plaintiff by defamation. The inhibition upon the use of the injunction to restrain further publication of defamatory material does not apply to injurious falsehood - Palmer (2001) 208 CLR 388, 404 (Gummow J).
 - Injurious falsehood requires either that the defendant intended to cause the harm or that it may be the 'natural and probable result' of the publication of the false statement - Palmer (2001) 208 CLR 388, 411 (Gummow J).
 - It is unclear whether the tort of injurious falsehood is limited to persons causing harm to plaintiff's goods or business or whether it yet extends to false and malicious statements which interfere with any prospective advantage, commercial or non-commercial, to the plaintiff - Palmer (2001) 208 CLR 388, 407 (Gummow J).
- Malice:** knowledge that the statements made were false, or a reckless disregard as to their truth or falsity - Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc (2002) 120 FCR 191, 206 (Weinberg J) ('Orion').
- No action will lie where the false publication was made in mere lack of care or with an honest belief in its truth - Orion (2002) 120 FCR 191, 202 (Weinberg J).
 - Careless is not, however, tantamount to recklessness and is certainly insufficient to give rise to liability for injurious falsehood - Orion (2002) 120 FCR 191, 202 (Weinberg J).
 - The 'single meaning' rule, which is a fundamental principle of defamation law, does not apply to cases of injurious falsehood - Ajinomoto Sweeteners v Edwards & Sons Ltd [2011] QB 497, 508-09 (Sedley LJ).

Extent of liability:

- Test for remoteness of damage is reasonable foreseeability.
- Applicable test:** as with other injurious torts, is the natural and probable consequences of the defendant's conduct - Palmer (2001) 208 CLR 388, 413 (Gummow J).

Damage recoverable:

- Clear economic losses to business/property flowing from the publication are recoverable by an award of damages.
- Divided authority as to whether damages for non-economic loss (hurt feelings) are available - See Bride v KMG Hungerfords (1991) 100 FLR 256 at 281 per Murray J, SC(WA). However, see Joyce v Sen Gupta [1993] 1 WLR 337 at 347-349 per Sir John Nicholls V-C.

Standing for corporations: presumptively cannot sue for defamation doesn't mean they cannot bring a claim in injurious falsehood, so long as they satisfy the elements of that cause of action - Beechwood Homes (NSW) Pty Ltd v Camenzuli [2010] NSWSC 521, [14] (Harrison J).

Other remedies:

- Interlocutory injunction** to restrain a publication which arguably amounts to an injurious falsehood more readily than he or she would be able to obtain such relief in relation to an allegedly defamatory publication - Kaplan v Go Daddy Group [2005] NSWSC 636, [38] - [44] (White J).
- Rationale for restricting corporations from being able to sue for defamation is that they could chill speech. Paradoxically, forcing corporations to rely on injurious falsehood means they can stop speech altogether - see for example Menulog Pty Ltd v TCN Channel Nine Pty Ltd [2012] NSWSC 247.

3.4.6 Bane and Antidote

- In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together – Chalmers v Payne (1835) 2 CM & R 158, 159 (Lord Alderson B).
- **Test:** the weighing up and comparison of bane and antidote, to repeat Baron Alderson's evocative formula. It is a question of degree and of competing emphasis – Morosi v Broadcasting Station 2GB Pty Ltd [1980] 2 NSWLR 418n, 419-20 (Samuels JA).

3.4.7 Imputations of suspicion and guilt

- There is now a strong current of authority supporting the view that a report which does no more than state that a person has been arrested and has been charged with a criminal offence is incapable of bearing the imputation that he is guilty or probably guilty of that offence. The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty – Mirror Newspapers Ltd v Harrison (1982) 149 CLR 293, 300 (Gibbs CJ).
 - I think that it is capable of bearing the imputation that the **police suspected** him of having committed the offence and that they had reasonable cause for doing so. (301).
 - I would join with the Chief Justice in reserving for future consideration the question whether a report stating that a person has been arrested and charged by police with a particular offence is capable of bearing an imputation to the ordinary reasonable reader that the police officer who made the arrest had **reasonable cause** for suspecting that the person arrested had committed that offence – 303-04 (Brennan J).
- The communication of the fact that a charge has been levelled against the plaintiff in its particular web of language will require a ruling on whether it is or is not capable of bearing the further imputation that police suspicion was grounded on reasonable cause – (Serji v Australian Broadcasting Commission [1983] 2 NSWLR 669, 677 (Glass JA)).

3.4.8 Test for what is defamatory

Just as the **ordinary reasonable reader** is taken to adopt a **uniform view of the meaning** of the words used, so too the ordinary, reasonable reader, in **assessing the defamatory quality** of the imputations conveyed by the matter, will apply a **uniform moral or social standard** – Reader's Digest Services Pty Ltd v Lau (1982) 150 CLR 500, 506 (Brennan J).

Test: whether the words published were likely to injure the plaintiff in the estimation of right-thinking members of society generally' – Slim v Stretch [1936] 2 ALL ER 137, 140 (Griffith J).

- Whether the defamatory matter injured the plaintiff's reputation in the opinion of a reasonable reader of fair, average intelligence – Slatyer v Daily Telegraph Newsprint Co Ltd (1908) 6 CLR 1, 7 (Griffith CJ).
- Anything which is likely to lead an ordinary decent person in the community, taken in general, to think the less of [the plaintiff] – Gardiner v John Fairfax Publications Pty Ltd (1987) 42 SR (NSW) 171, 172 (Jordan CJ).
- Generally, **disparagement** is generally necessary in order for an imputation to qualify as being defamatory – Boyd v Mirror Newspapers Ltd [1992] 2 NSWLR 449, 452-53 (Hunt J). However, there are certain categories of defamatory imputations that do not require an element of disparagement.

Reputation may therefore be said to be injured when the esteem in which that person is held by the community is diminished in some respect – Boyd v Mirror Newspapers Pty Ltd v Chesterton (2009) 238 CLR 460, 466 (French CJ, Gummow, Kiefel and Bell JJ).
- For any such injury to be actionable, whether it reflects upon a **person's character or their business or professional reputation**, the test must be satisfied (477).
- The very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men- confirms that the hypothetical referee is a person who will apply general community standards. It may be taken to refer to ordinary decent persons (478).
- There are many standards held within the general community which are not of a moral or ethical kind but which may be relevant to an assessment of whether a person's standing in the community has been lowered (479).
- Moral or ethical standards may be relevant to imputations about a person's business or professional reputation, for example those concerning a person's honesty or fidelity in the conduct of a business or profession, failure to conform to relevant ethical standards pertaining to that profession or which suggest misconduct in the discharge of professional duties. Some statements may convey more than one meaning and bring into question moral or ethical standards as well as conveying a lack of ability to carry on a business or profession – A charge of unfitness for office furnishes an example. (479).
- In such cases the ordinary reasonable person may be expected to draw upon such community standards as may be relevant, in order to answer the question whether there has been injury to that reputation (480).
- In some cases, it may be obvious that people will be thought the less of simply because of what is said about them (480).

4.1 Absolute Privilege

Publication on an **occasion** of absolute privilege means that the defendant has **complete protection** from liability in defamation. Absolute privilege **cannot** be abused or lost by the defendant's **improper motive**.

Mann v O'Neill (1997) 191 CLR 204 (Brennan CJ, Dawson, Toohey and Gaudron JJ)

(211) well settled that absolute privilege attaches to all statements made in the course of judicial proceedings.

(212) extends to any document published on an 'occasion properly incidental (to judicial proceedings), and necessary for (them).'

(212) attaches to statements made in the course of quasi-judicial proceedings (proceedings of tribunals recognised by law and which act 'in a similar manner to that in which a Court of Justice acts.' Whether proceedings are quasi-judicial, 'whether there will emerge from the proceedings a determination the truth and justice of which is a matter of public concern.'

(213) absolute privilege attaches to statements made in the course of **parliamentary and judicial proceedings** for reasons of necessity.

(213-14) absolute privilege **should not** be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that attaches to judicial proceedings are absolutely privileged.

Defamation Act 2005 (NSW) s 27

(1) Defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.

(2) Matter is published on an occasion of absolute privilege if:

(a) matter is published in the course of proceedings of a body, or under the authority of a body, and (but not limited to):

- (i) publication of a document by order, or under the authority, of a body, and
- (ii) publication of the debates and proceedings of the body or under the authority of the body or any law, and
- (iii) publication of matter while giving evidence before the body

(iv) publication of matter while presenting or submitting a document to the body, or

(b) matter is published in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to):

(i) the publication of matter in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process), and

(ii) the publication of matter while giving evidence before the court or tribunal, and

(iii) the publication of matter in a judgment or other determination of the court or tribunal, or

The matter is published on an occasion of absolute privilege if, published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section, or

The matter is published by a body in any circumstances specified in Schedule 1:

Defamation Act Schedule 1

1) Ombudsman, (2) Privacy Commissioner, (3) Information Commissioner, (4) Law Reform Commissioner, (5) Workers Compensation Act, (6) Motor Accidents Act, (7) Health Services Act, (8) Matters arising out of proceedings of State Parole Authority, Serious Offenders Review Council and Serious Offenders Management Committee

4.2 Qualified Privilege

Bashford v Information on Australia (Newsletters) Pty Ltd (2004) 218 CLR 366, 373 (Gleeson CJ, Hayne and Hayden JJ)

In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another and the law considers such publication as malicious, unless it is **fairly made** by a person the **discharge** of some **public or private duty**, whether **legal or moral**, or in the **conduct of his own affairs**, in matters where **his interest is concerned**. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the **absence of actual malice**. (Parke B in *Too good v Spyring*)

• **Reciprocity of duty or interest is essential.**

[10] the **circumstances** that constitute a **privileged occasion** can themselves **never be catalogued and rendered exact**. A court must 'make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication.'

4.3 Fair Comment and Honest Opinion

Rationale: provides recognition and protection to the exercise of the individual's right to freedom of expression.
Pryke v Advertiser Newspaper Ltd (1984) 37 SASR 175, 191 (King CJ)

Elements:

1. Statements of comment, not fact.
 - **'it is essential that the whole of the words in respect of which it is relied on should be comment'**, it must appear that they are opinions stated by the writer or speaker about facts, which are at the same time presented to, or are in fact present to, the minds of the readers or listeners, as things distinct from the opinions, so that it can be seen whether the opinions are such that they can fairly be formed upon the facts.' – *Goldsborough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524, 531-532 (Jordan CJ).
 - The distinction between fact and comment is commonly expressed as equivalent to that between fact and opinion – *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 263 (Gummow, Hayne & Heydon JJ)
 - Comment; 'something which is or can be reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark, observation, etc.' (ibid 263).
 - Comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, from which his conclusion may be reasonably inferred. (ibid 263).
 - The question of construction or characterisation turns on whether the ordinary reasonable 'recipient of communication would understand that a statement of fact was being made, or that an opinion was being offered' (ibid 264).
 - Harder for a viewer of television to distinguish fact and comment than it is for a person reading printed material, as the viewers sees and hears the material simultaneously and at once. (ibid 264).
 - Defamatory matter which appears to be a comment on facts stated or known but is not an inference or conclusion which an honest man, however biased or prejudiced, might reasonably draw from the facts so stated or known will not be treated as comment. (ibid 290).
 - An accumulation of items of allegedly inadequate or incompetent work, none of which is said to be a piece of deliberate concealment, is incapable of leading an honest person reasonably, to the conclusion that there was deliberate concealment. An honest person acting reasonably, or a fair-minded person acting honestly, would look for more than instances of incompetence, however many there were said to be (ibid 291).
 - Where the material is submitted to the public such that it invites public comment, then a factual substratum that is sufficient to justify the opinion will mean that the defence succeeds (*Kemsley v Foot*)
 - Factual substratum must be in the material (*Fairfax v O'Shane*)
2. Relate to a matter of public interest.
 - Defendant bears onus of proof – it is a question of law for judge. Distinction between matter of legitimate public interest and a matter of mere curiosity.
 - Just because something is done on private property doesn't mean that it is not of public interest – *South Hetten Coal* (poor accommodation standards), journalistic integrity (*Kemsley v Foot*)
 - People in public positions must not be too thin-skinned in reference to comments made upon them. It must often happen that observations are made upon public men which they know to be undeserved or unjust. Yet they must bear with them as a matter of public policy. Freedom to criticise is the best security for the proper discharge of public duties – *Lord v Clarke* [1939] SASR 434, 439 (Napier J)
3. Based upon facts truly stated, sufficiently indicated or notorious.
 - Defendant bears onus of proof regarding whether there is substantially accurate factual substratum according to an objective standard (*Manock*)
4. Honestly held opinion of the commentator, even if they are prejudiced or wrong-headed – *Joseph v Spiller* [2011] 1 AC 852, 882 (Lord Phillips of Worth Matravers PSC).
 - Commentator must be able to reasonably form the conclusion from the facts (*Goldsborough; Manock*)
 - Presumptive defence of fair comment arises and P must prove that there was a lack of honest belief in the view promoted.
 - Plaintiff must prove that the comment was dishonest – *Silkin v Beaverbrook*

7. Breach of Confidence

That which is confidence is private but that which is private is not necessarily confidence.

Development of law such that some types of information are self-evidently private/confidential (*Lenah Game Meats*)

Personal secrets

1. **Marriage** – archetype of obligation of confidence (*Argyll v Argyll*)
2. **De facto relationship** – Some element of permanence possess obligation of confidence (*Giller v Procopets*). Includes adulterous lesbian relationship (if long-standing) (*Stephens v Avery*). Includes adulterous homosexual relationship (if long-standing) (*Barrymore*)
3. **Employees** – Not every piece of information that an employee comes into contact with is confidential even if in course of employment (*Hitchcock v TCN Channel Nine*) – can be varied by contract
4. **Private health information** – clearly confidential (*AFL v Age*)
5. **Text v Pictures** – Text and pictures have different qualities of confidence (pictures more so) (*Theakston*)
6. **Other** – Whether the person has conducted themselves in treating the information as confidential (*HRH Prince of Wales; Mckennitt v Ash*)

Attorney General v Guardian Newspapers

Facts: Former UK spy wrote about his employment. Contrary to UK Official Secrets Act and his employment contract. English attorney general brought proceedings in NSWSC.

Underlying issue of breach of confidence. Issue as to whether the information had entered the public domain?

Some of the material had been published in the US already.

Issue: Real issue as to whether the news outlets had confidence or relations not with them. They weren't in a relationship with the crown nor employed by them.

Argument: if you are a 3rd party, there are some types of information that are so evidentially confidential that you cannot conscientiously disclose it to another person. (Watergate) the second requirement in *Coco*.

Categories: Sexual health, sexual activity, financial matters (Gleeson in *ABC v Lenah Game Meats*)

State of Victoria v Nine Network Ltd (2007) 19 VR 66

Facts: Corrections Victoria wanted to remove all the information. Send to various second-hand store. University students who bought the filing cabinet for \$30. Discovered it was filled with Corrections Victoria files. Sold some of the material to ACA for \$30,000. They sought comment from the government. They sought an injunction.

Test for breach of confidence:

- **for private individuals** – anything that will cause detriment (broadly defined)
- **In relation to the government** – government can only enforce its confidences, if the disclosure of those confidences would be **prejudicial to the workings of government (embarrassment, humiliation etc is insufficient)**. Approach is to go through the information and see whether the categories of information relied on here can be restrained. Can't ask the question broadly but to identify the specific categories.

Categories on the facts:

- **Information about health conditions about particular prisoners** – sorts of diseases they get, that is private health information confidential to those individual prisoners. The State of Victoria can enforce those principles on behalf of the prisoners.
- **Allegations about officers sexually assaulting prisoners**, dealt with them as internal disciplinary matters (no police/criminal prosecution) – Court found that the disclosure of this information would not be prejudicial to the workings of government. It would be embarrassing to have it exposed. This wasn't a sufficient reason to prevent the disclosure, it didn't meet the high threshold of being prejudicial.
- **Exchange of released paedophiles:** agreement between WA and Victoria to essentially do a paedophile swap to enable them to be re-assimilated – distinguished between the broad fact of the arrangement and of the actual details. Wasn't confidential that there was an arrangement and the nature of it, but anything beyond that was considered to be prejudicial to the workings of government. It would provide a real disincentive for high level interactions such as these to occur. It would deter the executive from entering into such arrangements.

In Australia, Public interest is not a defence to breach of confidence. If we're going to allow the courts than the legislature to develop a protection for privacy. One of the limitations from a media outlets perspective is that you don't have public interest as a defence.