

MLL217 –
Misleading Conduct and
Economic Torts

Exam Notes and Cases

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Topic 1

Establishing Defamation

Elements of Defamation

1. Defamatory matter;
2. Reference to the plaintiff; and
3. Publication to a third party.

Section 6(2): The Act does not affect the general law of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).

- These common law principles will continue to apply to determine whether the plaintiff has a good prima facie claim in defamation
- A plaintiff may succeed regardless of fault and regardless of the intention of the defamer.

Theophanous v The Herald and Weekly Times (1994) 182 CLR 104: Notwithstanding that he or she calls no evidence to establish either that the defamatory statement was false or that the defendant was motivated by malice or was guilty of negligence or some other fault. Proof of publication of the defamatory statement discharges the plaintiff's onus and casts upon the defendant the burden of positively establishing some defence.

Expression of Defamation

Example: Newspaper articles, cartoons, billboards, audio tapes, films, plays, skywriting, comments in a letter or statements made in an after-dinner speech, can all contain defamatory matter.

- Defamation may be conveyed by spoken or written words, pictures, gestures, signs and other visible, non-verbal representations.
- A defamatory meaning can be conveyed without words, for example the placing of a wax dummy in a rogues' gallery may defame the person represented by the figure.

Gregory v Duke of Brunswick (1843): The derogatory imputation was published by hissing at the plaintiff while on stage in the theatre.

Libel or Slander

- The distinction between libel and slander has now been abolished by the uniform defamation laws.
- As this distinction applied in Victoria until recently (when the Defamation Act 2005 (Vic) came into force on 1 January 2006) it is necessary to briefly discuss the distinction between libel and slander and the effect of that distinction.

Distinction: Very broadly speaking, libel refers to defamatory matter that is in a permanent form (for example in writing), whereas slander refers to impermanent defamatory matter (such as the spoken word).

- The importance of the distinction, which has its basis in the historical origins of the causes of action, lay in the fact that libel was actionable per se, that is, without proof of damage (which was presumed).
- Slander generally required a plaintiff to prove damage.

Element 1: Defamatory Matter

- A plaintiff seeking damages for defamation must be able to point to defamatory meaning, or meanings, which he or she alleges have been conveyed.
- defamatory imputations or defamatory charge must be pleaded.
- It is then for the judge to decide, as a question of law, if the matter alleged is capable of conveying the defamatory meaning(s) relied on by the plaintiff and whether that meaning(s) is capable of being defamatory.

Required Standard: In deciding whether the matter complained of is capable of bearing a defamatory meaning, a judge will decide whether an ordinary reasonable person could (not would) regard the words as defamatory. The court will ascribe to the words those meanings which ordinary people 'neither extremely suspicious nor extremely guileless' could regard as defamatory.

Lewis v Daily Telegraph [1964]

Held

- The meaning of the words is to be determined by the sense in which fair-minded ordinary reasonable persons in the general community would understand the published words.
- In determining this issue, it is vital that the tribunal of fact focuses only on the publication complained of and puts out of its mind the evidence relating to other issues at the trial.
- The ordinary reasonable person is taken to be a person of average intelligence who approaches the interpretation of the publication in a fair and objective manner.

Note: The person is neither perverse nor suspicious nor 'avid for scandal'. There is a limit of reasonableness, so that the ordinary reasonable person does not interpret the publications in a strained or forced or utterly unreasonable way.

Content, Mode of Publication and Audience

- The context in which words are used is significant
- Words said in a particular tone of voice may take on a different meaning.

Mode: The manner in which material is published will also be taken into account. For instance, listeners to broadcasts on the television or radio have less time or opportunity to reflect on and consider statements than a person reading a book; this may affect the impact of words used, as may the use of visual images, illustrations or other non-verbal matter.

Australian Broadcasting Corp v Comalco (1986)

Facts

- the defendant broadcast a current affairs program in which statements critical of the plaintiff's treatment of Aboriginals at Weipa in Queensland were made.
- Several defamatory imputations were pleaded by the plaintiff, including the charge that the plaintiff treated the Aboriginals 'like dogs' and was 'without decency and integrity'.

Held: In assessing the capacity of the statements to convey the alleged imputations, Blackburn CJ took account of the nature of a television broadcast, including the transient nature of the words and images used, the short time span in which viewers may digest the material aired, and noted that, in this context, the defamatory impact of the material could be strengthened.

Farquhar v Bottom & Anor (1980) 2 NSWLR 380

Facts: Defamatory matter was alleged to be conveyed in a chapter of a book.

Held

- Hunt J considered that a book might be expected to be read by an ordinary reader with some care, and with less 'loose thinking' than might be expected where other written material, for instance a newspaper article, was involved.
- This, he said, would be said to be a 'material fact in determining what imputation is conveyed'.
- Insofar as the meanings which are capable of being imputed in a newspaper article are concerned, it has been said that 'the relevant impression is that which would be conveyed to an ordinary sensible [person] reading the article casually and not expecting a high degree of accuracy'.

Lewis v Daily Telegraph (1963): Where the words used are 'imprecise, ambiguous, loose fanciful or unusual ... a wide degree of latitude [will be] given to the capacity of matter complained of to convey particular imputations'.

Cornes v The Ten Group Pty Ltd (2012)

Single Meaning Rule

First Limb

- The single meaning rule co-exists with the rules concerning true innuendos.
- Where a true innuendo is pleaded, the question whether matters bears a defamatory meaning is to be judged from the perspective of the ordinary reasonable person who possesses the relevant extrinsic knowledge.
- The ordinary reasonable person would understand the words used to mean that the claimant was in a sexual relationship with Dew.
- That same ordinary reasonable person with extrinsic knowledge of the claimant's marriage would then draw the true innuendos that the claimant was unfaithful to her husband and had committed adultery.

Second Limb

- The single meaning rule co- exists with the rule that a claimant is entitled to allege and prove that multiple imputations can be drawn from the matter.
- In that case the ordinary reasonable person with extrinsic knowledge of the claimant's marriage would draw two separate imputations: that the claimant was unfaithful and that she was adulterous.
- Once it is determined that the matter is capable of being understood in a defamatory sense the single meaning rule is spent, and it is open to the plaintiff to plead that the matter conveys multiple defamatory meanings (imputations), as well as true innuendos to those with relevant extrinsic knowledge.

Meanings Put to The Jury

Note: Any meanings which are considered to be incapable of being conveyed by the matter complained of, or incapable of being defamatory, will not be put to the jury. However, those meanings which are pleaded by the plaintiff and which are considered capable of being defamatory by the judge will go to the jury, who then decide whether the statements are, in fact, defamatory of the plaintiff.

Considerations for the Jury

- The ordinary and direct meanings of the words used, including any 'popular' or 'false' innuendos which may be drawn from the words used, that is secondary meanings arising from within the matter itself
- Any 'legal' or 'true' innuendos which may be drawn from the words used in conjunction with extrinsic facts known to some persons to whom the matter is communicated.

'Sting' of the Matter

- Litigants search for the 'sting' in the matter complained of.
- They search for those meanings which go beyond the apparent one, and look for those connotations or imputations which might be gleaned from the totality of the matter, or which are inherent in the words used.

The Literal and Direct Meaning

- Words can be directly defamatory, that is the defamation lies in the literal meaning of the words themselves, without recourse to inference.
- To call a person a liar or a thief, for example, will amount to defamation (based on the literal or direct meaning) when made in a serious context.

London Computer Operators Training v British Broadcasting Corporations [1973]

Facts

- A radio broadcast included the following statement about London Computer Operators Training Ltd:
- 'It is a financial racket where the aptitude test is bogus to begin with, where the certificate at the end is bogus; and the racket should be exposed'

Held

- This statement is defamatory in a literal sense, without the need to rely on any inferences or innuendos which might be contained within the words, although there may be those too. Where matter is plainly defamatory it may be unnecessary to plead an alleged meaning.
- 'Scandal-mongers are induced by the penalties for defamation to veil their meaning to some extent' and consequently defamatory statements are very often not literally defamatory but made by way of innuendo.

Popular or False Innuendo

Note: The natural and ordinary meaning of words, for the purposes of defamation, also includes the meaning or meanings which ordinary people would understand or infer from the words used. These intrinsic meanings are referred to as 'popular' or 'false' innuendos, in the sense that they are innuendos which would popularly, or likely, be drawn from the words by ordinary persons without recourse to any extrinsic information or knowledge.

London Computers: the judge found that the statement complained of could be understood by ordinary people as inferring that the company wanted: To get money from gullible students – shy, inexperienced, gullible, coloured – if not by false pretences, at least by rigging the aptitude tests [and] was being run by people of questionable honesty and background. These inferences or innuendos concerning the company's managers could be derived from the statement, by ordinary persons having some experience of the world, without being 'unduly cynical' or 'avid for scandal'.

Note: Material that merely reports that the plaintiff is accused or suspected of a crime, or is being investigated in relation to a crime, is not actionable as there is a legitimate public interest in the receipt of such facts.

Lewis v Daily Telegraph Ltd [1964] AC 234

Facts: An accurate newspaper report stated that the fraud squad were conducting an investigation into a limited liability company. The plaintiff was the chairman of that company. He alleged that the report imputed, by way of popular innuendo, that he was guilty of fraud or that the police suspected him of fraud.

Held: The words in their natural and ordinary meaning, without special knowledge, were not capable of bearing that meaning.

Mirror Newspapers Ltd v Harrison (1982) 149 CLR 293

Held

- A mere statement that a person has been arrested and has been charged with a criminal offence is incapable of bearing the imputation that he is guilty of that offence.
- A statement was capable of bearing the imputation that the respondent was suspected of having committed the offence. He also commented that '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' (at [16]).

Distinction between Valid and Invalid Defamatory Innuendos

Mirror Newspapers (1982): It is one thing to say that a statement is capable of an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience in human affairs in order to reach that result. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff. The defamatory quality of the published material is to be determined by the first not by the second proposition. (at [17])

Crime Accusations

- A defendant who reports that the plaintiff has been accused of a crime or is being investigated for a crime must take particular care to ensure that the report would not impute to the reasonable person that the plaintiff has actually committed the crime, or that there is a reasonable basis for the accusation against the plaintiff or for the investigations into his or her conduct.

Legal or True Innuendos

- Other meanings may be understood by those people to whom the matter is published ('publishees') who possess additional information or further facts which are not known to other 'publishees', and which are not apparent from the published material.

Example of Legal or True Innuendos

Statement: Reverend X regularly visits certain premises at No. 15 Young Street.

- These words alone are incapable of being defamatory, either on their literal meaning, or through popular innuendo.
- However, the situation is otherwise if some of those to whom the statement is published are aware of an additional fact – that there is a brothel operating at the premises in question.
- Those 'publishees' may draw a defamatory innuendo from the statement that others, who are not aware of the brothel, would not; that is that the Reverend visits the premises to avail himself of the services of prostitutes.
- This would constitute a legal innuendo.

Important: Where legal innuendo is involved, the matter must be published to at least one person who has the extrinsic information giving rise to the legal innuendo.

Cassidy v Daily Mirror Newspapers Ltd (1929) 2 KB 331,

Facts: The defendant published a photograph of a man and a woman with the caption: 'Mr M Corrigan, the racehorse owner and "Miss X" whose engagement has been announced'. The man in the photograph was in fact lawfully married to the plaintiff.

Held: The plaintiff was successful in establishing a true innuendo, conveyed to those readers who knew she was living with the man in the photograph, that she was an immoral woman who had cohabited with a man who was not her husband.

What is Defamatory?

Note: To be defamatory a matter must disparage the plaintiff's reputation, not simply hurt his or her feelings.

- It may be defamatory to allege a defect in the plaintiff's character by calling him or her a liar, a thief or a hypocrite, but abuse, no matter how vulgar, may not be defamatory.

Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460,

Held

- The High Court has emphasised that the material is to be judged by reference to the 'ordinary reasonable' or 'ordinary decent' recipient of the material, applying one common community standard. That is, the test is whether the 'ordinary reasonable' or the 'ordinary decent' person, applying normal community standards, would think less of the plaintiff.

Changing Community Attitudes

- Community attitudes and beliefs of course change over time, and the defamatory nature of material must be judged according to the prevailing views and beliefs of the community.

John Fairfax Publications v Rivkin (2003): While in previous decades it was defamatory of a person to allege they were a communist, this would no longer be the case.

What Type of Reputation can be Injured?

Radio 2UE Sydney Pty Ltd v Chesterton (2009): All aspects of a person's reputation and standing in the community – private, social, business, professional, or trading reputation – may be defamed.

Examples: To accuse a senior executive of defrauding the public, or to accuse a politician of a dishonest practice, or to impute that a professional person, such as a dentist, continues in practice despite having a contagious disease, may be defamatory both in a personal and in a business or professional sense.

Baric v Doherty (1987) Aust. Torts Reps 80–135

Facts

- A newspaper report that a solicitor had entered a plea of guilty on behalf of a defendant without his or his wife's presence in court and without his authority to enter the plea was held to be defamatory, as it imputed that the solicitor was guilty of gross professional misconduct.

Held: It is defamatory to impute that a person is incompetent or has failed to observe obligations in the exercise of a profession.

Disparagement as an Indispensable Requirement

Radio 2UE Sydney v Chesterton: Only imputations which disparage a person's reputation by imputing characteristics or behaviour to the plaintiff for which he or she is responsible are considered to be defamatory.

- It is defamatory to impute that the plaintiff is a criminal, or associates with criminals, is a thief, a liar or a hypocrite. This is because the person in question has control over the kind of conduct that has been attributed to them – and because it is conduct within their control, such statements are disparaging.

Physical Appearance

- A person cannot be defamed by statements about physical characteristics over which they have no control, and for which no blame can be attached to them – such as statements about their ethnicity or their personal appearance.
- It would not be defamatory to call a person a 'wog' or 'fat' (at least when unaccompanied by a suggestion that the weight gain was caused by a lack of discipline or from 'letting oneself go').

Business or Professional Reputation

- Where defamation of a business, professional or trading reputation is alleged, it must be proved that the matter defames the plaintiff's reputation in his or her business, profession or trade. False statements which injure the business itself (but do not affect its reputation) are not necessarily defamatory, although they may be actionable as an injurious falsehood.

Hall-Gibbs Mercantile v Dun (1910): Thus, it is not defamatory to falsely state that a business has ceased to trade, at least where there is no suggestion that the reason for the takeover was because of the poor business skills of its managers

Sungrauvure Pty Ltd v Middle East Airlines SAL (1975) 134 CLR 1

Facts

- The defendant published a short story in a magazine which told a fictional story of the hijacking of a fleet of aircraft by a guerrilla group.
- In the story, the airline whose aircraft were hijacked was called Middle East Airlines and its aircraft had a green cedar tree as its insignia.
- The plaintiff was an airline which operated as Middle East Airlines, and used a green cedar tree insignia. It complained that the story carried the imputation that travellers on its airline faced a serious risk of being hijacked.

Held: The trial judge did not allow the issue to go before the jury. On appeal the High Court held the matter was capable of having the meaning alleged: the matter need not be disparaging under the relevant legislation in force at the time, and it was sufficient that it attributed a condition to the plaintiff which was likely to injure that plaintiff in its business or profession (even without necessarily being disparaging).

Note: Following the enactment of the uniform defamation laws, the situation in Sungrauvure will no longer be actionable in defamation in any Australian jurisdiction, though it might be actionable as an injurious falsehood.

Common Law: Exceptional Situations

There are however two exceptional situations which have been put forward as cases where the common law does not require blameworthiness:

1. Where the imputation ridicules the plaintiff (casts the plaintiff in a 'ridiculous light'), and
2. Where the imputation will tend to cause people to 'shun or avoid' the plaintiff.

'Ridiculous Light' Exception: Applies where the material conveys the impression that the plaintiff is ridiculous, in the sense of deserving to be laughed at or absurd.

Boyd v Mirror Newspapers: The imputation will often carry a disparaging connotation, however it is not always necessary to prove disparagement.

Berkoff v Burchill [1996] 4 All ER 1008

Facts: Two articles were published about the plaintiff, a well-known actor, director and writer, containing statements which would be understood as meaning that he was 'hideously ugly'.

Held

- These remarks were capable of defaming the plaintiff.
- The remarks gave the impression that he was not merely physically unattractive in appearance, but 'actually repulsive'.
- The plaintiff, who was in the public eye and who, at least in part, made a living as an actor, would by virtue of the remarks be cast as an object of ridicule, scorn or derision. It was held not to matter that the remarks neither imputed discreditable conduct to the plaintiff nor any lack of skill or efficiency in his profession.

Element 2: Identifying the Plaintiff

Note: This question might be thought of as asking – who can sue?

- Matter is defamatory only if it is 'of and concerning the plaintiff'
- An imputation is not defamatory unless the person to whom it is alleged to refer is identifiable by those who are exposed to the derogatory matter. I
- Identification is readily established if the person is referred to by name, but the use of the person's name is not essential in order for the matter to be found defamatory.

How may the Plaintiff be Identified?

- Where the plaintiff is not referred to by name, the test is 'whether reasonable persons would reasonably believe the matter referred to the plaintiff'.
- Identification may be aided by knowledge of extrinsic facts which make recognition likely, or other statements made by the defendant or others. Even a work of fiction has the potential to be defamatory in appropriate circumstances.

Hulton & Co. v Jones (1910) AC 20

Facts

- A story concerning a fictitious character by the unusual name of Artemus Jones was published in a newspaper. A barrister by the name of Artemus Jones commenced action alleging that the article was defamatory of him.

Decision

- The defendant could not show that the libel was not 'of and concerning the plaintiff' by proving that he had never heard of the plaintiff. The matter would be libellous if others, knowing the circumstances, would reasonably think the language referred to the plaintiff.

Lee v Wilson & Anor (1934) 51 CLR 276

Facts

- A statement was made in a newspaper report of evidence given at an inquiry into allegations that members of the police force in Victoria had accepted bribes.
- The report of evidence of a Pentridge prisoner read: 'Ethell (a detective) said he thought that Detective Lee had the matter in his hands. It will cost you 35 pounds.' The report went on: 'He handed Ethell 35 pounds saying, "Here is the money for Mr Lee."' The evidence related to 'First Constable Lee of the Motor Registration Branch'.
- However there were, in fact, three policemen by the name of Lee in the Victorian police force. Senior Constable A. L. Lee, and a First Constable Clifford Lee, both of whom were detectives, were the plaintiffs.

Held

- Liability depended not on the intended meaning of the words, but on the actual operation of the words, that is, the understanding produced in the reader.
- Dixon J: 'if defamatory words, capable of relating to more than one person are found actually to disparage each of them among the respective groups of the community which know them, because the words are reasonably understood to refer to each of them, then they may all maintain actions, and this notwithstanding that the writer or publisher intended to refer to still another person whom his words are also capable of meaning'.

Summary of How the Plaintiff may be Identified

- It is irrelevant that a publisher did not intend to defame a person who is understood to be the person to whom the statement is referred. If reasonable people would reasonably believe or understand the person referred to is the plaintiff, then the fact that the publisher intended to refer to someone else, or did not intend to refer to any real person, will be of no significance. It is what is raised in the mind of the reader that matters, not what is in the mind of the publisher.
- The test is not whether a cautious, critical or careful person would understand the matter as referring to the plaintiff, but rather whether a reasonable reader would understand it as such.
- Evidence of witnesses, that they understood the matter to refer to the plaintiff, is persuasive but it is not conclusive evidence : the test is an objective one.

Henry v TVW Enterprises

Facts

- The Hinch program carried a story about a dentist who had hepatitis B but who was still practising and who had not informed his patients of his disease.
- At various places throughout the story footage was shown of the plaintiff dentist's distinctive surgery and staff uniforms.
- The plaintiff was not the target of the story, and it was stated in the course of the story they were restrained from showing footage of the dentist or from naming him; nevertheless the plaintiff was able to sue in defamation as evidence was given by a number of his patients and acquaintances as well as by other dentists that they had identified him from the story.

Held

Plaintiff was successful in recovering damages for the defamatory imputations that:

- He had deliberately exposed his patients to the risk of contracting a contagious and dangerous disease; and
- He had acted in breach of his professional obligations in failing to warn his patients of his condition.

Standing to Sue

Living Persons

- Any individual may bring an action in defamation, but only during his or her lifetime. Reputation is considered to be personal, and therefore no liability lies for defaming the dead.
- An action commenced by a living plaintiff will not survive if he or she dies before the matter is determined, as at common law a defamation action terminates upon the death of either party.

Section 10 (Defamation Act): a personal representative of a deceased person cannot commence, continue or enforce a defamation action in relation to the publication of defamatory matter about a deceased person whenever published, nor can a defamation action be commenced, continued or enforced against a person who has died since publishing the matter.

Note: On the other hand, if statements defaming a dead person also defame someone still living, then an action will lie if brought by the living person – in relation to that living person's own reputation.

Krahe v TCN Channel Nine : An imputation of adultery against a dead woman entitled her husband to sue because the imputation also implied he was unable to retain her affection.

Member of a Group who has been Defamed

- A defamation action cannot be brought by a group or class of persons without legal personality.
- Individual members of a group about which defamatory statements have allegedly been made, may bring an action in limited circumstances.

Note: If the group is so small that any allegedly defamatory statements can be understood as referring to each and every person in that group, then each individual may be able to sue.

David Syme & Co. v Lloyd [1984] 3 NSWLR 346

Facts

- Imputations concerning the financial advantages to be gained if a cricket series went to the full five games in a best-of-five series were the subject of an action by Clive Lloyd, the then-captain of the West Indies cricket team.
- The team as a group was discussed in the article, but not Lloyd individually.

Held

- It was inevitable that the reasonable reader would know that Lloyd was the captain and the person responsible for team performance, and that the reader could conclude that the article was 'of and concerning' Lloyd.
- It is the judge who must rule whether or not the defamatory matter is capable of referring to the plaintiff individually.

Individual in a Group

- Alternatively, an individual may bring an action if he or she can establish that he or she is the person aimed at within a group which has been allegedly defamed.
- An article which denigrates a particular profession or trade which contains a picture of one member of that profession or trade may be sufficient for the person in the photograph to establish standing.

Case: 'McLibel' Litigation

Facts

- McDonald's issued writs for defamation against two activists over claims that they made about its fast food and the effect that its activities had on customers, workers, and the environment.
- A gardener, Helen Steel, and a postman, Dave Morris, defended themselves in the longest trial in British history (313 court days). They were ultimately found guilty of having defamed the corporation in the leaflet: What's wrong with McDonald's; Everything they didn't want you to know.

Held

- The judge concluded that allegations of rainforest destruction, heart disease and cancer links, food poisoning, starvation in the third world, and poor working conditions were not true.
- Found that McDonald's marketing made use of susceptible children and it was responsible for animal cruelty.
- Awarded McDonald's \$A145,000 in damages, though McDonald's dropped a costs application (the two defendants had little money and relied upon donations to fight the case). On appeal, the decision was substantially upheld.

Defamation against Corporations

Section 9(1): provides that a corporation cannot commence an action in defamation unless it is an excluded corporation. (So, to be precise with terminology, it is only 'excluded corporations' that can sue.)

Section 9(2) of the Defamation Act 2005 (Vic) provides the definition of an excluded corporation:

(2) A corporation is an excluded corporation if –

(a) the objects for which it is formed do not include obtaining financial gain for its members or corporators; or

(b) it employs fewer than 10 persons and is not related to another corporation – and the corporation is not a public body.

Section 9(6): a 'public body' as meaning 'a local government body or other governmental or public authority constituted by or under a law of any country.'

Restrictions on Corporation

It follows that a corporation is now entitled to bring a defamation suit in an Australian jurisdiction only where it is not a public body, and one of the two following criteria applies:

1. It is a not for profit organisation; or
2. It employs fewer than 10 persons, and is not related to another corporation.

Section 9(3): In assessing the number of employees for the purposes of this section, part time employees are to be taken into account as an appropriate fraction of a full-time equivalent

Born Brands v Nine Network (2014): the word 'employs' in (the New South Wales equivalent legislation of) s 9 is clear, and the reference is only to employees; that is, persons having a contract of employment with the corporation.

'Related Corporation'

Section 9(4): In determining whether a corporation is related to another corporation, section 50 of the Corporations Act is to be applied

Section 46 (Corporations Act 2001): A corporation is related to another corporation where it is a subsidiary or holding company of that other corporation. A corporation is a subsidiary of another corporation where that other corporation controls the composition of its board, is in a position to cast more than half of the votes at its annual general meeting, or holds more than half of its issued share capital.

Heartcheck Australia v Channel 7 Sydney: Heartcheck had 100 issued shares. As 65 of these shares were owned by another corporation, the two corporations were related and Heartcheck was deprived of a cause of action by s 9 of the uniform defamation laws as it was not an excluded corporation; it therefore had no standing to sue.

Section 9(5): Sub-section (1) does not affect any cause of action for defamation that an individual associated with a corporation has in relation to the publication of defamatory matter about the individual even if the publication of the same matter also defames the corporation.

New South Wales Court of Appeal in Council of the Shire of Ballina v Ringland (1994) 33 NSWLR 680

Facts: A resident issued a press release stating that the Ballina council were surreptitiously disposing of sewerage into the sea, at night.

Held

- The council sued the defendant for defamation and injurious falsehood.
- A majority, Gleeson CJ and Kirby P, held that a local government authority was not entitled to bring an action in defamation under s 9 of the (then-in-force) NSW Defamation Act. The common law of defamation, it was held, did not set out to protect the reputation of an elected governmental body.

Element 3: Publication

Note: The mere creation of defamatory material, of or concerning another, is not actionable in itself.

‘Publication’: the term ‘publication’ is used in a wide sense. Publication is not limited to traditionally-understood forms of publication, including producing articles or books: publication in this sense means the communication, by whatever means, of the allegedly defamatory meaning, to at least one person other than the plaintiff, who is capable of understanding the defamatory meaning.

Sadgrave v Hole [1901]: dictating a letter containing derogatory remarks about a person to one’s secretary can constitute publication, by communicating the matter to the secretary.

Sims v Wran [1984] 1 NSWLR 317

Facts

- The NSW Premier made certain defamatory statements to the plaintiff journalist during a press conference which imputed that the plaintiff was not objective and was affected by personal malice.
- These comments were subsequently widely broadcast throughout Australia on radio and television and in the press.

Legal Issue: One of the issues before the court was whether Wran was liable for the subsequent broadcasts and republications of his statement.

Held

- The defendant will be liable not only where he or she intended or authorised the publication, but also where he or she could reasonably have anticipated that publication would occur
- He was found to be liable as he should have anticipated that the republication would take place, given the comments were made during a press conference attended by numerous other members of the media. Publication was therefore satisfied.

Publication of Legal Innuendo and Identifying the Plaintiff

Henry v TVW Enterprises: Where the imputation is raised as a matter of legal innuendo, or where the plaintiff is not expressly named in the material, the plaintiff must show that the material has been published to at least one person with the relevant extrinsic information (or who would identify the plaintiff):

Republication

Rule: A person who repeats, or 'republishes', defamatory material is, at common law, liable to the same extent as the originator of the matter.

Note: Exceptions may apply (see Topic 2).

Lewis v Daily Telegraph (1964): 'for the purpose of the law of libel, a hearsay statement is the same as a direct statement, and that is all there is to it'.

John Fairfax Publications v Obeld [2005]: the publication must be considered as a whole in determining whether it is capable of conveying a defamatory meaning and there will be no liability where it is clear from the re-publication as a whole that the author is repudiating or discounting the original defamatory matter.

Wake v John Fairfax Ltd (1973) 1 NSWLR 43

Held

- The circumstances of a republication may differ and the impact may depend on whether material is 'adopted, repudiated, or discounted'. That case concerned the newspaper report of a steward's inquiry into the racing of dogs at Harold Park in Sydney.
- The court held that there was no general rule either that by repeating a slander the re-publisher thereby adopted it and was liable, nor that a re-publisher was liable only if he or she adopted or re-affirmed the statement:
- When a defamatory publication purports to repeat or report the defamatory statement of another, it is an essentially different libel from one where the same imputation is conveyed directly. It may require to be charged or defended differently, but it is nonetheless libel.

Jurisdiction to bring a Suit

Common Law: At common law, the plaintiff had a cause of action in each state or territory where publication is proved and could choose the jurisdiction, subject to relevant rules of civil procedure, with the most favourable defamation laws.

Dow Jones v Gutnick (2002): confirmed that a defamation action can be commenced in any jurisdiction in which the internet material is downloaded, as it is at that point that publication occurs.

- Following the enactment of the uniform defamation laws in each state and territory, there will be one single law of defamation in Australia and therefore there should be no substantive advantage in suing in one Australian jurisdiction rather than another.

The Defence of Innocent Dissemination

- All parties involved in the dissemination of defamatory matter, even if they did not create it, are considered to have published the matter.
- Editors, printers, booksellers, newsagents and a whole range of parties may be liable. Some of these persons, often referred to as 'mechanical distributors', or 'subordinate distributors', may be able to escape liability if they can establish that they did not know, nor had the means of knowing, that the material they were disseminating was defamatory.

Section 32

1. published the material in the capacity of a subordinate distributor (or as an employee or agent of a subordinate distributor), and
2. did not know, nor ought reasonably to have known, that the matter contained defamatory imputations, and
3. was not negligent in failing to know that the material contained defamatory imputations.

Section 32(2): A person will be a subordinate distributor if they were not the first or primary distributor of the matter, they were not the author or originator of the matter, and they were not capable of controlling the content or publication of the matter before it was published.

Section 32(3): newsagents, bookshops, printers and other retailers and wholesalers are not primary distributors of the matter merely because they are involved in its publication

Section 32(3)(e): a person who broadcasts a live radio or television programme will not be treated as a primary distributor where it has no effective control over the person who actually makes the statements.

- The key here is whether there is any control over the material being broadcast.
- Live broadcasting a syndicated television or radio show (that is being produced by another media organisation) is different in this respect to a TV or radio network broadcasting its own television or radio show, where it would have control over the material being broadcast since it is producing that material itself.

Cyber Libel

Note: While it is clear that the author of the online material will be subject to ordinary defamation principles, the position of those involved merely in the mechanics of the online publication is more complex.

Trkulja v Yahoo! Inc LLC and Yahoo! 7 Pty Ltd [2012] VSC 88

Facts

- The defendant, which ran a search engine, conceded that it was liable for the publication of an article defamatory of the plaintiff that appeared as a search result when people typed the plaintiff's name into the Yahoo! 7 internet search service.
- The defendant made this concession once the plaintiff had produced evidence that at least one person had found the article that way, and had read and downloaded it.

Google Australia Pty Ltd [No 5] [2012] VSC 533

Held

- It was open to the jury to conclude that Google was liable as a publisher for search results which imputed that Mr Trkulja was so involved with crime that his rivals had hired a hit man to murder him.

Tamiz v Google Inc [2013] EWCA Civ 68

Facts

- The issue was the liability of Google for defamatory matter published on a blog that was hosted by Google.

Held

- Google was liable for the defamatory blog once it had been notified of the defamatory comments and given a reasonable time to take them down.
- It could be inferred that by allowing the defamatory matter to remain on the blog after it had been notified of its presence that Google had associated itself with, or made itself responsible for, the continued presence of the matter, and thereby became a publisher of the matter (at [34]).

Crookes v Newton [2011] SCC 47

Held

- The operators of a website will not be liable as publishers of hyperlinked material. The majority conclude that a hyperlink would not be publication of the content linked to because that linked content can be changed at any time.
- Liability requires the hyperlinker to repeat the content of the linked material (at [42]).
- The hyperlink is to be viewed as merely being a reference to another source rather than a form of publication (at 42).