

MLL217 –
Misleading Conduct and
Economic Torts

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Topic 1 – Establishing Defamation

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.

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.

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.

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.

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.

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).

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.

Farguhar 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'.

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.

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.

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'.

Lewis v Daily Telegraph [1964]

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 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.
- The 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 for forced or utterly unreasonable way.

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

'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.

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]).

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.

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.

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.

[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 Sungravure will no longer be actionable in defamation in any Australian jurisdiction, though it might be actionable as an injurious falsehood.

[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]).

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.

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.