

TOPIC 2: DEFAMATION

1. Defamatory Matter

A. WHAT IS 'MATTER'?

- Matter can be: (*s 4 of UDA*)
 - a. An article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical;
 - b. A program, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical;
 - c. A letter, note or other writing;
 - d. A picture, gesture or oral utterance; and
 - e. Any other thing by means of which something may be communicated to a person
- ❖ E.g. in *Tussauds*, wax museum exhibited effigy of M holding a gun in a room with notorious murderers next to the room of horrors. This was said to be defamation because by placing effigy, it was intended to connect him discredibly with the murder.

B. WHAT IMPUTATIONS DOES THE MATERIAL CONVEY?

- A plaintiff must sue on a single publication as a whole, despite how many defamatory imputations are contained within that publication (*s 8*). P should argue the following imputations:
- **TEST:** whether an **ordinary, reasonable member of the community** with average intelligence, and being 'neither perverse, nor morbid, nor suspicious of mind nor avid for scandal', would regard the imputations as carried (*Favell v Queensland Newspapers*)

I. NATURAL AND ORDINARY MEANING

- This is the literal meaning that an ordinary person would assign to the material aided only by general knowledge (*Jones v Skelton*)
- Where meaning is natural and ordinary – generally unnecessary for plaintiff to plead the meaning that is relied upon (because clearly obvious)
- ❖ E.g. 'X cheats his customers' or 'Y stole a loaf of bread from the bakery'

II. INFERRED NATURAL AND ORDINARY MEANING/FALSE INNUENDO

- Words that are not defamatory at face value, but are capable of being understood in a defamatory sense by an ordinary reasonable audience (*Lewis v Daily Telegraph*)
- Look at the inferred or indirect meaning which an ordinary or reasonable person would draw from it
- ❖ E.g. 'After X was raped, M went into hiding' or 'Sergeant G is the best policeman money can buy'
- ❖ E.g. in *Random House*, a book contained a statement that two Liberal politicians had sexual liaisons with the same woman and she inducted them into the Liberal Party. Court found implication that political commitment so shallow they would abandon for sexual liaison and that the woman had pre-marital sex.

III. TRUE/LEGAL INNUENDO

- Material with an otherwise innocent meaning that may be coloured by the "true" innuendo which is conveyed to certain people who have knowledge of extrinsic facts (*Tolley v Fry*)
- Where slang expression, its meaning to those who know it will need to be pleaded as true innuendo
- ❖ E.g. a man entered a brother vs a man entered 123 Green St, which some people may know is a brothel

- ❖ E.g. in *Tolley*, advertisement for chocolate with caricature of a golfer was published. If amateur golfer, unable to accept money and people would think he consented. Only some people would know that amateur golfers cannot except payment.
- Only need to show that additional facts were known to one or more persons – do not need to demonstrate that those persons understood those words in a defamatory sense

MULTIPLE MEANINGS

- Some words contain multiple interpretations and therefore the plaintiff must assign a single meaning in their pleadings (*Ten Group*)
- Plaintiff can only depart from pleaded meanings if such a departure would not prejudice, embarrass or unfairly disadvantage the defendant → will not be allowed if meaning is 'substantially different'

C. ARE THE IMPUTATIONS DEFAMATORY?

TEST FOR IMPACT OF DEFAMATION

I. PREFERRED TEST

- **TEST:** Whether the published matter would be likely to lead others to think less of the plaintiff or it would have the tendency to lower the plaintiff in the estimation of others (*Sim v Stretch*)
- Necessary that there be an imputation "to disparage the plaintiff, that is to impute moral blame"
- Taken be average person in Australia today (*Cornes*) and will depend on current community standards of morality (*Hepburn*) – not sectional attitudes
- BUT may be sufficient if it lowers him in estimation of a substantial & appreciable section of society
- ✓ Abortion (*Hepburn*)
- × Imputations of adultery (*Morosi*) (cf *Cornes*)
- × Imputations of homosexuality (*Rivkin*)

II. OTHER TESTS

1. Hatred, contempt and ridicule

- **TEST:** A publication without justification or lawful excuse is libellous if calculated to injure the reputation of another by exposing to hatred, contempt or ridicule (*Parmiter*)
- ❖ E.g. in *Parmiter*, imputations that mayor was corrupt and ignorant of his duties was defamatory

2. Cause plaintiff to be shunned or avoided

- **TEST:** CL recognises a cause of action for the publication of matter which is likely to cause others to shun or avoid the P (*Youssouf v Metro-Goldwyn*)
- Related to cases regarding insanity, infectious diseases or sexual impurity
- ❖ E.g. in *Metro*, imputation that princess had been raped by Rasputin was defamatory

3. Holding plaintiff up in a ridiculous light

- **TEST:** Does it create an enduring stigma on P in that people associated him as a ridiculous character who cannot be taken seriously or exposes him to ridicule? (*Boyd v Mirror*)
- ❖ E.g. in *Boyd*, comment that he was 'fat and slow' was not defamatory but 'that he had let his condition degenerate and was a hopeless player' was
- ❖ E.g. in *Ettinghausen*, photos of rugby player naked gave defamatory imputation that he agreed to it

SPECIAL FORMS OF IMPUTATION

I. DEFAMATION OF BUSINESS/PROFESSION

- There is no difference in test between business reputation and personal reputation (*Chesterton*)
- Defamation in relation to business can go to “lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade, business or professional activity” (*Drummond*)

II. JOKES/JEST/SATIRE

- Statement can be a joke but still defamatory because contains a statement (*Ten Group*)
- May also get into trouble where ordinary viewer doesn’t interpret it as carrying a statement of fact about plaintiff but do regard it as holding the plaintiff up for ridicule (coming within 4th test)
- ❖ E.g. in *Ten*, MM made a joke about guest sleeping with Nicole Cornes –found defamatory despite joke
- ❖ E.g. in *Pauline*, satirical song was held to convey the defamatory imputation that Pauline Hanson engaged in unnatural sexual practices and was homosexual

III. RUMOURS/REPETITION

- Can’t avoid defamation case simply by saying you are repeating the rumour (just adds own authority)

IV. VULGAR ABUSE

- Statements about the P may be in such general, albeit derogatory, terms that they simply fail to convey any imputation that is capable of injuring the plaintiff’s reputation (*Mundey v Askin*)

STANDARD FOR JUDGING DEFAMATION

- **TEST:** what would the ordinary reasonable and fair-minded recipient think?
- Don’t consider the intention of the defendant
- Court will assume that the reader reads the entire article and not just the headline (*Charlestone*)

I. WHO IS THE ORDINARY PERSON?

- Of fair, average intelligence (*Slatyer v Daily Telegraph Newspaper*)
- Neither perverse nor morbid nor suspicious of mind nor avid for scandal (*Lewis*)
- The read between the lines in light of their general knowledge and experience of world affairs (*Lewis*)
- They reject strained, forced or unreasonable interpretations
- They are not lawyers, they are lay persons (*Lewis*)
- Neither unusually suspicious nor unusually naïve
- Depending on publication they may or may not expect a higher degree of accuracy
- Where controversial issue, they are an appreciable and reputable section of the community (*Hepburn*)

II. FACTORS THAT MAY IMPACT

- Form/medium: written publications are more likely to be read with care and reviewed compared to a broadcast where all you have is a first and fleeting impression
- Tone and inflection: certain statements can be seen as insulting or endearing depending on tone
- Context: scope is important –TV segment in isolation, the whole programme or past episodes?
- Prominence: look if there is a large headline and are there pictures?

BANE AND ANTIDOTE

- For antidote to neutralise the bane it must completely dispel bane, showing it to be false (*Charleston*)
- The following examples will not be sufficient to dispel the bane:
 - Publishing the plaintiff’s denial along side the imputation
 - Suggestion by the publisher that the allegation should be disregarded or that it is just a rumour
 - Using the word “allegedly” or presenting other side of story won’t dispel the bane
- ❖ E.g. in *Charleston*, neighbour star head on porn star body. Inside said pornographic computer games. This was accepted as dispelling the bane because ordinary person would not just read headline.

D. DOES THE DEFAMATORY MATTER REFER TO THE PLAINTIFF?

- P must show that the defamatory matter is 'of and concerning the plaintiff' (*Bjelke-Petersen*)
- Judge must decide whether it is capable of referring to the P and then trier of fact decides whether it actually refers to P (*E Hulton & Co v Jones*)
- **LOOK AT SPELLING OF BOTH NAMES**

I. EXPRESSLY REFERRED TO

- Publication may expressly refer to the plaintiff by name (*Barbaro*)
- If D intends to refer to a fictitious person but a real person bears that name, then they may be saved if a *reasonable person* would not interpret it as referring to a real person or treat it as mere fiction (*Hulton*)
 - ❖ E.g. in *Hulton*, found that it did refer to plaintiff because he worked for that particular newspaper and he was well known in the area. He found 5 people that said they would have thought it was him
- Turns on what ordinary reasonable person would interpret the publication as referring to (*Morgan*)
- Where more than 1 person can be identified by the same name, both can bring actions (*Lee*)

II. NOT EXPRESSLY REFERRED TO

- **ASK:** whether the ordinary person would they reasonably believe that it refers to plaintiff (*Caravan*)
- Three scenarios:
 1. Where, as a matter of general knowledge, the words would be taken as referring to the plaintiff then the plaintiff is relevantly identified
 - ❖ E.g. the Chancellor of University or 2014 Nobel Winner
 2. Where statements A makes about B may defame C –
 - ❖ E.g. in *Cassidy*, statement about husband cheating with X may defame wife or defamation about corporation relates to director
 3. Where the identity of the person defamed would be apparent only to persons who have knowledge of special circumstances that are not matters of general knowledge (treat as true innuendo)
 - ❖ E.g. in *Henry*, footage from dentist office for report on malpractice was enough to identify

III. MEMBER OF A GROUP

- The group cannot bring an action as a group because they are not a natural legal person
- 1. Making statements that defame the whole class
 - If P can prove the statement is capable of referring to all members of the group, then, each member is entitled to an individual cause of action (*Lloyd v David Syme*)
 - If an allegation is too general or the size of the group is too large, it will be unlikely that the allegations reflected on each of the individual members (*Canavan*)
 - More extravagant the allegation = less likely reasonable people would accept it as defamatory
 - ❖ E.g. in *Syme*, remark about Sri Lankan cricket team cheating was defamatory against captain because he was implicated in a decision to throw a match
- 2. Making statements about certain unidentified member(s) of a class
 - If the slur is such that a failure to name the individual member effectively casts a slur on all members, such as, "I know which of the ministers is corrupt", all members of the group will have been referred to (*Bjelke-Peterson*)
 - If it is possible to relate the imputation to only one member, such as, "one of the partners was involved in fixing court cases", none of the members of the group will have been referred to
 - ❖ E.g. in *Bjelke*, the statements of 'this government's corruption' and 'Ministers have their hand in the till' cast a slur on all party members and therefore capable of bringing an action

IV. SPLITTING DEFAMATORY IMPUTATIONS

- Where imputations are published first, followed by the identification of P in a separate publication
- **TEST:** Where the 1st publisher defames but does not identify X but the 2nd publisher does, the first publisher is safe UNLESS 1st publisher invited audience to view the publication that named X (*Baltinos*)
- ❖ E.g. in *Pedavoli*, SMH's article about teacher who slept with student invited readers to visit school website and ascertain the identity of the teacher – gave enough information that it could be determined

E. WHO MAY BE A PLAINTIFF?

I. NATURAL PERSONS

- Action can be brought by a living person - since reputation is seen as personal to plaintiff defamation action at CL ends when the plaintiff dies (*Calwell v Ipec Australia*)
- Living natural persons who are bankrupt can bring the action (*s 60(4) Bankruptcy Act*) and the action or damages do not vest in the trustee in bankruptcy (*Re Wilson; ex parte Vine*)

II. CORPORATIONS

- Corporations cannot sue for defamation unless they are an excluded corporation (*s 9(1) DA*)
- *s 9(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
 - b. It employs fewer than 10 persons and is not related to another corporation and the corporation is not a public body
- The above exception therefore applies to NFPs and small family corporations
- Does not affect the ability of an individual who is connected with a corporation to sue if the defamatory matter is about both the individual and corporation (*s 9(5) DA*)

III. PARTNERSHIPS

- A partnership may sue jointly for defamation if the imputation refers to the firm as a whole (*Smith*)

IV. TRADE UNIONS

- Unincorporated associations cannot sue (*Cothor v John Fairfax*)

V. GOVERNMENT BODIES

- A popularly elected local authority/council cannot sue (*Ballina; Derbyshire*)
- This principle applies to any elected body (e.g. State and Federal parliament)
- This doesn't prohibit individual MPs or officials bringing actions personally (*Bjelke-Petersen*)