

Topic 1: Freedom of Speech.

- Society values free speech as people are free to say what they want.
- Free speech extends beyond written and spoken word to painting, sketching or cartoon.
- Free speech also refers to right to seek and receive information, not just right to communicate.
- The term 'free' means free from regulation/ freedom from interference by the state/ free of legal restriction.
- Why protect free speech?
 - Self-fulfilment and autonomy.
 - Truth
 - Democracy
- How is free speech protected in Australia?
 - CL and statute – CL protects free speech in a negative sense as it is a residual liberty. The CL doesn't take it away, you just have it.
 - Vic Charter
 - International recognition and protection such as treaties – International Covenant on Civil and Political Rights Article 19(2).

Topic 2: Defamation

- Defamation is designed to protect one's reputation

Relationship with other causes of action

- Injurious falsehood – a tort that protects against actual economic loss that results from the publication of false information.
- *Elements to be proven by the plaintiff*
 - certain matter was published by the defendant concerning the plaintiff's goods, services, business or property;
 - the matter was false;
 - the defendant was actuated by malice (ie spite, ill-will, intention to injure);
 - the plaintiff suffered actual and provable pecuniary loss as a result of the publication (loss of business, downturn in profits etc).
- Misleading & deceptive conduct
 - S18 and 19 ACL.
 - S19 media safe harbour defence as s19 is too greater restriction on free speech.
 - Section 19 says that section 18 does not apply to a publication of matter by an information provider (defined as a person who carries on a business of providing information) if:
 - in any case—the information provider made the publication in the course of carrying on a business of providing information; or
 - if the information provider is the ABC, the SBS or the holder of a licence granted under the *Broadcasting Services Act 1992*—the publication was by way of a radio or television broadcast by the information provider.
- Negligence
 - *Sattin v Nationwide News (1996)*: A P tried to amend proceeding to include negligence claim however court said you cant add negligence as allowing recourse to torts of negligence would impose on mass instruments of communication a CL duty of care to make sure information is accurate.

Distinction between libel & slander

- No distinction between libel and slander per UDA s7 which has abolished the distinction.

Defamatory Matter

1. What is 'matter'?

Defamation Act 2005 (Vic) s4

Is(n't) a matter within s4 as a s4 matter includes:

- a. An article, report, advertisement or other thing *communicated by* means of a newspaper, magazine or other periodical; and
- b. A program, report, advertisement or other thing *communicated by* means of television, radio, the Internet or any other form of electronic communication; and
- c. A letter, note or other writing; and
- d. A picture, gesture or oral utterance; and
- e. Any other thing by means of which something may be communicated to a person.

Monson v Tussaouds:

Facts: exhibition of a wax effigy of a person who has been tried for murder and acquitted, in company with the effigy of notorious criminals.

Held: Court give a decision that it is defamatory because it affects P's reputation. It is liable actionable per se.

2. What imputations are conveyed by the material?

- UDA s8 – P has one cause of action regardless of the number of imputations carried by the matter.
- The plaintiff must plead the defamatory imputations in the publication.
- Types of meanings:
 - A. Natural and ordinary meaning conveyed directly
 - a. Meaning is clearly and explicitly stated in publication
 - B. Natural and ordinary meaning inferred
 - a. Meaning not expressly stated but can be detected by a layperson.
 - b. Less direct but ordinary reader would pick up on the meaning.
 - C. True (or legal) innuendo:
 - a. The material the Plaintiff is complaining about is only capable of being defamatory if it is considered in the context of extrinsic facts.
 - b. Tolley v Fry:
 - i. Facts: The plaintiff was an amateur golfer. The defendant, without the plaintiff's knowledge or consent, published adverts showing the plaintiff and his caddy each with bars of the defendant's chocolate protruding from their back pockets. The plaintiff said that this carried an implied defamatory message that he had been paid for the advertisement, and had 'prostituted his reputation' as an amateur golf player.
 - ii. Held: in the circumstances in which the publication took place, as explained by the evidence, the caricature was capable of bearing the meaning alleged in the innuendo.
 - D. Single meaning rule:
 - a. If a word or phrase is interpreted in different ways, you have to come down on one side or the other. (Ten Group v Cornes)
 - b. Judge determines whether intended meaning is capable of being defamatory.

3. Is [X] defamatory?

A. **Modern TEST per *Slim v Stretch*:

a. Whether the matter lowers the P in the estimation of right thinking people. (*Slim v Stretch*; *Byrne v Deane*; *Malik v McGeown*)

- E.g. No right thinking member of society would think less of someone who reported an illegal activity to the police. (*Byrne v Deane*).
- Don't have to show there has been an actual adverse effect on his/her reputation.
- Not looking for evidence of whether people now think less of P but rather is there a 'tendency' people would think less of P?
- Per Greer LJ in *Byrne v Deane*: The question is, what is the meaning which any reasonable man would attach to the statement contained in the document?

B. Apply other tests if relevant:

a. Hatred, contempt and ridicule

- i. A publication without justification or lawful excuse is defamatory if it is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule. (*Parmiter v Coupland*)

b. Shun and avoid:

i. *Youssouf v Metro-Goldwyn-Mayer Pictures*:

- Facts: P, a real life Russian Princess alleged that a movie defamed her as the Princess in the movie had a sexual relationship with evil Russian monk, Rasputin. She argued people would make a link between movie Princess and her.
- Held: court adopted shun and avoid test. To say that someone was raped would cause people to shun and avoid her so it was defamatory. It would cause people to shun and avoid her as it might affect her prospects of marriage as she may be seen as impure.
- Aside from rape, this test can be used for things such as a contagious or infectious disease, asserting someone is insane as that may cause someone to be shunned or avoided.
- This test has been heavily criticised as it moves away from idea of reputation.

c. Ridicule test:

- i. Does the material hold the P in a ridiculous light?
- ii. Must be more than a trivial degree of ridicule (*Ettinghausen*)
- iii. NB: Satire – if a man in jest conveys a serious imputation, he jests at his peril. (*Cornes v The Ten Group* – joke about Nicole Cornes sleeping with another football player.)

Boyd v Mirror Newspapers:

- Facts: Boyd was rugby player and article said he was fat, slow and predictable.

- Held: Hunt J said that calling someone fat and slow doesn't make people think less of him. However, the publication ridiculed him and imputed fault as it imputed that he hasn't kept himself in good enough physical condition to play rugby.