

MLL217 – MISLEADING CONDUCT AND ECONOMIC TORTS EXAM NOTES

DA – Defamation Act
 LAA – Limitation of Actions Act
 ACL – Australian Consumer Law (Schedule 2 to CCA)
 CCA – Competition and Consumer Act
 FTA - Australian Consumer Law and Fair-Trading Act 2012 (Vic)

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Topics 1 & 2: Defamation & Defences

- **Definition** – Tort committed where D communicates to 3rd party material which lowers the reputation of P in the eyes of ordinary persons.
- Protects personal reputation and trade, business and professional reputation (same test for both).
- **Test** – whether the conduct has defamed P.
- Strict liability offence – no need to show fault or an intention to injure.
- Protection of reputation (via the prima facie claim) v Freedom of speech (via defences such as honest opinion and privilege).
- Proving defamation can be quite straight forward, however, the defences are problematic (justification is a huge part of defamation case law).
- Defamation v Privacy (defamation is not concerned with privacy and vice versa). A violation of privacy is not grounds for a claim of defamation.
- There is no tort of Privacy in Aus (there is in UK & US). If you do have a cause of action re privacy, it is not a defamation claim. Aus concerned with protection of reputation rather than protection of privacy.
- Barnaby Joyce – trying to promote new tort of privacy (right to protect privacy, particularly surrounding media). Personal life should not be used to try and change policy and law.
- Falsity not required for defamation action. No need to prove falsity, it is presumed material is false.

Uniform Defamation Laws

- Each State had its own law – Vic was based on CL.
- UDL (Uniform Defamation Laws) came into effect in January 2006. Each state has its own name for the act, however, substance of the act is substantially the same throughout each jurisdiction (eliminates forum shopping and having people bring multiple claims in multiple states and work around the cap on damages).
- UDL codified CL. UDL not that much different in Vic to CL law prior to enactment of UDL.

Principle features of UDL

- **S 6 DA** - Adopts CL principles (CL continues unless expressly or impliedly modified by UDL).
- **S 7 DA** – abolishes distinction between libel (permanent written form) and slander (spoken (transient) form).
- **UDL provides that all defamatory matter is actionable per se without proof of special damage, regardless of whether libel or slander at CL (s 7 DA)** – calculation of damages would be less, however, claim in defamation could still be successful.
- Restricts the rights of Corporations to sue.
- Reforms damages (cap and show damages should be calculated and awarded).
- Adopts statutory qualified privilege defence.
- Modifies limitations period from 6 years from publication date to 1 year.
- Note: Some aspects of UDL are different between states - SA, ACT – don't allow trial by jury for defamation. TAS – able to sue deceased. This is not available in any other State.

Elements of the Tort of Defamation

- (1) The subject matter conveys a defamatory meaning or imputations; and
- (2) the defamatory matter identifies, or is capable of identifying, P as the person defamed; and
- (3) the defamatory matter has been published to at least one person other than P.

- UDL does not define these elements, principles are drawn from CL.
- Onus on P to prove the elements.
- Onus then shifts to D to prove a defence – because truth is a defence, **defamation law in**

effect regulates false statements.

- **S 4 DA – defines ‘matter’** as including an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical; and a program, report, advertisement or other thing communicated by means of television, radio, internet or any other form of electronic communication; and a letter, note or other writing, and a picture, gesture or oral utterance, and any other thing by means of which something may be communicated to a person.

The First Element: Defamatory matter

- Two steps to determining if material is defamatory:
 - (1) identify the imputations from the material that convey the defamatory meaning(s);
 - (2) identify whether those imputations are in fact defamatory.

(1) identify the imputations from the material that convey the defamatory meaning(s)

- Speakers intention not relevant.
- **Test** is whether the ordinary or reasonable person (the ‘hypothetical referee’) would draw the suggested meanings from the words.
 - The ORP is a purely hypothetical bystander with no previous knowledge of the background to the defamatory matter.
 - The ORP is not perverse or suspicious or ‘avid for scandal’ but is one ‘who can and does read between the lines’ : **Lewis v Daily Telegraph**. (imputing intelligence and curiosity in the ORP).
 - **Trkulja v Google (HCA)** in making the assessment, bear in mind that ordinary people have different temperaments, outlooks degrees of education and life experience. The exercise is one of attempting to envisage a midpoint of temperaments and abilities and on that basis decide the most damaging meaning that ORP at the midpoint could put on the impugned words or images considering the publication as a whole.
- Even if 25 imputations, only bring one cause of action but raise all imputations in that one cause of action. Sometimes (**s 23 DA**) can raise more than one cause of action but need Court approval for this.
- **Defamatory imputations** – can be express (literal, i.e. P is terrorist or murderer) so for ORP that is clear imputation. Literally meaning is defamatory and actionable, however, secondary meanings (innuendos) are the most complicated as these need to be proven (which is much harder).
- Two kinds of innuendos:
 - **Popular and false:**
 - The meanings which ORP would understand or infer from the words used, without the need for ‘special’ or ‘extrinsic’ information.
 - (1) Imputation might be drawn because word or phrase has secondary meaning:
 - **Murphy v Plasterers Society** – statement during a strike that P a ‘scab’ imputed P was treacherous and disloyal to fellow workers (literal meaning of ‘scab’ not defamatory but secondary meaning as understood by ORP was defamatory).
 - **Bjelke Peterson v Warburton** – Government ministers had their ‘hands in the till’ imputed corruption.
 - (2) Or imputation might be drawn by ‘reading between the lines’:
 - **Nyoni v Pharmacy Board of Australia (No 6) (2018)** – Pharmacist sold addictive drugs and was permitted to do so, however, was audited and found not to have kept the required list. Pharmacy registry website listed conditions, claimed that legislative notification and conditions on website were defamatory and imputed that he had a drug addiction and was not a reliable pharmacist. Court held that reading between lines ORP would assume pharmacist could not be trusted to sell those addictive drugs.
 - **Hockey v Fairfax media Publications Pty Ltd (2015)** – article headlines ‘Hockey for Sale’, ‘Joe Hockey for Sale’ imputed by ‘reading between the lines’ corruptness, sold access to privileged documents and knowingly took money from corrupt families. Article headlines were defamatory to his career.

- **Reports of criminal investigations** – ok if material imputes that P accused or suspected of or being investigated for a crime (provided this is true), however, it is defamatory to impute that P has actually committed the crime or there is a reasonable basis for the accusation or investigation.
 - **Mirror Newspapers v Harrison (1982)** – newspaper reported P and ors had been arrested in connection with assault and contained photos of P. P alleged publication imputed P was directly involved in assault and was guilty of that offence. Court held that matter was not capable of bearing either of these imputations. Assuming ORP not avert for scandal and knows principle ‘innocent until proven guilty’, no defamatory imputations (Mason, HCA).
 - **Favell v Queensland Newspapers Pty Ltd (2005)** – mere statement that a person being investigated is not enough. However, if accompanied by account of suspicious circumstances as to why someone is being investigated (house fire) then imputation is defamatory (material stated fire was suspicious and showed P had motive for lighting fire).
- **Legal and true:**
 - Meanings that could be construed as defamatory by persons who have extrinsic information.
 - **Lewis v Daily Telegraph** – ‘P seen to enter particular address’ not defamatory, however, for those who knew that address happened to be a Brothel then defamatory.
 - **Cassidy v Daily Mirror** – photo published of man and woman noting ‘engagement’ however they were married. To those with extrinsic knowledge and knew P, it imputed that she lied about claiming to be married and that she was immorally cohabitating with a man.
- Again, irrelevant that D did not intend to harm P and made the statement innocently.
- **Must be able to show that it was published to someone with that extrinsic information:**
 - **Cornes v The Ten Group Pty Ltd** – reasonable to infer that someone with that knowledge watched the show that day. Doesn’t have to be expressly stated, just needs to be reasonable that ORP would have had that extrinsic knowledge.
- **Single meaning rule** – if there are two possible ways to understand something (defamatory and non-defamatory) then the question the court has to decide is whether the ORP would interpret the statement in the defamatory sense or in the innocent sense. Either all population would have to understand it as defamatory or innocent. (there is no mid-way point).
 - **Cornes v The Ten Group Pty Ltd** – only if every person watching the broadcast knew the facts of the broadcast would it deny any defamatory meaning. Court had to be able to show that any ORP would have assumed it as a joke. If this could not be shown, then is defamatory in nature. ORP would need to understand show was comedic and that Mick Molloy as a comedian was joking for single meaning to be that the comment ‘you slept with her too’ would not have been defamatory. Held: no doubt that ORP would not have viewed in a joke sense but would have been understood in a defamatory sense.
- Can have true innuendos and single meaning rule. Single meaning rule identifies statement itself as defamatory, then argue all different imputations that arise from the statement.
- **Context and mode of publication:** the ORP has to take into account the context and occasion on which the communication is made. i.e. – not defamatory if material reasonably determined in lighthearted way.
 - **Entienne Pty Ltd v Festival City Broadcasters:** context was not portrayed sufficiently to be a joke.
 - Material must be read as a whole. Sensationalist headlines to be read in conjunction with accompanying text” **Charleston v News Group Newspapers Ltd, Hockey v Fairfax Media Publications Pty Ltd (2015)** (text of the article can neutralise/negate the sting of the headings) (bane and antidote).
- Mode of publication relevant to determining whether imputations capable of being drawn.
 - **ABC v Comalco** - ABC report produced on treatment of aborigines by Comalco. ABC produced trailers which showed short snippets of aboriginal women stating they no longer wanted to be ‘treated like this’ by Comalco. Overall impression was that Comalco

treating aboriginal community badly. This is the overall impression shown by the trailers. Four Corners wasn't a live to air show and had complete control over how it was shown and chose to show trailers, therefore, it was more likely to leave the impression that it was defamatory to Comalco.

- Online defamation (search results and autocomplete predictions)
 - **Trkulja v Google LLC (2018):**
 - The capacity of the result to defame is to be judged to reference to the ORP who has made the Google search in issue;
 - There would be significant variance in the extent of comprehension and understanding of how the result is produced and Google's contribution to it;
 - The question whether the standard of knowledge and comprehension of the processes involved should be taken as some hypothetical midpoint in the range of understanding is yet to be authoritatively determined.

(2) identify whether those imputations are in fact defamatory.

- The material must lower P's reputation (personal or business) 'in the estimation of right-thinking members of society generally' (**Slim v Stretch (1936)**).
- Standard is that of the 'hypothetical referee': the 'ORP' or "ordinary decent" person, applying general community standards.
 - **Radio 2UE Sydney Pty Ltd v Chesterton (2009) (HCA)** – 'one common social or moral standard to be applied, not the standards of a particular religion or culture'. No particular characteristics are imputed in ORP in any sense.
- **Must be defamatory in fact:**
 - P committed a crime
 - P associated with known criminals or underworld figures
 - P is a hypocrite
 - P is dishonest and/or a liar
 - P is treacherous and/or disloyal
 - P is an alcoholic or drug addict
 - P is not of an appropriate character to hold public office (**Hawke v Tamworth Newspapers**)
 - P is incompetent and not qualified to hold a particular job.
- Community views/standards change over time. i.e. – no longer defamatory to say:
 - P born out of wedlock
 - P had child out of wedlock (BUT could be defamatory if imputation that P had children merely to claim social service benefits)
 - P is a homosexual (BUT could be defamatory if added suggestion that P was gay pretending to be straight, therefore a hypocrite (Jason Donovan case) or was a pedophile.
 - P is 'living in sin'
 - P had sex outside of marriage (BUT imputation of adultery could be defamatory (**Cornes v Ten Group Pty Ltd**) or added suggestion that P was sexually promiscuous or used sex in manipulative way (**Random House Australia Ltd v Abbott & Costello**).
 - P is mentally ill (**Mallik v McGeown**).
- Material must disparage P by imputing characteristics or behavior for which P is responsible (i.e. – P's honesty or integrity).
- P not defamed by a statement about personal characteristics, gender or ethnic background because no blame can be attributed to P for these things, i.e. –
 - Overweight (unless suggests lack of discipline)
 - Ill (unless suggests a hypochondriac)
 - A 'wog' or an 'Arab'
 - P innocent victim of crime
- Abuse is also not defamatory, but an action may arise in tortious assault or anti-discrimination laws.
- **Exceptional causes where disparagement is not required:**
 - (a) the imputation casts P in a '**ridiculous light**'
i.e. – imputation exposes P to scorn, derision or ridicule by making P look absurd or foolish.
 - **Boyd v Mirror Newspapers** – P (footballer) 'slow, fat and predictable' and 'waddled' onto field. Portrayed P in a ridiculous light: not dependent on

- imputation that he was at fault or to blame for condition.
 - **Ettingshausen v ACP** – Both disparaging imputation (that P had let himself be photographed nude) and ridiculous light imputation.
 - **Berkoff v Burchill** – imputation that P (an actor) was 'hideously ugly' defamatory as exposed him to ridicule.
 - (b) The imputation will cause people to 'shun or avoid' P
 - Insanity (but see **Malik v McGeown**)
 - Rape victim (but see **Galeo v Amalgamated Television Services**)
 - Infectious disease

Rationale: these imputations can lead to a degree of social exclusion because of people's irrational prejudices.
 - P bears onus of proof.

Business defamation

- Determined according to ORP test (not to ORP in same industry etc).
- Statements which merely injure P in her business or profession are not defamatory unless they damage professional business reputation, by imputing behavior or an event for which P is responsible.
 - **Dawson Bloodstock Agency v Mirror Newspaper** –
 - **Radio 2UE Sydney Pty Ltd v Chesterton** –
- Statements injuring P's business (though not reputation) might be actionable as an injurious falsehood where malicious.
- Better actions for business are injurious falsehood and misleading conduct.

The Second Element: Identifying the Plaintiff

- P can sue if identified or identifiable from the material.
- If P is not expressly named – would the ordinary reasonable recipient identify P from the material?
- **Younan v Nationwide News Pty Ltd** - Where extrinsic knowledge is required, must show:
 - (a) publication to recipients with the extrinsic knowledge;
 - (b) Those recipients identified P;
 - (c) Those recipients reasonably came to that conclusion.
- Evidence of identification not required – helpful, but not determinative (unless pleading a legal innuendo).
- Illustrative cases (fictional character):
 - **Hulton v Jones** – Hulton write book about fictional character who was a barrister, there was a real barrister by the name of Jones who had these characteristics. Hulton didn't know Jones existed but intent isn't relevant. Sufficient to the identification of P (test strictly applied).
 - **Henry v TVW Enterprises** – Dentist with Hep-B and practicing but hadn't told patients. Didn't name him but showed outside of his practice. Imputations claimed that he had acted in breach of professional obligations and deliberately spreading Hep-B to his patients. Material had to be published to at least one of his patients able to identify him as the person being defamed.

– no claim if the matter is not published to anyone who identified P as the person referred to.

Defamation of a group

- A member of a group can sue if the defamatory statements can be understood:
 - As referring to P as an individual; or
 - As referring to each member of the group because the group is small or the circumstances of the publication give rise to the implication (**Bjelke-Petersen v Warburton**).
- Generalised statements about a large of indeterminate number of people is not actionable (i.e. all lawyers are thieves) – not sufficient to identify P expressly or impliedly.

S 10 DA - Deceased persons

- CL rules - deceased person nor their estate can sue for defamation.
- Defamation proceedings cannot be commenced or continued against a deceased D.

Corporations

- CL – corporations could sue for statements adversely affecting trading or business reputations. Some critical of actions by big corporations to use ‘deep pockets’ to stifle public debate.
 - **McLibel Case** – 2 volunteers for Greenpeace handing out flyers against health of meals McDonalds producing. HCA on appeal – did McDonalds have standing to sue? Multinational public company should be open to scrutiny (defence to defamation) did not hold, McDonalds won on appeal.
- **S 9 DA** – limits corporations ability to sue unless an ‘excluded’ corporation (not for profit, or employs less than 10 people). Subsidiaries can’t be excluded corporations.
- **Alternative causes of action for corporations** – injurious falsehood or misleading or deceptive conduct.
- **S 9(5) DA** – employee can sue if can demonstrate that defaming corporation defamed that person directly.

Public bodies

- Local councils and other elected bodies cannot sue.
 - **Ballina SC v Ringland** – No ‘governing reputation’ that is immune from criticism by electors (basis of democracy).
- **S 9 DA** – confirms this decision.

The Third Element: Publication

- General rule: D must publish material in a comprehensive form to at least one person other than P (physical element).
- D liable for publications that are intended, authorised, or which could be reasonably be foreseen or anticipated (mental element).
- Must be reasonably foreseeable that the publication would occur.
- Limitations:
 - **Wenhak v Morgan (1880)** – no publication if made by D to D’s spouse – policy interest in preserving privacy and confidentiality.
 - **State Bank of New South Wales Ltd v Currabubula Holdings Pty Ltd** – publication to an employee is generally actionable but not publication to a member of the governing body of the corporation (e.g. – a director).
 - **Sims v Wran** – a general presumption that letters addressed privately to P will only be opened by P.
- Legal innuendo – publication must be to someone with extrinsic knowledge.
- **Republication**: D not excused because merely repeating or reporting defamatory statement made by another – **John Fairfax Publications Pty Ltd v Rivkin [2003]**.
- **TV & radio stations are liable for statements by interviews and guess & talkback callers.**
- Newspapers liable for letters to the editor (though may have defence of honest opinion).
- Any person who particulates in the publication of defamatory material is prima facie liable:
 - Current affairs items: journalist, producer and media proprietor
 - Newspaper item: journalist, editor, printer, proprietor, newsagent, delivery agent.
- The law distinguishes between:
 - **Primary publishers** – persons involved in generating the content or who have editorial control over the content.
 - **Secondary (subordinate) publishers** – persons who participate in the publication of the matter but who have no control over content.
 - Knowledge requirement is different:
 - **Primary publisher** – irrelevant whether has knowledge that the matter contained defamatory imputations
 - **Secondary publisher** – liable only where did know, or ought to have known, that the matter contained defamatory imputations, or whether have adopted or ratified that matter.
 - **Duffy v Google [2015]** – Google denied publication, however, none of their defences were successful. Context of the whole publication needs to be considered. Reason google were determined to be publisher is that Google had not removed hyperlinks to article defaming Duffy. Google determined to be secondary publisher. Found to be defamatory as Duffy raised hyperlinks with

Google who had not removed them. Google could only be sued for the period they had knowledge of the defamatory matter. Auto-complete in search results is not passive facilitation, it is considered publication.

- Defence of Innocent Dissemination – CL defence (***Vizetelly v Mudie's Select Library***).
- Defence now enacted in **s 32 DA**. 'Subordinate distributors' defined in **s 32(2) DA**.
- Object is to protect those merely involved in the 'mechanics' of the distribution, such as libraries, booksellers, newsagents, other retailers, wholesalers etc.
- Innocent Dissemination only applies as a defence if a subordinate distributor – 'neither knew or ought to have known material was defamatory and lack of knowledge was not due to negligence on subordinate distributors part. Once D is aware material is defamatory (or reasonably expected they should be aware) then defence no longer applies.
- **S 32(3) DA** – clarifies position of ISPs and email service providers: not liable merely because providing means by which matter is transmitted or made available by another person over whom the provider has no effective control.
- **Broadcasting Services Amendment (online Services) Act 1999 (Cth)** – provides that no law of any state can make an ISP provider liable for defamation.
- Innocent dissemination doesn't protect main publisher (i.e. – radio program or tv station producing the material). However, **s 32(e) DA** does protect live broadcaster where they had no effective control over the person making the statement (narrow scope).

Cyber Libel

- Ordinary defamation principles apply.
- There are not many Aus cases on cyber libel so far.
- D liable as primary publisher if authorised the matter or had editorial control of content or had authorised or ratified content: ***Byrne v Deane* [1937]**.
- Passive facilitators (ISP or email service providers) are not liable as they cannot be deemed a publisher: ***Bunt v Tilley* [2006] UK**. If, however, the provider goes beyond this (i.e. – hosts a blog) then liable once notified of the defamatory content – **s 32(3)(g) DA**, and ***Duffy v Google Inc* [2015] SASC**.
- Hosts of third-party created content (i.e. – blog hosts) are liable once notified of the defamatory content (can become subordinate publisher) particularly if they take too long to take down the defamatory matter: ***Tamiz v Google Inc* [2013] UK**. (took Google 1 month to take down content and failed to exercise control over the blogs being hosted, therefore, liable).
- To be a primary publisher you have to be intentionally complicit or negligent. A subordinate publisher becomes liable when they become aware of the defamatory material: ***Von Marburg v Aldred (No 2)* [2016] VSC 36**.

Search Engine Providers

- Prima facie liable as secondary (subordinate) publishers of the matter and are liable once notified of the defamatory content.
- ***Duffy v Google Inc* [2015]**, per Blue, J; ***Google Inc v Duffy* [2018] HCA** held that it is 'strongly arguable that Google's intentional participation in the communication of the allegedly defamatory results to Google search engine users supports a finding that Google pushes the allegedly defamatory search results'. Doesn't matter whether you create the words yourself or the program that creates the search results – still liable once aware.

Providers of hyperlinks to defamatory matter (individuals)

- One NSW authority, however, no Aus HCA authorities on this subject.
- ***Crookes v Newton* [2011] Canada**: alleged a smear campaign against him and other members of his political party. Newton didn't post any defamatory matter against Crookes directly, however, provided hyperlinks to other material not published by him which did contain defamatory matter. **Held**: hyperlinks on their own cannot be considered publication. Adoption or endorsement of the content of the hyperlink text is required.