

MLL217 – Misleading Conduct and Economic Torts Notes

MLL217 – Misleading Conduct and Economic Torts Notes	i
Defamation	1
Libel and Slander (s 7 Defamation Act)	1
Restrictions on Bringing Action	1
Deceased Persons (s 10 Defamation Act)	1
Corporations (s 9 Defamation Act)	1
Public Bodies	2
Establishing Defamation	2
Elements of Defamation	2
Subject matter conveys a defamatory meaning or imputation.....	2
Establish if the imputations are in fact defamatory.....	4
Defamatory matter was published	6
‘Cyberlibel’ – Liability of online publications	6
Jurisdiction to Bring Action	6
Who is Liable?.....	7
Defences to Defamation	7
Innocent Dissemination (s 32 Defamation Act).....	7
Justification (Truth) (s 25 Defamation Act)	8
Contextual Truth (s 26 Defamation Act)	9
Honest Opinion (s 31 Defamation Act)	9
Qualified Privilege.....	10
Under Common Law	10
Conventional.....	10
Political and Governmental Discussion (Lange Defence)	11
Under Statute (s 30 Defamation Act).....	12
Absolute Privilege	14
Under Statute (s 27 Defamation Act).....	14
Under Common Law	14
Public Documents and Fair Reports of Proceedings of Public Concerns (ss 28 - 29 Defamation Act)	14
Triviality (s 33 Defamation Act)	14

Apology (s 20 Defamation Act).....	14
Offer to Make Amends (ss 15 – 18 Defamation Act)	15
Remedies.....	15
Injunctions.....	15
Damages.....	15
Compensatory.....	15
General Damages – Non-economic Losses (s 34 Defamation Act)	15
Special Damages – Economic Losses (s 35 Defamation Act)	16
Exemplary (s 37 Defamation Act)	16
Misinformation Torts	17
Tort of Deceit.....	17
Under Common Law	17
Elements.....	17
Under Statute	18
s 18 of ACL.....	18
Key Concepts Underpinning the Australian Consumer Law (ACL)	19
Who the ACL applies to.....	19
Definition of ‘in trade or commerce’	20
Trade or commerce.....	20
Interpretation of ‘in’	20
Conduct by Business	20
Conduct by private individuals	20
Political and Government Publications.....	21
Other instances	21
Injurious Falsehood.....	21
Deceit vs Injurious Falsehood	21
Elements.....	22
Negligent Misrepresentation	22
Establishing Duty of Care	23
Breach, Causation and Remoteness	23
Interaction with s 18 ACL	23
Passing Off.....	23
Prohibition on Misleading or Deceptive Conduct (s 18 ACL)	25

Nature of prohibition.....	25
Evidence.....	26
EC’s and Disclaimers	26
Dominance of s 18 and relevance to common law	26
Interaction with Defamation Law.....	27
Elements.....	27
Conduct that can be misleading or deceptive.....	27
Non-disclosure.....	27
In commercial transactions	28
Puffery.....	28
Literal Truth	28
Relaying Third Party Information.....	28
Future Statements	28
Expression of opinion.....	29
Negligent Advice	29
Contractual Promises.....	29
Defamation.....	30
Target Audience.....	30
Surrounding circumstances.....	30
Causation.....	30
Exemption from Liability from s 18 (s 19).....	32
Advertising.....	33
Test for Breach	33
Nature of the Product	33
Mode of advertisement	33
The Dominant Impression	33
Advertisements Making False Claims	33
Premium or credence.....	33
Puffery.....	34
Passing off	34
Comparative Advertising.....	35
Specific Prohibitions on False or Misleading Representations (Part 3-1 ACL – s 29).....	36
Overview of Prohibitions as per s 29	36

Goods and Services	36
Limbs of Prohibition	36
Application of ‘uses’ and ‘benefits’	36
Characteristics of goods	37
Premium or Credence claims	38
Representation product is ‘new’	38
Representation about acquiring goods or service	38
Representation about testimonials from a person	38
Representations about sponsorship/approval/performance characteristics/accessories/uses/benefits	38
Price	39
Representations about availability of repair facilities/parts of goods	39
Representations about place of origin of goods	40
Representations regarding need for goods/services	41
Representations about existence/exclusion of warranty/guarantee	41
Representations that consumers must pay for rights	41
Liability to Mislead (ss 33-34 ACL)	41
Application of s 34	42
Remedies for Contravening ACL (available to the regulator)	42
Contravention of both s 18 and Part 3-1	42
Injunctions	42
Non-punitive Orders	42
Contravention of Part 3-1 only	43
Civil Pecuniary Penalties (ss 224-228 ACL)	43
Infringement Notices (s 134A CCA)	43
Adverse Publicity (s 247 ACL)	44
Criminal Penalties (Part 4-1 ACL)	44
Remedies for Contravening ACL (available to private litigants)	44
Injunctions (s 232 of ACL)	44
Damages (s 236 ACL)	44
General principles of measure	44
Recovering Damages	45
Contributory Negligence	45

Proportionate Liability (Part VIA CCA)	46
Vicarious Liability (s 138 CCA).....	46
Accessorial Liability	46
Other Remedial Orders	47
Liability of Manufacturers for Safety Defects.....	48
Definition of ‘Manufacturer’ (s 7 ACL).....	48
Definition of ‘goods’	48
Definition of ‘have a safety defect’ (s 9 ACL)	48
Circumstances to be considered under (s 9(2)).....	49
Cause of Action.....	49
Personal injury or death caused by the defect (s 138)	49
Loss suffered by a person due to the death or injury of another (s 139)	50
Damage caused to other goods ordinarily acquired for personal, domestic or household use (s 140)	50
Damage caused to land, buildings or fixtures ordinarily acquired for private use (s 141)	50
Defences to Defective Goods Action (s 142).....	50
Contributory Negligence (s 137A CCA)	51
Limitation Period	51
Damage to property (s 143 ACL).....	51
Personal Injury (Part VIB CCA).....	51
Non-economic loss (NEL) (s 87 CCA).....	52
Loss of earning capacity	52
Gratuitous care damages/Loss of ability to care for others.....	52
Aggravated/exemplary damages.....	52
Other Torts Protecting Economic Interests	53
Negligence.....	53
Indeterminacy of liability Defined	53
Consequential Economic Loss from Damage by D to their own, or a TP’s property	53
Liability for Defective Structures	53
For Residential premises	53
For commercial premises (Woolcock Street v CDG Pty Ltd):	54
Proportionate Liability	54
Definition of ‘concurrent wrongdoer’	54

Scope of Liability.....	54
Interference with Contractual Relations.....	54
Defence	55
Intimidation.....	55
Conspiracy.....	56
Unlawful interference with trade or business.....	56

Defamation

Defined as a tort committed when a person communicates to a third-party (TP) material that lowers the reputation of another in the eyes of an ordinary, reasonable person (ORP). The laws protect personal and professional reputation, as well as business. Primarily concerned with protection of reputation, not privacy.

Strict liability tort, meaning the plaintiff (P) needs to show 'fault' or an intention to injure from defendant (D).

Must be balanced with protecting freedom of speech.

Libel and Slander (s 7 Defamation Act)

Technically, libel is defamation in a permanent form (such as written) while slander is not permanent (such as spoken). Distinction abolished by UDL. Historically, slander needed proof of 'special damage' such as a demotion or loss of job, but UDL abolished this and slander is treated the same as libel (s 7 Defamation Act)

Restrictions on Bringing Action

Deceased Persons (s 10 Defamation Act)

A deceased person cannot sue for defamation (s 10(a) Defamation Act) as:

- They have no reputation to protect
- Death makes it impossible to cross examine to establish truth
- Historical writings would be inhibited

Defamation proceedings cannot be launched against a deceased D (s 10(b) Defamation Act).

If an action is ongoing and a party to the action passes, the action ceases.

Corporations (s 9 Defamation Act)

At common law, corporations could sue for statements affecting business reputations, however there is some criticism of actions by big corporations to use their resources to silence public debate (SLAPP – Strategic Lawsuit Against Public Participation), such as MLibel.

Now, s 9 Defamation Act states:

- Corporation cannot sue unless it is an 'excluded corporation' at the time of the publications (s 9(1) Defamation Act)
- Corporation is an 'excluded corporation' if it is: (s 9(2) Defamation Act)
 - Not for profit OR
 - Has fewer than 10 employees, is not related to a larger company and is not a public body
 - Number of employees calculated by taking into account employees with a contract of employment in place (*Born Brands v Nine Network Australia*)

Effect of s 9 is to force corporations to seek alternative routes to protect reputation. s 9 does not preclude individual employees or director from action (s 9(5) Defamation Act).

Public Bodies

Councils and elected bodies have no right to action as no 'governing reputation' is immune from criticism by those who elect it (*Ballina SC v Ringland*).

s 9 Defamation Act states:

- 'Public body' cannot sue even if it would otherwise fall in the definition of an excluded corporation
- 'Public body' is a local or other government body or public authority constituted by statute (*s 9(6) Defamation Act*)

Establishing Defamation

Uniform Defamation Laws (UDL) took place in January 2006. Each state and territory enacted uniform legislation. Victoria governed by *Defamation Act 2005*. Intention was to prevent forum shopping, practice of bringing claim in multiple states/territories.

UDL:

- Adopted common law principles (resulting in no significant change in Victoria, which was using common law)
- Removed distinction between libel and slander
- Restricted the rights of corporations to sue
- Reformed damages
- Adopted a statutory qualified privilege defence
 - Although common law defences can still apply
- Modified limitation period from 6 years to 1 year
- Unless expressly or impliedly modified by the UDL, common law principles continue to be in use (*s 6 Defamation Act*)

To establish defamation, P must show elements discussed below, then onus shifts to D to prove their defence. Truth is a defence (*s 25 Defamation Act*), so law in essence is regulating false statements.

Elements of Defamation

Subject matter conveys a defamatory meaning or imputation

1. Two steps:

1. Identify content from the material that conveys defamatory meanings (defamatory imputations)
 - i. Intention of speaker is not relevant. Test is if ORP would interpret content in defamatory way
 - ORP is purely hypothetical bystander with no previous knowledge of the subject matter
 - One who 'can and does read between the lines' (*Lewis v Daily Telegraph*)
 - Used to 'envisage a mean of midpoint and abilities and on that basis to decide the most damaging meaning' of the words in the subject matter (*Trkulja v Google*)
 - ii. Can be express (literal) or be insinuations/innuendos

- 2 kinds of innuendos:
 - a. 'Popular' or 'false' innuendoes
 - i. Meanings that ordinary people can infer without extrinsic information
 - ii. Can be drawn because word or phrase has secondary meaning (*Murphy v Plasterers Society, Bjelke Peterson v Warburton*)
 - iii. Can be drawn by 'reading between the lines' (*Nyoni v Pharmacy Board of Australia, Hockey v Fairfax Media Publications*)
 - iv. Reports of criminal investigations ok if merely imputing P is accused or suspected of crime and only if this is true
 1. Defamatory to suggest P actually committed the crime or even that there is reasonable basis for the accusation/investigation (*Mirror Newspapers Ltd v Harrison, Favell v Queensland Newspapers*)
 - b. 'Legal' or 'true' innuendoes
 - i. Meanings that could be construed as defamatory by people with extrinsic information (*Lewis v Daily Telegraph, Cassidy v Daily Mirror*)
 - ii. Irrelevant if D did not intend to defame and made statement innocently
 - iii. P must show that material was published to at least one other person with extrinsic material (*Cornes v The Ten Group*)
- 2. ORP must consider context and occasion of communication
 - i. Determined from perspective of ORP
 - ii. 'Single meaning rule' requires court to determine if matter can be understood in a defamatory sense, it does not stop P from arguing that multiple meanings were conveyed
 - iii. Material needs to be read as a whole
 - Sensationalist headlines to be read in conjunction with accompanying text (*Charleston v News Group, however Hockey v Fairfax – articles titled 'Treasurer for sale' not defamatory, but poster and tweets were as they lacked context. This can happen if headline can be separated from article by ORP*)
 - iv. Bane and antidote
 - Where one part of the article cancels out another part (*Bik v Mirror Newspapers, Cornes v The Ten Group*)
 - a. Antidote can cancel out bane – e.g. An article saying one is being investigated for a crime, then following on to say they were cleared

- b. Antidote needs to be credible and not have ability to be doubted (*Cornes v The Ten Group*)
 - i. Antidote often need to come from the source of the bane, not just a mediating force or following up article, otherwise it may not have the effect of negating the sting
- c. In fast moving TV/Radio shows such as talk shows there is often no opportunity to give a subject matter critical analysis, so the initial impression is critical (*Amalgamated Television Services v Marsden, Cornes v The Ten Group*)
- v. Not defamation if clearly light hearted (such as a joke, satire, social commentary) (*Entienne Pty Ltd v Festival City Broadcasters*)
 - However worth noting that *Cornes v The Ten Group* found that a joke about Nicole Cornes sleeping with AFL footballer Stuart Dew could have been taken literally
 - ORP's general knowledge of the world considered, not knowledge about comedic nature of show or defendant
- vi. Mode of publication needs to be considered (*Cornes v The Ten Group*)
- vii. Online defamation such as search engine results and autocomplete suggestions (*Trkulja v Google*)
 - Perspective of ORP conduction Google search
 - Knowledge of how Google results are produced would have significant variance
 - Standard of knowledge to be used not yet authoritatively determined

Establish if the imputations are in fact defamatory

2. Previously, material must lower P's personal or business reputation 'in the estimation of right-thinking members of society generally' (*Sim v Stretch*)
 1. Examples:
 - i. 'P committed a crime'
 - ii. 'P associates with underworld figures'
 - iii. 'P is a hypocrite'
 - iv. 'P is dishonest/a liar'
 - v. 'P is treacherous or disloyal'
 - vi. 'P is an alcoholic or a drug addict'
 - vii. 'P is not fit to hold a public office' (*Hawke v Tamworth Newspapers*)
 - viii. 'P is incompetent at their particular job'
3. Currently, standard is in the view of the ORP applying general community standards, not standards of one culture or religion (*Radio 2UE Sydney v Chesterton*)
 1. Community views change over time. No longer defamatory to say:
 - i. P born/had child out of wedlock/living in sin/had sex out of marriage (assuming 2 consenting adults)