LAWS3428
MEDIA LAW: DEFAMATION AND PRIVACY
EXAM NOTES
Semester 1 2020

Table of Contents

PRELIMINARY

Reputation and Free Speech

Defamation is intended to balance the right to reputation and freedom of speech. Reputation, unlike privacy, has been closely protected by the common law for a long time.

What is reputation?

- **Defamation is concerned with other's thoughts.** *Plato Films v Speidel* per Lord Denning (first judicial consideration of 'reputation'): reputation is the view of others on the plaintiff; character who they intrinsically/truly are.
- **This is fundamental to defamation law:** damage to reputation is the gist of the action, so a defamatory statement is not actionable without it.
- Unique as a subject of CL protection. A proprietary right protected by trespass is the same for all trespasses, but reputation is idiosyncratic, the protection the law provides is unique in each case.

Why does reputation matter?

- Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* (1986) – **3 types of reputation in defamation:**
    1. **As honour** – a statement which lowers someone in the eyes of honest people of society is defamatory (changed in Australia in 2009);
    2. **As property** – Lockean perspective. Defamation law adjudicates the (un)fairness of aspersions in the marketplace. This leads to protection such as professional reputation or claims for economic loss in defamation.
    3. **As social interest** – post-WW2 development of the notion of dignity as a fundamental social interest led to recognising that defaming someone violated their dignity.
- There are other approaches – see, e.g., **reputation as celebrity.** Post presumes reputation loss must be bad, and that people with good reputations enjoy benefits. **Contemplate, for example, Kardashians – poor reputation leads to success?**
- International recognition in *ICCPR* art 17.1.
- **USA:** not a right, but a consideration to be weighed against it, see *Rosenblatt v Baer*.
- **UK:** The *European Convention on Human Rights* makes no express recognition of reputation, but it is part of the logic of a right to a private life: *Re Guardian News and Media*. **Implications?** If recognised, **reputation becomes subsidiary to privacy.**

Freedom of Speech

- Barendt, *Freedom of Speech* (2005) – three reasons a liberal democracy protects freedom of speech:
    1. **Necessity for representative democracy** – but what place does non-political, non-governmental speech take in this?
    2. **As a truth-seeking function** – couples with a sense of truth as a marketplace, with truth prevailing. Recent events perhaps make this questionable.
    3. **As a guarantee of autonomy** – setting a clear standard ensures people can speak freely, knowing the limits, and make speech more meaningful. **What implications does this have for defamation or privacy actions? Does this approach justify a strict approach to free speech?**
- International recognition in *ICCPR* art 19.2 but note qualification by necessity to protect the rights and reputations of others under art 19.3.

- **USA:** *New York Times v Sullivan* – constitutionalised defamation – where P is a public official, the burden of proof is reversed, and actual malice must be proven. This expanded to include people involved in an event of public discussion.
- **UK:** *R (ex parte Miranda) v Secretary of State for the Home Department:*
    - Application for judicial review of decision of Home Office trying to get Miranda's sources.
    - Free speech is anterior to being a citizen and the need to be informed. Free speech is needed for government and also self-development and fulfilment.
- **Canada:** Charter of Rights and Freedoms in *Constitution Act 1982* enshrines a "fundamental freedom" of "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication": s 2(b). *Hill v Church of Scientology of Toronto*: evaluate by balancing.
- **New Zealand:** the *Bill of Rights* s 14 gives protection. This is again a balancing act: *Lange v Atkinson*.

Related Actions

A number of actions overlap with defamation or may provide comparably favourable outcomes to an action in defamation. They protect related or similar interests, and sometimes can incidentally protect reputation. *Foaminol Laboratories v British Artid Plastics*, however, suggests that where the protected interest is reputation, the action must be in defamation (though in practice this is not always the case). **These also impose liability for the publication of false statements.**

In particular, these actions do not require consideration of the balancing exercise necessary for interlocutory injunctive relief against defamation in *Australian Broadcasting Corporation v O'Neill*. **Where the plaintiff catches wind of potential publication, this is a <u>significant</u> advantage.**

Injurious Falsehood

- **History:** grew alongside the tort of defamation. Protects related interests.
- **Traditional formulation in *Ratcliffe v Evans***; applicable HCA authority, ***Palmer Bruyn & Parker v Parsons***.
- **SCAFFOLD** from *Palmer Bruyn & Parker v Parsons* (sole HCA Authority) per **Gummow J:**
    1. **A false statement about one's goods, services or business**
        a. Cf. defamation – not 'false and disparaging' here;
    2. **Publication to a person other than the plaintiff**
    3. **Actual malice**
    4. **Actual damage**
        a. *Palmer Bruyn* uses a standard of actual damage, but *Ratcliffe* in the UK uses special damage. There is a conflict on this. In *Mahon v Mach 1 Financial* [2019] NSWSC 1576, McCallum J used actual damage. This is likely the Australian position.
        b. Actual damage is **pleaded and proven pecuniary loss, but not limited**. Gummow J in *Palmer Bruyn & Parker*, must be **the natural and probably result of publication.**
        c. See, eg,:
            i. *Menulog* – loss of prospective orders;
            ii. Damage to brand goodwill
            iii. Fall in share price
        d. Cf. special damage, e.g., loss of a contract, must be specifically plead and limited.
    - Onus on plaintiff to prove these elements.
- *Palmer Bruyn v Parsons*:
    - Palmer Bruyn were surveyors executing an application to set up a McDonalds. Parsons prepared a joke letter allegedly from Palmer Bruyn intended to circulate Newcastle council. It was leaked to the Herald and McDonalds terminated their relationship with Palmer Bruyn for bad press.
    - **Held:**
        - First 3 steps met per majority, but damage was too remote to say that private circulation would lead to it being published in a newspaper.
        - Cf. Gleeson CJ, no malice if it were an ill-timed joke.
- **Why injurious falsehood?**

- First, it is a **more onerous action to prove than defamation as it requires proof of intent and damage.**
- **Corporations can take the action.**
- **No single meaning rule:**
  - *Ajinomoto Sweeteners v ASDA Stores*: where Ajinomoto, aspartame manufacturer, sued ASDA for a label which said "no hidden nasties; no artificial colours, flavours or aspartame". It is possible to, at once, read the label as saying that aspartame is a hidden nasty, and that it is a separate category.
- **Injunctive relief:** freedom of speech is not the core of injurious falsehood, and it is easier to get it: *Omega Plumbing*;
  - *Menulog v TCN Channel Nine*
    - Allegations of deceptive trade practices by Channel Nine against Menulog, based on a single instance where there was a bait-and-switch and Menulog refused to give a refund. Channel Nine sought to publish contrary to advice the article was inaccurate. Menulog sought an injunction.
    - **Held per Davies J:**
      - PF case met;
      - Balance of convenience met – Channel Nine can air other content, but Menulog will lose business from advertising prior to the airing of the episode.
  - **<u>CRITICAL:</u> draw a sharp distinction between reputation and injury to business (that is, actual damage), *Cvek v Mihailescu* [2019] VSC 679 per Dixon J.**
    - Aspersions were cast upon the plaintiff's property development business and he sought an interlocutory injunction.
    - **Held**:
      - The interest protected here was reputation. Seeking an injunction on the basis of injurious falsehood was therefore a subversion of *O'Neill* and could not be granted.

Subsequent Identification?

- The concept of subsequent identification is a problem for defamation, because the cause of action is complete upon publication. How can we, therefore, retrospectively impose liability for a subsequent identification? Per *Baltinos*, the position is that **a non-defamatory publication cannot create liability if it points to a defamatory publication, but a defamatory publication by the defendant pointing elsewhere for identification can, the same as where the defendant makes a further publication which identifies them.**
- *Baltinos*:
    - Baltinos was a migration agent. The SBS aired a story suggesting he committed fraud. A foreign language publication said "if you're interest in migration fraud, tune into SBS tomorrow".
    - **Held per Hunt J – see above.**
- *Pedavoli*:
    - The Sydney Morning Herald published an article stating that a teacher was standing trial for sleeping with a student. They were alleged to teach English and drama, be a woman, and were in the late twenties or early thirties. The only person teaching English and drama was Pedavoli; in truth they were just an English teacher. Fairfax argued that the only identification was by people with prior knowledge, as they did not direct people to another source to identify her. There was a spike in school website traffic after publication.
    - **Held:**
        - Subsequent publication can be relied upon, **but what test should be used?**
        - **Simpson JA**: there is no publication until defamatory meaning is conveyed and identification is met; the fact that there is a gap in timing between publication to the reader and identification is not material. **It is a question of fact determined by remoteness.**
        - **Sackville AJA:** On the basis of *Baltinos*, it was predictable to the defendant that they would use the website to identify them and therefore identification can be made out, by the application of conventional principle.
- **Is there a better way?** Defamation is a tort at heart. The tort is complete at point of publication. Therefore, the issue is identification to establish damages. **The question may be one of causation and remoteness** – was it the nature and probable result of the article?

PUBLISHED BY THE DEFENDANT – PUBLICATION

- The leading authority in Australia on publication, *Dow Jones v Gutnick*, recognises that publication is a bilateral act, of dissemination of the matter to a recipient who receives it in comprehensible form and comprehends it (Gleeson CJ, McHugh, Gummow and Hayne JJ).
    - This means that, for example, if a defamatory matter written in West Frisian is received by someone who only speaks English, and only them, there is no publication**.**
- **General rules:**
    - **There is, in mass media, a presumption of publication – where one can point to the extent of publication and therefore presume it was published to at least one other person.**
        - **Internet media?**
    - Liability for publication is *prima facie* strict and broad – it applies to **any person who voluntarily participates in disseminating defamatory matter.**
        - *Goldsmyth v Sperrings*:
            - Goldsmyth, a conservative party donor, sued Private Eye for defamation over the decades, and ultimately started suing their distributing bookstores for defamation. He was settling settlement by all the bookstores, to stop selling Private Eye in exchange for him dropping the suit.
            - **Held:** they are all liable in defamation as publishers.
    - **There can be multiple publication of an imputation**: *Duke of Brunswick v Harmer* (where the Duke sent his manservant to retrieve a defamatory matter about him from 18 years earlier from the library); reaffirmed in *Dow Jones v Gutnick*.
        - **THIS HAS THE EFFECT OF RESETTING THE LIMITATION PERIOD.**
    - **Publication can be by omission, but the liability is not strict:**
        - *Byrne v Deane*:
            - A defamatory limerick, accusing the plaintiff of dobbing the club in to the police, was left on its wall. The owners were aware.
            - **Held**:
                - The defendant's omission in failing to remove the defamatory matter made them a publisher.

Republication

- Republication refers to where **one can be held liable for the extent of third-party publication.** You must meet one of the four tests in *Speight* for republication. Under *Sims*, there are two ways it can be plead. That is a matter for the plaintiff.
- *Speight v Gosnay* – liability for republication arises:
    - Where there is consent to republication;
    - Where there is authorisation of it;
    - Where it is done pursuant to a legal, moral or social duty [Query whether a defence of privilege arises].
    - Where it is the natural and probable consequence of the publication;
- *Sims v Wran*:

- An ABC journalist, Sims, was called a disgrace at a press conference by Wrans. That statement was later republished on talk-back radio. Was Wran liable for the republication?
- **Held per Hunt J**:
  - It was the **natural and probable consequence** of the statement that it would be republished on radio;
  - **Republication can be plead as a matter to damages or as a separate point of publication.**
    - The latter approach offers more damages but opens up **defences** on each subsequent publication. The former is immune to new defences but is limited in terms of damages.

Choice of Law

- The location of publication influences the choice of law.
- Historical rule: *Phillips v Eyre*, need double actionability in the forum and *lex loci delicti*.
  - *Gorton v ABC*:
    - This Day Tonight criticised Gorton for losing his role as prime minister. He sued in the ACT but plead defamation in that action in Victoria and NSW too.
    - **Held per Fox J:**
      - The action was justiciable in ACT and Victoria;
      - However, NSW had a complete defence available, so the action failed and was not justiciable in NSW.
      - Therefore, the action could not be taken in the ACT so long as he plead damages in NSW.
- The rule changed due to absurdity – the same matter in each jurisdiction would produce different outcomes:
  - *John Pfeiffer v Rogerson*:
    - **Where looking at publication in Australia, only apply the *lex loci delicti*, you do not need double actionability.**
  - *Regie Nationale des Usines Renault SA v Zhang*:
    - **Where looking at publication internationally, only apply the *lex loci delicti*, you do not need double actionability.**
  - *Neilson*:
    - Tort may require consideration of *renvoi* – where the rules of another jurisdiction require consideration of Australia's rules, they will be determinative.
- **CURRENT POSITION***: DA* s 11:
  - If there is single publication in Australia, use that law: *DA* s 11(1).
  - If there is multiple publication (see definition in *DA* s 11, can just be substantially the same matter) in Australia, test for the **closest connection and apply that law:** *DA* s 11(2), informed by s 11(3). ***Renvoi* precluded by *DA* s 11(4).**
  - If international multiple publication, the common law applies. *Renault* requires consideration of the *lex loci delicti*, and *renvoi* if relevant.

Innocent Dissemination

- Modern jurisprudence understands innocent dissemination as a **defence**, but a defence that ensures a matter won't go to the jury. However, there has been some discomfort with this position.
- This was initially not applicable to printers, as printing was a laborious process which required knowledge of what you were thinking. However, as of *McPhersons v Hickie* in 1995, there has been doubt about that position.
- **Historically**:
    - *Emmens v Pottle*:
        - With the emergence of newsagents in the 19th century, one was sued for the sale of defamatory magazines.
        - **Held**:
            - A newsagent is a *subordinate distributor* with no constructive nor actual knowledge, **no liability**.
    - *Emmens v Pottle*, affirmed in *Vizetelly*:
        - Mudie, a lending library, disseminated defamatory matter.
        - **Held per Romer LJ:**
            - Innocent dissemination applies here, for the lack of actual and constructive knowledge on what was disseminated.
            - Innocent dissemination is not a fundamental doctrinal rule, but a policy-based modification on the surface of defamation.
    - The position **changed significantly** with *Thompson v ACT*:
        - Stepdaughter of Thompson was interviewed on NSW television, accused Thompson of impregnating her. He sued Channel 9, and also Australian Capital Television, the simulcast network for the ACT. ACT argued they were an innocent disseminator being a **secondary publisher**.
            - **Held at HCA per Brennan CJ, Dawson and Toohey JJ:**
                - Innocent dissemination, as in *Vizetelly*, is not a deeply principled rule, and was developed without television being even conceivable.
                - They were not a secondary distributor, a mere conduit, but were putting the program on consciously, contracted to do that, and did not make any efforts to check the content for liability.
- **CURRENT POSITION**:
    - *DA* s 32 has overruled *Thompson* (s 32(3)(g) in particular):
        - **Start** with s 32(1)(a)–(c), that is the chief test.
        - While testing s 32(1)(a), check if they are a subordinate distributor under s 32(2), looking at the specified list of exclusions under s 32(3).