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Topic 1 - Establishing Defamation

General Introduction

- The tort of defamation is committed where the defendant ⁽¹⁾ communicates to a ⁽²⁾ third party matter which ⁽³⁾ lowers the reputation of the plaintiff in the eyes of ordinary reasonable persons'.
- **There are three elements**
 1. The subject matter carries a defamatory meaning or imputation;
 2. The defamatory matter identifies, or is capable of identifying, the plaintiff as the person defamed, and
 3. The defamatory matter has been published to at least one third party.
- The tort of defamation is concerned with the protection of a person's reputation, be it personal, social or business/professional.
- The law of defamation tries to counter tension between the right of reputation and the freedom of expression.
- It is a complete defence to liability in defamation if the published material was true.

Uniform defamation laws

- Defamation laws used to be different in each state and Territory. Some based on Common Law (Vic), some codified (QLD) and others a mixture of the two (NSW).
- Problematic for Media Company's publishing in more than one jurisdiction.
- The lack of uniformity also led to 'forum shopping' where plaintiffs 'shopped around' for the jurisdiction with the laws that most favoured their claim.
 - o This was possible in the case of material published in more than one jurisdiction:
 - o see, eg, *Dow Jones Inc v Gutnick* [2002] HCA 56
- In 2005 the State Attorneys-General agreed to adopt uniform national defamation laws.
- Each jurisdiction passed uniform laws on 1 January 2006.
- In Victoria, the model defamation provisions are contained in the *Defamation Act 2005 (Vic)*.
- The main features of the UDL are that it:
 - o Adopts primarily common law principles to determine pf defamation liability (no major change for Vic as common law applied here)
 - o Abolishes the distinction between libel and slander
 - o Restricts the rights of corporations to sue
 - o Reforms damages (eg, by abolishing exemplary damages and placing caps on the non-economic loss recoverable)
 - o Adopts a new statutory qualified privilege defence
 - o Modifies limitation period from 6 years to 1 year
- The UDL does not affect the operation of common law principles except to the extent that the legislation otherwise provides: see *s 6 Defamation Act 2005 (Vic)*.

Defamation and Privacy

- Defamation law is concerned with the protection of a person's reputation.
- It does not protect privacy and any such protection is an incidental result.
- This is particularly true with the common law rule that the truth of the statement is a complete defence.
- Formerly, in some jurisdictions (QLD, Tas, ACT, NSW) there was a need to establish that the publication was in the 'public interest' or for the 'public benefit', in addition to being true.
- This is not in the UDL.
- A person will not be liable for publishing personal and confidential information if it is true, even if it is not in the public interest to print the information.

Libel and slander

- There used to be a distinction between Libel (written) and Slander (spoken) forms of defamation.
- The distinction as important as when it was written there was no need to prove special damages (actionable *per se*) where as Slander was not.
 - This was as it was considered that more weight was given to the written word as it was permanent and considered.
- The distinction between libel and slander has now been abolished in all Australian jurisdictions:
 - **s 7(1) Defamation Act 2005 (VIC)**.
 - This section provides that the publication of defamatory matter *of any kind* is actionable without proof of special damage: s 7(2).
- However, there does now contain a defence of 'triviality' in s 33, used if the publication is plaintiff is likely to sustain harm.
 - slander spoken to only a very small group (eg one or two people) who are well acquainted with plaintiff and not likely to take the slander seriously = trivial.

Establishing a prima facie case of defamation

Element 1: The subject matter carries a defamatory imputation

- There are two steps to determining if material is defamatory:
 1. The first step is to identify the imputations from the material that are reasonably capable of bearing defamatory meaning(s)
 2. The second step is to determine whether those imputations are in fact defamatory.

Step 1: Identifying defamatory imputations

- Whether the defendant intended to defame the plaintiff is irrelevant.
- The test is whether the ordinary reasonable person would draw the suggested defamatory meanings from the words.
- Whether material is defamatory is to be 'determined by asking whether hypothetical referees (described in the authorities as "reasonable" persons or "right-thinking members of society generally" or "ordinary (persons) not avid for scandal") would understand the words in a defamatory sense.'
 - **Random House Australia Pty Ltd v Abbott [1999] FCA**
- the 'ordinary, reasonable person' is a purely hypothetical bystander, who has no previous knowledge of the background to the defamatory matter:
 - **Entienne Pty Ltd v Festival City Broadcasters Pty Ltd (2001) 79 SASR 19.**