

DEFAMATION HYPOTHETICAL STRUCTURE

INTRODUCTION

DA = Defamation Act

CB = Casebook

→ ADVISING THE PLAINTIFF?

RULE: Australian courts have traditionally protected reputation over free speech in defamation cases (**Rolph**). This favours [plaintiff], who must prove publication, identification, defamatory meaning, and serious harm to succeed against [defendants].

[plaintiff] consider any viable alternatives to remedy their reputational harm, as defamation law can be expensive, complex and ineffective (**Rolph**). If [plaintiff] chooses to proceed, they must issue a Concerns Notice to any defendants pursuant to **s12B DA**.

→ ADVISING THE DEFENDANT?

RULE: Australian courts have traditionally protected reputation over free speech in defamation cases (**Rolph**). This puts [defendant] at a disadvantage, who will need to establish a defence if identification, publication, defamatory meaning and serious harm are made out by any potential plaintiff.

Specifically, [plaintiffs] may have claims against them.

Hopefully, the plaintiffs consider any viable alternatives to remedy their reputational harm, as defamation can be expensive, complex and ineffective. If any plaintiff chooses to proceed with an action, they will need to issue a Concerns Notice to [defendant] pursuant to **s12B DA**.

NOTE: The rules will be fully explained at first, but only briefly explained in subsequent mentions.

READING TIME + STRATEGY TIPS

- Plan your answer so that you deal with the most contentious publication / plaintiff first.
- 20–30-minute reading time!
- When deciding who potential plaintiffs are, remember corporations and governments.
- Look for 2-4 imputations for each plaintiff.
- If possible, dismiss defences that don't apply to demonstrate knowledge.

PRELIMINARY ISSUES:

IF PRELIMINARY ISSUES ARE NON-CONTENTIOUS:

Standing of plaintiff + capacity of defendant: To sue for defamation, a plaintiff must have standing. Standing is uncontentious here, as [plaintiff] is a natural person. Similarly, it is uncontentious that the [defendant] can be liable if the elements of the tort are met.

Election of Jury: The trial is unlikely to involve complex records or technical issues, so either party may elect a jury (s21(3) DA, s21(1) DA). As such, I will refer to the obligations of judge / jury under s22 DA as relevant.

Jurisdiction: Victoria is the most appropriate jurisdiction, even if the semi-online nature of the publication raises issues under s11(1), the harm occasioned by the publication has its closest connection in Victoria pursuant to s11(2).

Presumptions: Before addressing the key elements, two presumptions must be noted. First, falsity is presumed, though [defendant] may rebut this by proving truth. Second, fault is presumed, removing the need to prove intent, recklessness, or negligence. The former presumption of damage has been replaced by the serious harm threshold.

WHERE PRELIMINARY ISSUE IS CONTENTIOUS, SEE DETAILED RULES BELOW

1. WHO CAN SUE?

RULE: To sue for defamation, the person or entity must have standing. This is usually non-contentious, as all natural persons have standing. However, [state facts which make this complex]

→ PUBLIC FIGURE? (has standing)

RULE: To be clear, Australian law differs from the US position, in that a person's right to sue is not extinguished merely because they are a politician or celebrity. Thus, [plaintiff] has standing.

- In **Hockey**, a politician and treasurer, successfully sued for articles and tweet published under the headline 'Treasurer for Sale'

→ PARTNERSHIP? (has some standing)

RULE: Partnerships have standing to sue for defamation provided the imputation is made against the partnership and concerns their business or trading reputation (**Todd**). The test is whether [the partnership] is the entity defamed.

- A partnership cannot sue where the imputations relate to something that is impossible for a partnership to do, like murder or adultery. In **Todd**, the imputations were that 'Todds Furniture' Mart was owned by a man who murdered his wife and who attempted suicide, it was not that 'Todd Furniture Mart' murdered his wife -- a partnership cannot murder its wife and attempted suicide.

IMPORTANT NOTE: individual partners may still sue in respect of their personal reputations

→ CORPORATION? (has some standing)

RULE: Corporations have standing at common law, so long as the corporation is the entity defamed. However, the **DA** has significantly curtailed their rights to sue. Specifically, only ‘excluded corporations’ have standing (**s9(1) DA**), and they cannot recover damages for ‘hurt feelings’, which is usually a significant award for compensation (**Jameel**).

IMPORTANT NOTE: individual employees / partners may still sue in respect of their personal reputations

What is an excluded corporation?

A corporation is an excluded corporation if:

1. Their objective is **not to obtain financial gain** for members (**s9(2)(a) DA**) OR
2. Including full and part-time workers, there are **fewer than 10 employees** (**s9(2)(b), s9(3) DA**) AND it is **not related to another corporation** (**s9(2)(a)**)
3. AND it is **not a public body**

→ GOVERNMENT BODY? (no standing)

RULE: Government bodies do not have standing to sue in defamation to protect or vindicate their ‘*governing reputation*’. In **Ballina Council**, Gleeson made it clear that this is based on the idea that democracy encourages people to express their criticism, even where they may be ill-founded. To allow government bodies to have standing in defamation would therefore be ‘*incongruous*’ to democracy.

- In **Ballina Council**, the Council attempted to sue a reporter regarding a reproduced press release that accused the council of secretly pumping out sewerage into the sea. They were considered to NOT have standing.

IMPORTANT NOTE: individual councillors may still sue in respect of their personal reputations

→ DEAD PLAINTIFF (no standing)

RULE: Deceased persons do not have capacity to sue – the cause of action dies with the plaintiff (**DA s10(a)**). Thus, [plaintiff] has no standing.

CONCLUSION: does the plaintiff have standing?

2. WHO CAN BE SUED?

DEAD DEFENDANT?

RULE: There can be no action for defamation against deceased persons (including a personal representative of a deceased person) in relation to the publication of defamatory matter by a person who has died since publishing the matter (**s10(b) DA**).

3. JURISDICTION

→ MATTER PUBLISHED WHOLLY IN ONE JURISDICTIONAL AREA?

RULE: The matter has only been published in [place]. The matter is thus published wholly within one jurisdictional area, and so the applicable law is that of the area (s11(1) DA).

- Victorian law will apply to a Victorian newspaper publication

→ MATTER PUBLISHED IN MULTIPLE JURISDICTIONAL AREAS?

RULE: The matter has been published in [place, place, place]. The matter is thus published in more than one jurisdictional area, and so the applicable law will be from the jurisdictional area within which the harm occasioned by the publication has its closest connection (s11(2) DA).

Where is the
closest
connection?

RULE: The court may consider:

- The plaintiff's ordinary residency (s11(3)(a) DA)
 - o For corporation: principal place of business
- The extent of publication in each jurisdictional area (s11(3)(b) DA)
- The extent of harm in each relevant Australian jurisdictional area (s11(3)(c) DA)
- any other relevant matter (s11(3)(d) DA)

PUBLICATION

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RULE: The first element [plaintiff] must prove is publication, which consists of the **communication** of defamatory matter to at least one person other than [plaintiff] (**Dow Jones, Webb**). This communication may take place by way of **positive act**, by **omission**, or by **republication**, with publication by [publication type] evident on the facts.

- **RATIONALE:** Many consider this to be the **foundation** of a defamation action, as the harm typically arises when a third party comprehends the defamatory matter (**Dow Jones**).

PUBLICATION TYPES

→ POSITIVE ACT?

RULE: This occurs where a person **actively** takes steps to **communicate** it to someone else (**Webb**), which is evident on the facts as the defendant has [acts]

- **Primary publisher:** the author, editor, newspaper owner, printer and distributor.
- **Subordinate distributors:** such as booksellers, newsagents and libraries.

→ OMISSION / FAILURE TO ACT?

RULE: This occurs where a person **refuses** or **omits** to remove defamatory material that has originated from another person (**Byrne; affirmed in Urbanchich**). On the facts, [refusal/omission].

RULE: The case law suggests that there is a **knowledge** requirement, in which the [plaintiff] must establish that the [defendant] consented, approved or in some way ratified the defamatory statement, such that other may continue to read it. (**Urbanchich**). On the facts, [defendant did / didn't have knowledge].

- In **Byrne** the defendants owned club where material about a member was posted on the clubroom wall. The occupiers were alerted to the presence of the material and refused to remove it within a reasonable time and so this WAS publication.

→ PUBLICATION BY REPETITION?

RULE: A person who makes a defamatory comment may be held as a publisher for the republication of that comment, where republication is a '**natural and probable consequence**' of their original comment (**Wran**).

- In **Wran**, the court decided that it is a 'natural and probable' result that the comments made by a politician at the press conference will be republished in the media, making him responsible for that publication in whatever form it takes.

→ PUBLICATION BY REPUBLICATION?

RULE: A defendant will be considered a publisher where they have merely repeated defamatory matter originating from another person.

WHEN IS PUBLICATION? – SINGLE PUBLICATION RULE

RULE: s5A Limitations of Actions Act (LAA) states that a cause of action accrues on the date of first publication. This means publication has occurred.

→ **For an electronic communication:** when it was first uploaded for access or sent electronically to a recipient (s5B(1)).

→ **Traditional publication:** on the date of print or broadcast.

SUBSEQUENT PUBLICATION MATERIALLY DIFFERENT?

RULE: Of course, the single publication rule will not apply where a subsequent publication is materially different from the first (s5A(2) LAA).

IS THE DATE OF PUBLICATION MORE THAN ONE YEAR AGO?

RULE: An action for defamation must not be brought after one year from the date of the publication (s5(1AA)). The day in which the matter was published is **not** included in the period (s44(1) LAA).

When is a publication materially different?

To decide if a matter is materially different, consideration is given to (s5A(4)):

- the level of importance that a matter is given
- the extent of subsequent publication

CONCLUSION: Has there been publication? When did it occur? Who is the publisher?

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