TABLE OF CONTENT

Topic 1 Introduction; Alternative Causes of Action 5

Part I - Why defamation law exists and what it protects 5

1. The organising tension: reputation v. freedom of speech 5

2. Concepts of reputation 5

3. Concepts and sources of freedom of speech 6

4. The contingent nature of defamation law 9

Part II - The tort of defamation in context: Other actions protecting reputation and other overlapping interests 10

1. Cause of action 10

2. Injurious falsehood 11

3. Misleading or deceptive conduct and the media overlap 16

Topic 2 Defamation: Preliminary Issues 20

1. History of defamation law 20

2. Libel and slander 21

3. Criminal defence 22

4. Plaintiffs: who can sue for defamation? 23

5. Where can they sue: Forum and jurisdiction 30

Topic 3 The Plaintiff's Case: Liability for Defamation 33

Part I - Elements, Definitions, and Function of Judge and Jury 33

1. Elements of the cause of action 33

2. Functions of judge and jury 34

Part II - Defamatory material 41

1. What imputations arise? Interpreting the meaning of words 41

1.1. Natural and ordinary meaning 42

2. Reports of police activities, charges, and rumours 46

3. Defamatory imputations: assessing the defamatory quality of imputations 48

3.1 "Hatred, contempt, or ridicule" formulation 48

3.2 "Lowering the estimation" 49

3.3 "Business defamation"? ... 51
3.4 The issue of disparagement ... 51
3.5 "Shun & avoid" formulation ... 52
3.6 "Ridiculous light" ... 54
3.7 Contested values, sectional attitudes ... 57
3.8 Imputations of homosexuality ... 58
Part III - 'of and concerning' the plaintiff ... 71
1. Indirectly identified by words (true innuendo) ... 71
2. Identify by picture ... 72
3. Other examples of indirect identification ... 73
4. Identification where a fictitious name is used and the plaintiff has the same name74
5. Identification where a name is used and intended to refer to a particular person but other persons with the same name ... 74
6. Group defamation ... 75
7. Identification in subsequent publications ... 77
Part IV - Published by the defendant ... 79
1. Publication repetition & republication ... 79
2. Internet intermediaries ... 88
3. Presumption of Damage ... 92
Part V - Serious Harm ... 94
1. Serious harm threshold ... 94
2. Formal requirements ... 101
Topic 4: Defences to Defamation ... 102
Part I - Justification ... 102
1. Truth at common law and the defence of justification: DA s 25 ... 102
2. NSW: Truth + (public interest or qualified privilege): DA 1974 s 15 (repealed) .. 103
3. The Polly Peck Defence ... 104
4. The defence of contextual truth ... 106
Part II - The Defence of Privilege ... 108
1. Absolute Privilege ... 108

2. Qualified privilege ... 109

Part III - Public interest, honest opinion, and other defences ... 117

1. Public interest defence ... 117

2. Fair Comment and Honest Opinion ... 118

3. Other Defences ... 121

Topic 5: Remedies for Defamation ... 124

1. Injunctions ... 124

2. Damages ... 125

Topic 6: Privacy and Breach of Confidence ... 127

Part I - Privacy, the Media, and Breach of Confidence ... 127

1. Privacy, confidentiality, and privilege ... 127

2. Breach of confidence ... 129

Part II - Indirect protection in tort ... 136

1. Why indirect protection? ... 136

2. Trespass and privacy ... 138

3. Aerial trespass ... 142

4. Nuisance ... 143

5. Action on the Case for the Intentional Infliction of Harm ... 143

6. Defamation and negligence as privacy proxies ... 144

Part III - Direct protection at common law in Australia ... 145

1. To what extent does the common law protect privacy interests against media intrusion by a tort of privacy? ... 145

2. Australian common law development ... 145

Part IV - Direct protection under statute in Australia ... 146

Part V - Direct protection at common law in overseas jurisdictions ... 148

1. United States ... 148

2. United Kingdom ... 149

3. New Zealand ... 150

Topic 1 Introduction; Alternative Causes of Action

Part I - Why defamation law exists and what it protects

1. The organising tension: reputation v. freedom of speech

Defamation law protects the social value of a person's reputation, but every expansion of liability can chill speech. The legal system therefore constructs a balance through elements, thresholds, defences, procedural rules, and restrained remedies. This balance favors protection of reputation until very recently.

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 - Defamation law must strike a balance between reputation and freedom of speech. The case also reshaped qualified privilege for communications about government and political matters.

> **STATUTORY EXPLANATION** Defamation Act 2005 (NSW), s 3 states the statute's objects: nationally uniform defamation rules, no unreasonable limits on freedom of expression (especially public-interest discussion), and fair, effective remedies for reputational harm. Treat these objects as interpretive context, not as a free-standing defence.

2. Concepts of reputation

- The definition of reputation is murky.
- Lord Danning: reputation = what the other people think of the plaintiff (therefore, publication is the essence of the cause of action for defamation—communication to at least one person other than the plaintiff).
  - ➢ In c.f. character = what the plaintiff truly is.
- Historically, you need to prove damage caused by reputation, but now damage is presumed.
- Damage from defamation is usually non-economic loss—injuries to feelings and damage to reputation, assessed globally.
- Robert Post: three types of reputation interest – Reputation is a relational interest between people. Each different type of interest is a reflection of the different society.
  (1) Reputation as honour: reputation is a social construct. People who have high ranking in society have higher reputations, and the harm to their reputation will be greater. Where the defamation happened and reduced people's rank in society, the role of defamation law is to restore the person to the rank he/she is to occupy. [Put the people in the position s/he would have been]. Test for defamation: the people's ranking / position / estimation in the eyes of society has been lowered.

(2) Reputation as property: reputation is an economic construct. People are connected with each other through the mechanism of the marketplace. Plaintiff creates a reputation which is of value and is a property of them (a result of their labour). Defamation damaged the reputation, which is a property. The function of the defamation law is to provide compensation for the damage to property. Thus, partnerships and businesses can also have reputations. The nature of the reputation then becomes important.

(3) Reputation as dignity: reputation is a social construct as well, but a different type. Emerged post WWII—the idea of international human rights emerged. As a natural person, you have a reputation as a part of your human dignity. Defamation strikes at the human dignity (central sense of self). Plaintiff needs to be restored to their dignity in society. Reputation as a human right is an odd human right because the content of the right is subjective; no two reputations are the same. The content of the right is not stable. It is a dynamic interest (reputations change over time). So it can hardly be categorized as a human right. But, reputations are deserved on a real basis. You can only restore the reputation you deserve. You cannot obtain the reputation you don't deserve.

- Think of reputation as a media construct. E.g., we know a celebrity's reputation not because we personally know them, but through the media: the media creates the plaintiff, defendant, and audience.
  - ➢ The function of suing for defamation is actually to amplify the publication. Yet, because reputation is a dynamic interest, the effect and outcome of suing for defamation becomes a part of your reputation as well.
  - ➢ Function of defamation law in providing redress for reputation harm. It is difficult to use law to change what other people think of you. To what extent is defamation law a vehicle for securing the ends that it seeks to secure?

> **TAKEAWAY:** Defamation protects reputation in the eyes of others. Insult, distress, or privacy invasion alone is not enough.

3. Concepts and sources of freedom of speech

> **STATUTORY EXPLANATION**
>
> - ICCPR art. 17 protects against arbitrary or unlawful privacy interference and unlawful attacks on honour or reputation.
>
> - ICCPR art. 19 protects expression but permits lawful, necessary restrictions to protect others' rights and reputations.
>
> The structure is one of qualified rights and proportional balancing.

- The definition of freedom of expression is clear.
- Three principal justifications for why we protect freedom of speech:

(1) Liberal democracy

(2) The marketplace of ideas: test ideas, ideas compete, and the better idea prevails
(3) Freedom of speech is a human right. Freedom of speech is closely related to freedom of thought. Allowing speech as free as possible can promote freedom of thought and human dignity.

- Australia: no general constitutional personal right to free speech; the implied freedom concerns the system of representative government.
- Comparative reference points:

US Position: New York Times v Sullivan (1964) 376 U.S. 254:

- Sullivan sued the New York Times for publishing a full-page advertisement that criticized the police in Montgomery, Alabama, for their mistreatment of civil rights protesters.
- The First Amendment has a role to play where an elected public official is suing for defamation.
- When the case involved an elected public official, some common law principles needed to be altered: Usually, the onus of proof is on the defendant, and there is no need for the plaintiff to prove that the publication is false. But in the case where the plaintiff is a public official, s/he bears the onus of proof to establish that the publication is false. S/he also needs to prove that the publication was made with actual malice (knowingly/recklessly publish false info)
- This reverse onus of proof also later extended to other public figures.
- A radical change from being in favour of protecting reputation to being in favour of freedom of speech.
- This case was later criticised and reversed. But there might still be difficulty in suing defamation by public figures in the US.

UK Position: Reputation is a part of private life.

- ***R (Miranda) v Secretary of State for the Home Department [2014] EWHC 255 (Admin); [2014] 3 All ER 447***: David Miranda, the spouse of journalist Glenn Greenwald, was stopped in transit at Heathrow under Schedule 7 to the Terrorism Act 2000. He was carrying encrypted storage devices containing material derived from Edward Snowden's disclosures. Police detained and questioned him and retained devices. Miranda sought judicial review, arguing that the statutory purpose was not met and that the stop disproportionately interfered with freedom of expression under ECHR art 10. The Divisional Court dismissed the claim. The true and dominant purpose was to identify the material and mitigate the risk of release, which fell within the statutory counter-terrorism purpose. The power had to be exercised on a reasoned basis, proportionately, and in good faith. Although the stop indirectly interfered with press freedom, the court held that the evidence of grave national-security risk

- ***Nikolic v Nationwide News Pty Ltd [2020] VSC 98*. An unknown** third party operated a Twitter account impersonating Nikolic, posting inflammatory content including anti-LGBTQ+ material opposing same-sex marriage. The Australian published an article linking Nikolic to the hateful Twitter posts. Nikolic sued for defamation, arguing the article conveyed imputations that he held homophobic, extremist anti-LGBTQ views.
  - ➢ How to separate two distinct imputations in modern Australian defamation:
    (1) Imputation that a person is gay;
    (2) Imputation that a person holds anti-gay / homophobic beliefs or associates with anti-LGBTQ extremists.
  - ➢ Whether the context of the whole publication determines the "sting" of any defamatory meaning?
  - ➢ Daly AsJ granted summary judgment for the defendant. The Court held the article did not carry the imputation that Nikolic personally endorsed or authored the offensive social media posts. The only sustainable imputation was merely that the Twitter account attributed to him opposed same-sex marriage. The court clarified: mere opposition to same-sex marriage (without further allegations of bigotry, hatred, or discrimination) is not automatically defamatory under contemporary Victorian community standards. The judge emphasised that the reputational harm turns on the precise imputation and full contextual reading, not broad labelling.
  - ➢ Modern defamation law draws a sharp legal separation between:
    - Alleging someone's sexual orientation (gay);
    - Alleging someone holds hostile, discriminatory anti-LGBTQ ideology.
  - ➢ The reputational "sting" flows from attributed conduct, prejudice, or extremist views, not just sexual orientation. Courts must assess every imputation within the full context of the publication; partial readings risk misidentifying defamatory meaning. Not every opinion against LGBTQ policy reforms automatically qualifies as a defamatory allegation of homophobia.
- ***Campbell v Dugdale [2020] CSIH 27*.** Pro-independence blog operator Stuart Campbell posted a controversial tweet about a politician referencing homosexuality, after which former Scottish Labour leader Kezia Dugdale published a column describing Campbell as homophobic, prompting Campbell to launch defamation proceedings against Dugdale over the homophobia imputation.
  - ➢ Allegation of homophobia is defamatory. Contemporary society views prejudicial anti-LGBTQ attitudes as discreditable; this reverses the historic common law position where the stigma attached to homosexuality itself.
  - ➢ Context confirmed Dugdale's column was presented as opinion/comment, not a statement of objective fact.
  - ➢ The underlying tweet provided a factual basis upon which a fair-minded person could rationally form the view that Campbell's language was homophobic. Honest

belief in the opinion satisfied the fair comment defence, notwithstanding that the Sheriff found Campbell was not in fact homophobic.
- Malice was not established, so the defence remained intact.

- ***Greenwich v Latham [2024] FCA 1050*. -** The court focused on the tweet's specific imputation of disgusting sexual conduct and rejected any assumption that homosexuality itself was discreditable. Meaning, defamatory quality, and serious reputational harm were assessed in the political and social-media context of the publication.
- ***Ahmadi v Guardian News & Media Ltd [2025] EWHC 1191 (KB).* -** The English High Court held that an imputation of homosexuality or a same-sex relationship is not defamatory under modern English community standards, even where the claimant faces grave danger in Afghanistan. Physical risk and subjective distress do not substitute for reputational harm in the relevant legal community.

Case Summary		
Case Name	**Facts**	**Legal Rule**
Classic Formulations & the General Test		
Parmiter v Coupland (1840) 151 ER 340	Defendant published allegations attacking the plaintiff's conduct and character. Known for Parke B's classic defamatory-capacity formulation.	"Calculated" means objectively tending to harm reputation — no subjective intent to injure is required. The "hatred, contempt, or ridicule" formula is influential but not exhaustive; it does not capture all forms of reputational harm.
Scott v. Sampson (1882) 8 QBD 491	Plaintiff brought a libel suit over publications about his private life. The case concerned admissibility of evidence on damages and general reputation.	Defamation is a false statement to a person's discredit. The law protects reputation, not merely wounded feelings. A defendant cannot run collateral trials on unrelated accusations just to show the plaintiff already had a bad name.

Case Summary		
Case Name	**Facts**	**Legal Rule**
Sim v Stretch [1936] 2 All ER 1237	Neighbour dispute: defendant sent a telegram implying the plaintiff owed money to his maid. The telegram was necessarily read by a telegraph employee.	The working test is whether the matter tends to lower the plaintiff in the estimation of right-thinking members of society. Mere rudeness or breach of etiquette is not enough; tendency suffices — no need to prove actual reputational harm.
Professional & Business Reputation		
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460	Radio presenters attacked a journalist's professional competence. The trial judge wrongly directed the jury on a separate "business defamation" test.	There is **no separate test** for business or professional defamation. One unified test applies: would an ordinary reasonable person think less of the plaintiff? Mere disparagement of goods/services is not enough — it must impugn personal attributes like competence or integrity.
John Fairfax & Sons Ltd v Punch (1980) 31 ALR 624	Publication reported that a politician had lost the confidence of his party. The claim concerned reputational harm in a public-office context.	Reputation extends to standing in an occupation, public office, or organisational role. Allegations of unfitness, incompetence, serious failure, or loss of confidence can be defamatory — even without asserting conventional immorality or private misconduct.

serious criminal allegations (drug offences, fraud). Evidence proved the search results were only viewed by three people in Australia. Google applied to stay the proceedings, relying on the Jameel "real and substantial tort" principle.

- The threshold inquiry asks whether there exists a real and substantial reputational injury justifying the burden of litigation.
- Key evaluative factors: **size of Australian audience, seriousness of imputations, plaintiff's legitimate interest in vindication, court and party resources consumed, enforceability of any judgment**.
- Even where the imputations are grave, extremely limited local publication may mean no substantial harm occurs.
- On the facts: only three Australian readers; costs of complex cross-border litigation vastly outweighed the reputational vindication achievable. Proceedings stayed.

Armstrong v McIntosh [No 2] [2019] WASC 379: The plaintiff alleged multiple defamatory imputations in messages sent to a single third party. The defendant sought dismissal, arguing publication to only one person could not support a viable defamation claim. At common law (before the Australian uniform serious harm reforms in 2021), there was no statutory threshold; the court analysed the scale and context of publication.

- Publication to a single individual is legally sufficient to complete the defamation cause of action at common law.
- Size of audience impacts damages quantum, not liability itself.
- Limited private communication can still attract an award of damages, including aggravated damages, if published maliciously.
- The court dismissed only one discretely pleaded publication; otherwise refused to strike out.

> **TAKEAWAY** Note that those cases arose before Australia's 2021 uniform defamation amendments introducing the statutory "serious harm" test under s.10A Defamation Act 2005. This common law proportionality threshold operates separately from the post-2021 statutory "serious harm" test under s.10A.

> **STATUTORY EXPLANATION: The** Defamation Act, s 10A makes serious harm an element: the publication must have caused, or be likely to cause, serious reputational harm. For an excluded corporation, the threshold is serious financial loss. The judge determines the issue and may do so before trial.

Landmark Australian trilogy: the first superior court interpretation of s.10A Defamation Act 2005 (NSW) Newman v Whittington [2022] NSWSC 249; [2024] NSWCA 27; [2025] NSWSC 275: The plaintiff, Jasmin Newman, worked as a family dispute resolution practitioner. The defendant, Adam Whittington, operated a child recovery business. The conflict arose after Newman published a book criticising Whittington's industry practices. Between late 2019 and October 2021, Whittington published 12 impugned posts publicly on Facebook, Twitter, and a WordPress blog. Newman pleaded multiple serious defamatory imputations, including allegations that she supported paedophiles, acted as a fraud, falsely claimed psychologist qualifications, and endorsed perpetrators of domestic violence. Some publications fell after 1 July 2021, the commencement date of Australia's uniform defamation reforms introducing s.10A serious harm threshold. Whittington declined to file a defence, resulting in a default judgment on liability. The litigation proceeded in three phases: an interlocutory strike-out application, an appeal to the Court of Appeal, and a final hearing to determine whether serious harm was proven, assess damages, and consider injunctive relief.

Legal issues and proceeding history: The core statutory question concerned the interpretation and application of s.10A Defamation Act 2005 (NSW), which imposes a serious harm element for all defamation causes of action arising post-reform. The litigation unfolded sequentially. At first trial ([2022] NSWSC 249), Whittington sought to strike out the claim, arguing Newman's pleadings failed to adequately allege serious harm. Sackar J refused to strike out. Whittington appealed to the NSWCA ([2024] NSWCA 27), submitting the primary judge misconstrued s.10A and accepted impermissible inferences of harm without evidence. The Court of Appeal dismissed the appeal and confirmed the legal framework set out at first instance. The matter was remitted to the NSWSC for the final evidence hearing ([2025] NSWSC 275). The critical live issue was whether Newman could prove on evidence that the publications caused or were likely to cause serious harm to her reputation. Ancillary questions included the availability of aggravated damages and whether a permanent injunction restraining further publication should be granted.

Held: Remedies ordered: $150,000 general and aggravated damages plus interest, alongside a permanent mandatory injunction requiring removal of existing content and restraining comparable future defamatory publications.

- s.10A abolishes the common law presumption of damage. Serious harm is a freestanding essential element of the defamation cause of action; the burden rests entirely on the plaintiff to prove it as a factual matter. Mere proof that words carry defamatory imputations is insufficient, and emotional distress alone cannot constitute serious harm to reputation.
- Courts may infer serious harm without direct witness evidence of reputational loss. Relevant factors include the gravity of the imputations, the public nature of social media platforms, and the "grapevine effect"—the realistic prospect of informal, uncontrolled onward sharing of online content beyond measurable direct readership.
- Serious harm was established:
    - The allegations struck directly at Newman's professional credibility;
    - The publications remained accessible online over a prolonged period;
    - Whittington persisted in hostile commentary without retraction or apology.

> **TAKEAWAY** Claimants must prove serious harm as a factual threshold rather than relying on historic common law presumptions. While direct evidence of reputational loss is valuable, courts can draw inferences of serious harm where grave imputations are disseminated on open online platforms, having regard to the grapevine effect. The case also clarifies the distinction between the lower pleading test at interlocutory strike-out applications and the higher evidential burden applicable at final trial. Persistent, unrepentant online defamation may justify substantial aggravated damages and injunctive relief where there is a tangible risk of ongoing reputational injury.

Selkirk v Wyatt (2024) 302 FCR 541: The plaintiff, a solicitor, sued over an online article reporting criminal convictions later quashed on appeal. Critically, she admitted she performed the underlying deceptive conduct. The primary judge found she failed to prove serious harm; the plaintiff appealed. The Court dismissed the appeal.

- Serious harm requires proof the publication worsened the plaintiff's reputation; if the plaintiff already bore existing discredit from proven conduct, it is harder to show incremental reputational damage from the article.
- Relevant factors: gravity of imputation, audience size, pre-existing reputation, causal link between publication and reputational setback.
- Injury to feelings does not equal serious harm to reputation.

> **TAKEAWAY** Where a plaintiff already has established a poor reputation stemming from their own conduct, proving serious harm from a further publication becomes significantly harder. Courts examine incremental reputational damage, not just whether the words are damaging in abstract.

Smith v Lucht [2017] 2 Qd R 489: Smith is a suburban solicitor. His daughter was previously married to Lucht, and they have disputes over access to children. They engaged in an email exchange, and Lucht called Smith and her father "dennist denuto" twice.

- Is Dennis denuto something that requires extrinsic knowledge? True innuendo: No need, but with the passage of time, now you might need
- Defence of triviality established, because in the publication, the statement was published to the three same people receiving the earlier email, who know each other. Limited publication to parties who know each other, and the statement is not changing anyone's mind on anything.

MG v PJ [2025] QCA 99: The plaintiff sued relatives over statements made to police and police protection notices circulated to a tiny audience. Primary judge held serious harm not established; plaintiff appealed. Court dismissed the appeal.

- Findings on serious harm involve evaluative factual judgment, but appeals apply the correctness standard, not the more deferential "clearly wrong" test.
- Statements made to police for investigative purposes: police act in an official capacity