

Defamation

Relevant Legislation: *Defamation Act 2005 (NSW)*

Preliminary Points from the DA

- If there are multiple perpetrators, **where** is the action taken?
 - Applicable in the jurisdiction “*with which the harm occasioned by the publication as a whole has its **closest connection***”
 - Factors considered:
 - Place at time of publication where P was resident
 - Extent of publication and jurisdiction
 - Extent of harm sustained by P in each jurisdiction
 - Other matters considered relevant - s 11(3) DA
 - *Dow Jones v Gutnick*
 - NJ/US laws were more favourable to the P who was in Australia
 - Sought to have the jurisdiction in the US
 - HC said rule of thumb = occurs at the place where material is made available in comprehensive form
 - The internet = where read and downloaded by the browser
 - ∴ In Victoria
 - Television/radio
 - Published in each place it is seen or heard (*Gorton v ABC*)
 - Newspaper/print
 - Each place it is made available to be public (*McLean v David Syme*)
 - Internet
 - Where it can be viewed/downloaded on a browser (*Dow Jones v Gutnick*)
- Libel v Slander (abolished)
 - S 7 DA
 - Distinction abolished
 - As such, **all defamatory publications**, whether in permanent or temporary form, are **actionable without proof of actual damage**.
 - Libel = defamatory matter in permanent form
 - Writing, pictures
 - Slander = defamatory matter in a temporary or intangible form
 - Spoken word, unrecorded speech

Elements:

1. It is the **communication** or **publication**
2. By a **defendant** (who can be sued)
3. To a **third party plaintiff** (who can sue)
4. Of a **defamatory matter**
5. Of and **concerning**, or **identifying**, the **plaintiff**
6. Without **lawful excuse**.

1. Was it a communication or publication?

- It must be *at least* communicated by words, conduct or other means to at least one other person than the plaintiff (*Pullman v Walter Hill*)
 - Anything on the internet is also sufficient
 - Each web page of a website constitutes a separate publication
- Material is not defamatory *per se* (*Consolidated Trust Co v Browne*)
 - The 3rd party needs to have *some* knowledge of the extrinsic facts of the subject matter, or person etc.
 - EG reading an article about someone you don't know, or that has no standing, or fame, is unlikely to be *defamatory*.
- Is only a certain part of the community aware of the extrinsic facts?
 - If so, it will be treated as a publication *only to those members*
 - *Krahe v TCN Channel Nine*

Was it republished?

- If so, it may count as another publication and give rise to a cause of action (*Channel Seven Adelaide*)
- Does the republication carry the same defamatory imputation?
 - Depends on the *context* (*JFP V Obeid*)
 - EG if it republishes in order to report on the dispute over the allegations... not defamatory....obviously
- All persons in the chain may be held liable
 - Television station
 - Employees
 - Live people talking
 - Editor
 - Writer
- The original publisher will not be responsible for any republication unless:
 - They authorised the republication
 - Knew or intended the material to be republished
 - Republication was the natural consequence of the original publication
 - Republished under a moral obligation
 - *Whitney v Moigard*

- *Sims v Wran*
 - Facts
 - Premier refused to speak at a conference
 - Accused a journalist, the P, of malice
 - Held
 - A politician who says something at a press conference, it is assumed that their words will be republished
 - Therefore, they are also liable for that republication
- How closely did the republication correspond with the original publication?
 - o Mere furnishing of some materials is not republication if it's a materially different story (*Thiess v TCN Channel Nine*)

2. Was the **imputation by a party that can be sued?**

- a. Was it a *living person*?
 - i. Must be against a living person, not a company
 - ii. That isn't to say, though, that a company may not be *vicariously liable* for their natural person employee
 - iii. Cannot sue a deceased person – the cause of action ends with their death – s 10 DA
- b. Was it a *contributor* to a publication?
 - i. Generally, every person who contributes to a publication can be held liable (*Webb v Bloch*)
 - ii. Liability is *joint and several* (*Webb v Bloch*)
 - iii. Including:
 1. Editor
 2. Author
 3. Publisher
 4. Printer
 5. Proprietor
 6. Distributor
 7. Journalist
 8. Producer
 9. Executive producer
 10. Freelancers
 11. Press agencies
- c. Was it a party that *failed to remove* a publication?
 - i. This is a *maybe*
 - ii. This will depend on the circumstances
 1. Does it have an expressly stated 'comments' column?
 2. Do they have a flagging system?
 3. Was it taken down 'as soon as practically possible'?
 4. Were they aware, or ought to have been reasonably aware, of the defamatory material?
 - a. *Robertson v Dogz Online*
 - iii. It will also come down to control over the page
 1. Was it a host?
 2. Facebook example:
 - a. Facebook itself – generally not liable as they act similar to ISPs whereby they simply provide the means
 - b. Host of the page – usually liable
 - i. Supported by recent NZ case

- c. Because the host has *control*
- 3. ISP generally not liable
 - a. They only provide the means and infrastructure
 - b. Parallels can be drawn with the recent iiNet copyright HC case

3. Is the Plaintiff a party who can sue?

- a. Was it a living person?
 - i. Must be alive and a natural person
 - ii. Action ends upon their death – as no one else to take up their cause of action with their unique, special damage (*Calwell v Ipec Australia*)
 - iii. S 10 DA
- b. Are they a bankrupt?
 - i. They are entitled, whether the imputation was made before or after bankruptcy – s 60(4) *Bankruptcy Act*
 - ii. However a trustee cannot bring an action (*Howard v Crowther*)
- c. Was it a partnership?
 - i. If the imputation *refers to the firm as a whole* – then the partner has grounds to sue (*Smith v McQuiggan*)
 - ii. But if it refers to *only the one partner* – the other partner(s) cannot sue
- d. Was it a corporation?
 - i. Generally speaking, no.
 - ii. However, is it an exempted ‘excluded corporation’?
 - 1. S 9 DA
 - 2. <10 employees and not related to another corporation
 - 3. non-profit organisation which is not a public body
 - iii. onus of proof in demonstrating the excluded corporation with the *plaintiff* (*Heartcheck Australia*)
- e. Was it a trade union?
 - i. Yes, if it concerns the way it conducts its affairs (*NUGMW v Gillian*)
- f. Was it an unincorporated association?
 - i. No, cannot bring an action
 - ii. no legal personality
- g. Was it an Elected Body/Statutory Body?
 - i. Generally, unable to maintain an action for *itself*
 - ii. EG local council, local statutory body
 - iii. In sync with the implied freedom of political expression
 - iv. Perhaps someone in a particular organisation which has been singled out may have an action?
 - v. Yes if one person is wrongly impaired