

# 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
      - ie internet = where read and downloaded by the browser
      - ∴ In Victoria
  - o Television/radio
    - Published in each place it is seen or heard (*Gorton v ABC*)
  - o Newspaper/print
    - Each place it is made available to be public (*McLean v David Syme*)
  - o Internet
    - Where it can be viewed/downloaded on a browser (*Dow Jones v Gutnick*)
- Libel v Slander (abolished)
  - o S 7 DA
    - Distinction abolished
    - As such, **all defamatory publications**, whether in permanent or temporary form, are **actionable without proof of actual damage**.
  - o Libel = defamatory matter in permanent form
    - Writing, pictures
  - o 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 3<sup>rd</sup> 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