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DEFAMATION

Defamation occurs where one person communicates (by words, photographs, video, internet, illustrations or other means) material which is likely to damage the reputation of another.

Historically there used to be two forms of defamation:

- Libel – defamatory matter in permanent form such as writing or picture.
- Slander – defamatory matter in transient form, such as spoken word.

Legislation has abolished the distinction between libel and slander. The most recent expression of the abolition is in the *Defamation Act 2005 (NSW)* enacted as part of the Uniform Defamation Laws which commenced on 1 January 2006 and which apply in NSW to causes of action arising on and after 1 January 2006.

Defamation is actionable “per se”, i.e. the person defamed, (“the Plaintiff”) does **not** need to prove that they have suffered damage. If threatened with defamation action, you should immediately seek legal advice.

Limitation period for commencement of an action in court

One year from date of publication.

What must be proven by the Plaintiff

- The communication has been published by the Defendant; and
- The communication has been published to a third person; and
- The communication identifies or is about the Plaintiff; and
- The communication is defamatory.

Identity of the Plaintiff

Frequently, material is published which does not expressly name or identify the Plaintiff. If the Plaintiff is to succeed, the defamatory matter must refer to or concern the Plaintiff.

Publication

Publication does **not** have the everyday meaning we usually think of, e.g. “publication of a novel”. In defamation law “published” simply means communicated.

Defamatory matter

The Plaintiff is required to identify the imputations conveyed by the publication. An imputation is the message, insult or innuendo conveyed by the publication. The Court is required to look at the alleged defamatory material and determine the imputations by determining the ordinary meaning of the publication.

The Court checks the publication against the following tests:

- It is likely to injure the reputation of the Plaintiff by exposing him or her to hatred, contempt or ridicule.
- It contains a statement about the Plaintiff which would tend to make the Plaintiff be shunned or avoided.
- It has a tendency to lower the Plaintiff in the estimation of others.

Place of publication

Frequently, defamatory material is published in a number of states and/or, territories of the Commonwealth and overseas, especially where material is published on the internet.

In respect of internet publications the High Court has held that the general rule is that defamation occurs at the place where the material is made available in comprehensive form (e.g. where online material was downloaded).

Commencement of an action

The Plaintiff can, with limitations, commence action in any jurisdiction. Generally the action would be commenced in the one where he or she resides. Under the Act, if the publication is in a number of states and territories, the Plaintiff should commence action in the place where the harm occasioned by the publication as a whole has its closest connection, that will determine the law applicable to the defamation. The procedure in Court is determined by the law of the place where the action is commenced.

Who can sue?

An individual living person can sue. A deceased person cannot sue. Corporations employing ten or more persons do not have a cause of action unless the corporation is an excluded corporation. Excluded corporations:

- Non-for-profits: the company's main object when formed was **not** obtaining financial gains for its members
- Corporations which employ fewer than 10 people and are not related to another corporation

A corporation cannot receive damages for hurt feelings but must be hurt in the "hip pocket" to receive compensation.

Who is liable?

Anyone who published or authorised the publication could be liable. E.g. An author, distributor, editor, printer or proprietor of a newspaper, press agency, internet service provider or online bulletin board. The latter two publishers may be liable particularly in situations where the material stayed on the internet or bulletin board and the publisher ignored warnings or requests from the Plaintiff to remove it.

DEFENCES

Proving defamation is frequently half the battle. The Defendant may have or raise any defences either under the common law or under the Act. A summary of mainly statutory defences is set out below.

Justification – section 25 of the Act ("Truth")

The defence known as Justification is also commonly known as the defence of truth. Under the Act, truth is now a complete defence and the previous public interest requirement needed to make out the defence in NSW is no longer applicable.

The onus of proof in respect of *any* defence falls on the publisher (Defendant), meaning the Defendant must be able to prove that the matters complained by the Plaintiff are substantially true. It is also requisite that the publisher must justify *all* defamatory imputations in the publication. So if 8 defamatory imputations are pleaded by the Plaintiff, the defence requires justification of all of them.

Contextual Truth – section 26 of the Act

This relates to publications where there are a number of imputations, major and less serious, some of which are proven true and some not proven true. The basis of the defence is that if the imputations which are most serious are proven to be true, the Defendant can escape liability in respect of the minor imputations which are not true, because the minor ones do not further injure the Plaintiff.

Absolute privilege – section 27 of the Act

Absolute privilege embraces occasions where statements are made such that the publisher or speaker is wholly immune. In other words, there is absolute freedom of speech. At common law, this includes reports of parliamentary proceedings, proceedings in Courts and most tribunals, communications between spouses, executive communications by persons holding high executive office of state, such as ministers.

Fair copy or extract of a public document – section 29 of the Act

In NSW, categories of public documents which attract this defence have been specified in a schedule to the Act (schedule 2). E.g. a document relating to special commissions of inquiry or a document produced to the parliamentary committee by the Independent Commission Against Corruption in a private enquiry and subsequently made public.

Qualified privilege – section 30 of the Act

The Act also provides a statutory defence of qualified privilege as follows:

- The recipient has an interest or apparent interest in having information on some subject;
- The matter is published to the recipient in the course of giving to the recipient information on that subject; and
- The conduct of the publisher in publishing that matter is “reasonable” in the circumstances.

The test of apparent interest is that if at the time of publication, the publisher believes on reasonable grounds that the person to whom the matter is published had that interest. The ‘reasonableness’ requirement is difficult to make out. These defences do not succeed very often because of the onerous test of reasonableness. See Section 30 (3) of the Act for the full test.

“Free speech defences”

A free speech defence was expounded in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, in which the High Court confirmed there was an extended Common Law defence of qualified privilege related to political communication justified by reference to an implied constitutional freedom of a communication, but without needing to resort to the implication of personal rights into the constitution.

Remedies for Defamation

The main remedy is damages (i.e. money). The maximum compensatory damages are \$324,000. In addition to damages for hurt to feelings and damage to reputation, the

Court may award damages for economic loss if such loss can be proven to be causally linked to the defamatory publication. A court cannot order an apology.

Offer of amends and apology

It is possible to defend a claim based on the failure to accept a reasonable offer of amends by the publisher and in some circumstances the offer may be a complete defence to a claim. The offer may include an offer to publish an apology.

Considerations if you are a publisher

Before you publish you must consider whether the publication is defamatory. If it is, could re-wording or editing it, or leaving out a photo prevent it from being defamatory? Will you likely or possibly be sued by the subject of the publication? Can you prove the truth of the imputations in the publication? Can you defend it? If you are concerned or not sure, then don't publish or seek legal advice before publishing.

Disclaimer

This sheet is provided as a general guide only. It is not designed to be, nor should it be interpreted to be an exhaustive statement of the law. It is not specific legal advice and should not be relied on as such in respect of a particular publication or publications.

Martin Bullock Lawyers can offer expert advice in defamation cases. If you need assistance, contact us on 02 9687 9322 or by email to mbl@mblawyers.com.au.