



## Miles and Dowler, *A Guide to Business Law 21st edition*

### Study Aid – Chapter summaries

#### Chapter summary – ch 4 – defamation and privacy

1. Defamation is a tort designed to protect reputation against unjust injury/harm.
2. In New South Wales, the law dealing with defamation comprised both the *Defamation Act 1974* (NSW) and the common law principles. The Commonwealth introduced a “**national defamation law model**” which was adopted by New South Wales in its *Defamation Act 2005* and the other States and Territory have also passed similar laws. Most of the new laws apply to the publication of defamatory material after 1 January 2006. Previous matters are covered by the *Defamation Act 1974* (NSW) and the common law in NSW. Similarly the various statutes and/ or common law that applied before 2006 in the other States and Territory are applicable to cases prior to 2006.

The objectives of these new laws are:

- to promote speedy and non-litigious resolution of defamation disputes;
  - effective and fair remedies for any person who is defamed; and
  - freedom to express oneself within reasonable limits.
3. Defamation is the publication of any material that “tends to lower the reputation of a person in the estimation of those who know that person”.

As a result of *Radio 2UE v Chesterton* (2009) 238 CLR 460; [2009] HCA 16 it appears there is no distinction between defamation that harms personal or professional reputation of an individual.

Defamation can be caused by spoken words, pictures, videos, emails, Internet sites, gestures, writing, drawing, or basically anything that communicates a message.

4. For a defamation action to be successful a plaintiff must establish the following elements:
  - (a) the material was defamatory;
  - (b) the material identified the plaintiff; and
  - (c) the material was published (communicated to others apart from the plaintiff).
5. In the event these elements are established the defendant must show a valid legal defence to avoid liability.



6. Defamation can occur in emails and on the internet. Usually, the internet service provider is protected against defamation by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth).

Two recent cases in the Victorian Supreme Court (*Trkulja v Yahoo! Inc LLC* [2012] VSC 88 and *Trkulja v Yahoo! Inc LLC* [2012] VSC 88) have raised questions about the liability of search engines for the publication of defamatory material. These two cases indicate that any detailed complaint can put online platforms on notice that material on their sites may be potentially defamatory and expose them to liability.

7. The usual remedies for defamation are injunctions and damages.

8. Defences to defamation under the new uniform laws include

- section 25: justification;
- section 26: contextual truth;
- section 27: absolute privilege;
- section 28: publication in a public document;
- section 29: fair report of matters of public interest;
- section 30: qualified privilege;
- section 31: honest opinion;
- section 32: innocent dissemination; and
- section 33: triviality (no harm).

In *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, the High Court suggested there was an implied freedom of speech under the Commonwealth Constitution concerning political matters. Three years later the majority of the High Court judges in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 said that even though there may not be an implied right of freedom of communication in the Constitution, a defendant who has made a statement about a “political” matter, otherwise defamatory, could successfully use the defence of qualified privilege if he or she can show reasonableness.

9. Under the new defamation laws juries determine if defamation has occurred and judges decide the question of damages/ remedies.
10. It is possible for the decision of a jury to be later overturned by a court. In *Rivkin v John Fairfax Publications* [2002] NSWCA 87 (unreported), the court ordered a new trial and Rivkin succeeded in defamation in the later case. In *John Fairfax v Gacic* (2007) 230 CLR 291; 235 ALR 402; [2007] HCA 28, the High Court



recognised that the NSW Supreme Court of Appeal had power under State law to overturn a jury decision where it was unreasonable.

11. One of the main features of the new defamation laws is the offer of amends/apology. Where a plaintiff refuses any reasonable offer to settle the dispute their refusal may be used as a defence in later defamation proceedings. An apology by a publisher is not an admission of guilt and is not admitted as evidence in any later court case.
12. **Injurious falsehood:** The defendant publishes false statements about the plaintiff or the plaintiff's property in order to persuade people not to deal commercially with the plaintiff. It is actionable if the defendant acted with malice and the plaintiff suffered special damage in the sense of being unable to dispose of property or having to reduce prices.
13. Up until 2011, s 52 of the *Trade Practices Act 1974* or the equivalent *Fair Trading Acts* allowed a person to claim damages for misleading or deceptive conduct in such situations (in lieu of injurious falsehood). Under the new *Australian Consumer Law* introduced in 2010, it may be possible for similar legal action to be taken.
14. The tort of deceit is normally used in conjunction with false misrepresentation and involves proof of the following:
  - false statements;
  - made knowingly or recklessly;
  - with intent to induce reliance on it; or
  - resulting in losses/damage to the plaintiff.
15. In 2014, significant amendments were made to the *Privacy Act 1988* (Cth). The Act now includes 13 new privacy principles, known as the Australian Privacy Principles (APPs).
16. The administration of commonwealth privacy laws is by the Office of the Australian Information Commissioner (OAIC). From 31 Dec 2014, the OAIC will be disbanded and its current functions will be divided into 4 categories.
17. The administration of NSW privacy laws is by the Information and Privacy Commission, established in 2011.
18. Privacy is a legal right requiring protection. In New South Wales there are a number of laws that protect the privacy of individuals including the:
  - *Privacy Act 1988* (Cth);
  - *Privacy and Personal Information Protection Act 1998* (NSW); and
  - *Health Records and Information Privacy Act 2002* (NSW).



19. Recent case law suggests there is a move (at least in one State) towards recognising invasion of privacy as a tort at common law which allows for damages but at present the law remains uncertain.