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DEFAMATION AND SOCIAL MEDIA

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DEFAMATION AND SOCIAL MEDIA - A "WHITE" ART -

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Introduction

1. Contrary to the best efforts of its practitioners to portray defamation law as something of a "black art", the truth is actually more mundane. It has its complexities and complications – as do all areas of law – but, in truth, defamation is no more complex that most other causes of action. The real difficulty for the lawyer who deals in defamation law only occasionally is that the details of some of these complexities (particularly in relation to pleading matters) can sometimes seem overwhelming. However, if a few central themes are kept in mind, defamation law is not the minefield that it is sometimes portrayed as being.

The Central Principles

2. The central principles are:

   (a) defamation law throughout Australia is governed by the common law and the (nearly) uniform *Defamation Acts 2005* which have been passed in each Australian state and territory[1].

   (b) Defamation will only have occurred if Person A (the Defendant or Defendants) has said or written something about Person B (the Plaintiff). This statement must have been read or heard by at least one third party;

   (c) The Plaintiff must be able to prove who the Defendant is and what they said or wrote. In practice, this is usually easier if the publication is in writing than in if it was merely spoken but there is otherwise no longer any distinction in law between slander (oral defamation) and libel (written defamation) [2];

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[1] *Defamation Act 2005* (Vic); *Defamation Act 2005* (NSW); *Defamation Act 2005* (SA); *Defamation Act 2005* (Qld); *Defamation Act 2005* (Tas); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT). References in this paper are otherwise to the *Defamation Act 2005* (Vic) but there are corresponding provisions in the other Acts.

[2] *Defamation Act 2005* (Vic) s 7

(d) Once the words are known, their meaning must be determined. Meanings in defamation law are known as “imputations”. Imputations are determined objectively based on what the ordinary, reasonable listener or reader would understand the publication to mean and regardless of the intention of the publisher;

(e) The Plaintiff must show that the imputation is defamatory – that is, the ordinary reasonable bystander is likely to think less of the Plaintiff if they were to hear or read the imputation;

(f) If these requirements are met, the issue that then arises is whether the Defendant can make out any defences to the imputation(s) that are held to have been conveyed. The primary defences (and the onus is on the defendant to prove each of these) are:

  (i) Justification or truth; – is the imputation true?

  (ii) Absolute Privilege – comments made in courts or in parliament or a limited number of other situations;

  (iii) Qualified Privilege – did the publisher have a legal, moral or social duty or interest in passing on information to the recipient and did that recipient have a corresponding duty or interest to receive the information? If so, was the publisher motivated by malice as this will defeat the defence;

  (iv) Fair Comment – a statement of opinion made on the basis of facts that are stated or known to the audience and those facts are true or absolutely privileged;

  (v) Fair Report – an accurate report of court, parliament and certain other proceedings;

  (vi) Contextual Truth – if a publication has two defamatory imputations and the Plaintiff complains about only one of them (Plaintiff’s imputation) but the other imputation (the contextual imputation) is so serious – and is true - that the Plaintiff’s reputation would not be further harmed by reason of the Plaintiff’s imputation;

  (vii) Triviality – the imputation is of such minor significance that the Plaintiff’s reputation could not be harmed;

(viii) Innocent Dissemination – the publisher did not know, and could not have reasonably known, that the published material was defamatory (for example, a newsagent selling a newspaper);

(ix) An offer of amends – in essence, an offer to apologise and pay some damages will be a defence if the offer is not accepted. However, for reasons considered below, the defence is rarely utilised.

(g) Owing to the desire to protect freedom of speech, interlocutory injunctions are rarely granted for defamation;

(h) Companies cannot sue for defamation unless they are not-for-profit entities or have less than 10 employees;

(i) Special damages and general damages are available. There is a cap on general damages of $376,500 (which cap increases in line with CPI)[3]. There are differing views on whether this is a scale or an upper ceiling that otherwise does not affect awards of damage[4]. Aggravated damages are also available but are not often awarded and, when they are, are not usually large.

3. The rules in relation to social media and publication on the internet are the same as for any other publication. However, publication on the internet does give rise to a number of difficulties in practice including:

(a) The fact that many people say things online which they would not otherwise say;

(b) Determining where publication occurs and, hence, whether Australian courts have jurisdiction and what law applies;

(c) Identifying the publisher(s);

(d) Ensuring an accurate, or even a reasonable, statement in 140 characters (or an otherwise short paragraph or sentence);

(e) Whether a publisher is liable for what is published in a linked site; and

(f) Whether a search engine, such as Google, is liable for the publication of the results which it generates.

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[3] *Defamation Act 2005* (Vic) s 35(3); Victorian Government Gazette, 18 June 2015, p 1337

[4] *Attrill v Christie* [2007] NSWSC 1386; BC200711465 at [44] where Bell J held that it did operate as the upper end of a scale cf Cripps v Vakras [2014] VSC 279 at [607] where Kyrou J found that it did not introduce a scale. Note that this decision was overturned on appeal but that this issue was not the subject of consideration by the Court of Appeal.

What is defamatory?

4. Subject to any defences that may be available, to succeed in an action for defamation, the plaintiff must prove that:

   (a) the defendant published material;

   (b) the material was defamatory; and

   (c) the defamatory material was "of and concerning" the plaintiff.

Publication

5. Subject to the defence of innocent dissemination, any person who takes part in, or authorises, the publication of defamatory material is said to have "published" the defamatory material. A person who republishes the defamatory statements of another is equally liable for their publication[5]. Hence, the definition of "publisher" in defamation law is very broad.

6. The broad definition of publication in defamation law had led to a number of issues in relation to online publications.

7. There is no presumption that a website has been downloaded in Australia or at all although, in some circumstances (eg online versions of major Australian newspapers or media organization), it will not be difficult for an inference to be drawn to that effect[6].

8. The material is said to have been published wherever the material has been accessed and so if the website or other publication has been read in Australia by a third party, Australian courts will have jurisdiction and Australian law will apply (although this may be true of a number of other countries). This can lead to issues of "forum shopping" although, it should be said, that the problem is more theoretical than real and the vast majority of plaintiffs have a very close connection to Australia.

9. A real problem that does arise with online publications is determining who to sue. The anonymity that the internet can afford means that it can be difficult to identify the publisher of the original material. As such, the most practical method of seeking to have material removed from the internet is to put the relevant website (in the case of comment made on, for example, Facebook) or ISP on notice of the defamatory nature of the material and demand that it be removed. If they fail to do so, having been put on notice of the defamatory nature of the material, they

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[5] *Truth (NZ) v Phillip North Holloway* [1960] 1 WLR 997

[6] *Al Almoudi v Brisard* (2006) 69 IPR 205; [2006] 3 All ER 294; [2007] 1 WLR 113; *Ahmed v John Fairfax Publications Pty Ltd* [2006] NSWSC 11 at [9]; *Steinberg v Pritchard Englefield* (2005) EWCA Civ 288 at [20]–[21]

can be held liable as publishers[7]. If an ISP or an internet content host is not aware of the nature of the material which they host, they will not be liable[8].

10. The publisher of webpage may be liable for what appears on another website if a hyper-link to it is provided[9]. This is particularly so if there is actual or implicit adoption of what appears on the hyper-linked site (as often occurs, in particular, on Twitter).

11. Another issue is whether search engines, such as Google, as responsible for the publication of the results which they generate. There is somewhat conflicting authority on this point but, in Victoria at least, it is certainly possible for Google to be held liable, particularly if it fails to remove material after being advised of the defamatory nature of that material[10].

Defamatory Meaning

12. Determining whether a publication is defamatory involves two steps:

    (a) What *imputations* flow from the words; and

    (b) Are the imputations defamatory?

13. An imputation flows:

    (a) from the "natural and ordinary meaning" that an ordinary person, unassisted by special knowledge, would understand that the words have (a "false" or "popular" innuendo)[11]; and

    (b) where certain readers or listeners may know particular facts that renders an otherwise innocent statement defamatory – eg asserting that a golfer accepted prize money would not usually be defamatory but may be defamatory if some of the readers know the golfer to be an amateur[12]. This is known as a "true innuendo"

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[7] *Godfrey v Demon Internet Ltd* [2001] QB 201; [1999] 4 All ER 342; [2000] 3 WLR 1020; *Bunt v Tilley* [2006] All ER (D) 142 (Mar); [2006] 3 All ER 336; [2007] 1 WLR 1243; *Tamiz v Google Inc* [2012] EWHC 449 (QB) at [39]; Rana v Google Australia Pty Ltd [2013] FCA 60

[8] *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91

[9] There is authority for the proposition that bringing people's attention to defamatory material can constitute the publication of that material. So pointing to a defamatory poster as people went by was held to constitute publication in *Hird v Wood* (1894) 38 SJ 234. See also Visscher v Maritime Union of Australia (No 6) [2014] NSWSC 350; *Kermode v Fairfax Media Publications Pty Ltd* [2009] NSWSC 1263 and *Buddhist Society (WA) v Bristile* [2000] WASCA 210 cf *Crookes v Newton* [2011] SCC 47; [2011] 3 SCR 269 at [42] and [48]. See also *Caram v Fairfax New Zealand Ltd* [2012] NZHC 1331 at [33]–[44].

[10] *Trkulja v Google Inc LLC* (No 5) [2012] VSC 533; BC201208568 at [16]–[20] and [27]. See also *Trkulja v Google Inc* [2015] VSC 635; but, for an alternative view see *Bleyer v Google Inc* (2014) 311 ALR 529; [2014] NSWSC 897. In *Duffy v Google Inc* [2015] SASC 170; BC201510358 at [184] Blue J determined that the issue was, essentially, whether the defamatory nature of the material had been brought to the attention of Google.

[11] See eg *Farquhar v Bottom (1980*) 2 NSWLR 380

[12] *Tolley v JS Fry & Sons Ltd* [1931] AC 333

14. The test of whether material is defamatory is an objective test and no evidence is admissible as to the natural and ordinary meaning of the words complained about[13].

15. Although the rules are easy to state, in practice the identification of the relevant imputation(s) is one of the most difficult aspects of defamation law. Nonetheless, identifying the precise imputation is vitally important even in a publication that appears to be plainly defamatory on its face. If an imputation is pleaded but the Court finds that particular imputation (or a substantially similar but not more serious imputation) is not conveyed, then the Plaintiff will not succeed even if the publication is otherwise defamatory.

16. An imputation will be defamatory if it:

    (a) was calculated to injure the reputation of the plaintiff by exposing him/her to hatred, contempt or ridicule[14];

    (b) would tend to lower the plaintiff in the estimation of right thinking members of society generally[15]; or

    (c) it would cause others to shun or avoid the plaintiff[16].

17. There is no longer any distinction between libel and slander[17].

Identification

18. As noted above, it must be shown that the defamatory imputation is "of and concerning" the plaintiff. The test is whether persons reasonably acquainted with the plaintiff would be led to believe that he or she was the person referred to. The intention of the publisher is irrelevant[18] and the person need not be specifically named.

19. Companies cannot sue for defamation unless the company is not-for-profit or it has less than ten employees and it is not a public body[19]. However, care must still be taken when publishing defamatory matter about a company because it may be that a defamatory imputation is conveyed in relation to an individual. However, where a statement is made a group of persons generally, and the

[13] *Slim v Daily Telegraph* [1968] 2 QB 157
[14] *Parmiter v Coupland* (1840) 6 M&W 105 per Parke B
[15] *Sim v Stretch* (1936) 52 TLR 669 at 671
[16] *Youssoupoff v Metro Goldwyn Mayer Pictures Ltd* (1934) 50 TLR 581 at 587
[17] *Defamation Act 2005* (Vic) s 7
[18] *David Syme & Co v Canavan* (1918) 25 CLR 234, 238
[19] Defamation Act 2005 (Vic) s 9

statement could have been referring to any of the individuals within the group, then usually it is not "of and concerning" any particular individual[20]

20. No action in defamation can be brought on behalf of, or against, deceased persons[21]

The Defences

21. The primary focus of debate at a defamation trial usually results from the defences that are pleaded rather than the plaintiff's cause of action. There are a range of potential defences available to an action in defamation including:

    (a) Justification (ie truth) including

        (i) common law justification,

        (ii) the statutory defence of truth;

        (iii) contextual truth;

    (b) Absolute privilege including common law and statutory absolute privilege;

    (c) Qualified privilege including:

        (i) Qualified privilege at common law;

        (ii) *Lange* qualified privilege;

        (iii) Statutory qualified privilege;

        (iv) Protected reports;

    (d) Fair comment (ie opinion) including common law and statutory fair comment;

    (e) Innocent Dissemination at common law and statutory; and

    (f) Offer of Amends.

Justification

22. The onus of proving the truth of the defamatory imputation is on the defendant. Unless the defendant can prove the truth of the statement it is presumed to be false.

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[20] *Mann v Medicine Group Pty Ltd* (1992) 38 FCR 400 cf *McCormick v John Fiarfax and Sons Ltd* (1989) 16 NSWLR 485, 492

[21] *Defamation Act 2005* (Vic) s 10

23. The defendant must prove that the "sting" of imputation conveyed is true – it is not sufficient that the article is literally true or that the imputation that the publisher intended to convey is true[22]. In that sense, defamation is said to be a strict liability tort.

24. The situation often arises that a plaintiff will plead a particular imputation that the defendant cannot prove is true. The defendant, however, will be able to prove the truth of a slightly different imputation. In those circumstances, the defendant is entitled to plead the alternative meaning that it contends and seek to prove the truth of that alternative meaning only if:

    (a) The defamatory meaning pleaded by the defendant is no more serious that that pleaded by the plaintiff; and

    (b) The meanings are sufficiently similar that the meaning pleaded by the defendant is only a "nuance" of the meaning pleaded by the plaintiff[23].

25. This is known as a "Polly Peck"[24] (or, in Victoria, *Hore-Lacy*) defence[25].

26. Prior to the passage of the Defamation Acts 2005 it was necessary in some jurisdictions (such as NSW) to demonstrate public interest as well as the truth of a publication. That is no longer the case (and never was the case in Victoria).

27. Pursuant to s 25 of the *Defamation Act 2005* it is sufficient for the defendant to prove that the imputation (or imputations) conveyed is "substantially true". This is not dissimilar to the position at common law where it is alleged that the sting of the imputation is true.

Contextual Truth

28. Section 26 of the *Defamation Act 2005* provides that it is a defence if:

    (a) in addition to the imputations complained of by the plaintiff, the publication contains other imputations (the contextual imputations) that are substantially true; and

    (b) in light of the (true) contextual imputations, the imputations complained of by the plaintiff do not cause any further damage to the plaintiff's reputation.

29. The NSW *Defamation Act 1974* contained provisions in relation to contextual truth but a range of decisions of the NSW Court of Appeal led to the provision

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[22] *Sutherland v Stopes* [1925] AC 47
[23] *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667, 676, 689 (*Hore-Lacy*).
[24] *Polly Peck Holdings plc v Telford* [1986] 1 WLR 147, 152
[25] In *Setka v Abbott* (2014) VR 352 the Victorian Court of Appeal considered the issue – once again – at some length and, in effect, re-stated that the law was as stated in Hore-Lacy. An application for special leave to appeal in *Setka v Abbott* was rejected by the High Court.

being effectively unworkable. This experience is being repeated, to a significant extent, under the uniform Defamation Acts, at least in NSW[26]. The difficulty is that, once a defendant pleads a contextual imputation, the Plaintiff then amends their statement of claim to plead that imputation also. Although the Defendant may be able to prove the truth of that contextual imputation, and so the Plaintiff will not succeed on that imputation, the fact that the Plaintiff is now complaining about the imputation means that the contextual imputation is no longer "in addition to" the imputations complained of by the Plaintiff. Hence, the contextual truth defence is defeated by the tactic.

30. Sometimes, New South Wales courts have prevented Plaintiffs from amending their claim on the basis of an abuse of process or, on the basis that, in accordance with case management principles, plaintiffs should get their imputations right the first time[27].

31. To date, the practice of Plaintiffs "pleading back" the Defendants' contextual imputations has not been adopted in Victoria.

Absolute Privilege

32. Certain occasions, such as statements made during judicial proceedings or in parliament, are protected by the common law defence of absolute privilege. Unlike qualified privilege, absolute privilege is not defeated by malice. Although the categories are not closed, the courts are very reluctant to extend absolute privilege to new areas unless it can be shown that it is necessary[28].

33. Section 27 of the *Defamation Act 2005* largely repeats the common law. Schedule 1 of the Act sets out additional circumstances in which absolute privilege will apply. It has been used in NSW (largely for publications under certain Acts) but not in Victoria.

Qualified Privilege

34. Where a person has a social, moral or legal duty or interest to make a publication, and another person has a corresponding duty or interest to receive such publication, then the publication will be protected by the common law

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[26] See *Besser v Kermode* (2011) 282 ALR 314; *El-mouelhy v QSociety of Australia Inc* (No 4) [2015] NSWSC 1816
[27] *Hall v TCN Channel Nine Pty Ltd* [2014] NSWSC 1604; *Waterhouse v Age Co Ltd* [2012] NSWSC 9
[28] *Gibbons v Duffell* (1932) 47 CLR 520 at 534

defence of qualified privilege. The privilege is "qualified" because it is defeated by malice[29].. This is known as "duty-interest" qualified privilege.

35. The categories of circumstances in which qualified privilege will arise cannot be "catalogued or rendered exact"[30]. However, subject to the *Lange* form of qualified privilege (referred to below), publications by the media and on the internet will not ordinarily attract the defence of duty-interest qualified privilege because the audience is too broad and all of the recepients cannot have had the requisite duty to receive the information. One exception is a fair and accurate report of court proceedings[31] and another is a response to an attack[32]. Further, if the publication on the internet is subscription based (rather than being free to anyone) and for a particular purpose then it may attract the privilege[33].

36. The defence is defeated by malice which will arise where a person uses the privilege to publish material for a reason other than that for which the protection was granted – that is, they published the material with an improper motive. Ordinarily the plaintiff will seek to show that the defendant has sought to injure the plaintiff. However, this will not always be conclusive as the High Court has determined:

> "*Improper motive in making the defamatory publication must not be confused with the defendant's ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory statement, bias, prejudice or any other motive than duty or interest for making the publication. If one of these matters is proved, it usually provides a premise for inferring that the defendant was actuated by an improper motive in making the publication. Indeed, proof that the defendant knew that a defamatory statement made on an occasion of qualified privilege was untrue is ordinarily conclusive evidence that the publication was actuated by an improper motive. But, leaving aside the special case of knowledge of falsity, mere proof of the defendant's ill-will, prejudice, bias, recklessness, lack of belief in truth or improper motive is not sufficient to establish malice. The evidence or the publication must also show some ground for concluding that the ill-will, lack of belief in the truth of the publication, recklessness, bias, prejudice or other motive existed on the privileged occasion and actuated the publication. Even knowledge or a belief that the defamatory statement was false will not destroy the privilege, if the defendant was under a legal*

[29] *Toogood v Spyring* (1834) 1 Cr M&R 193; 149 ER 1044, 1049-1050
[30] *Bashford v Information Australia (Newsletters) Pty* Ltd (2004) 204 ALR 193 at 196;
[31] *Wason v Waller* (1868) LR 4 QB 73 – as to which, see further below.
[32] *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 519
[33] *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193

duty to make the communication. In such cases, the truth of the defamation is not a matter that concerns the defendant, and provides no ground for inferring that the publication was actuated by an improper motive. Thus, a police officer who is bound to report statements concerning other officers to a superior will not lose the protection of the privilege even though he or she knows or believes that the statement is false and defamatory unless the officer falsified the information. Conversely, even if the defendant believes that the defamatory statement is true, malice will be established by proof that the publication was actuated by a motive foreign to the privileged occasion. That is because qualified privilege is, and can only be, destroyed by the existence of an improper motive that actuates the publication."[34]

37. Hence, in that case, a desire on the part of one of the defendants to harm the plaintiff was not held to amount to malice because the statements were made in the context of an election – and the court held that the very essence of a political battle is an intention to inflict damage on the other side.

"Lange" Qualified Privilege

38. Ordinarily the defence of qualified privilege is not available to material sent to a broad and indiscriminate audience (eg publications by media organizations or publications on the internet) because they are unable to demonstrate that there is a sufficient duty-interest relationship between themselves as publishers and their readership, which could be anyone in the world. However, following the High Court decision of *Lange v ABC*[35] *("Lange")* the defence is available where:

    (a) A statement is made in the course of "government and political affairs affecting the people of Australia";

    (b) The publisher has acted reasonably; and

    (c) The publisher is not motivated by malice.

39. This was said to be due to the implied protection of free speech said to exist in the Constitution on issues relating to government and political affairs.

40. In *Lange,* and in the large number of cases since that have considered the issues that arose in that case, the Courts have considered what constitutes "government or political affairs" and what a publisher must do in order to have been said to have acted reasonably. Hence while discussions about most aspects of

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[34] *Roberts v Bass* (2002) 212 CLR 1 at 31 per Gaudron, McHugh, Gummow JJ
[35] (1997) 189 CLR 520

government (including certain non-elected officials) does amount to political speech, comments about judges and the judicial system do not[36]. In order to be shown to be reasonable, a publisher will (at a minimum) have to put the allegations to the defamed individual and publish their response.

41. However, publishers will often have to do much more than this. The case of *Rogers v Nationwide News Pty Ltd*[37] demonstrates just how difficult it can be for media organizations to show that they have acted reasonably. In that case a journalist relied upon the summary of one case as it was provided by a judge in another case. The summary by the judge in the second case was slightly inaccurate and the media report accurately reported the inaccurate version of events. It was held that the reporter ought to have gone back to the original case and not assumed that the summary in the second case was an accurate representation of what occurred.

42. Indeed, the requirements of reasonableness are even more difficult on social media. If a publisher has only 140 characters, it is not possible to provide the person's response to the allegations. Further, with the desire for immediate news in the internet age, the time for obtaining a response and publishing can sometimes be very difficult. It might mean waiting 12 to 24 hours before publishing a highly contentious and newsworthy allegation and, for most media organisations these days, that would be a pathway to (even greater) irrelevance. Further, it is just not realistic for a person to seek the response of a politician before making a comment online. However, failure to do so may mean the defence is not available.

Statutory Defence of Qualified Privilege

43. Section 30 of the *Defamation Act 2005* provides that there is a defence of qualified privilege if:

    (a) The recipient had an interest or apparent interest in having information on a subject;

    (b) The matter is published to person in the course of giving him or her that information;

    (c) The conduct of the publisher is reasonable in the all the circumstances.

44. In other words, the defence applies as long as there is public interest in the story (as distinct from the public having interest in the story) and the publisher acts

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[36] *Herald and Weekly Times v Popovic* (2003} 2 VR 1

[37] (2003) 21 ALR 184

reasonably. The defence will be defeated if the publisher is motivated by malice. A range of factors for determining if a publication was reasonable is set out at section 30(3).

45. The section is largely similar to s 22 of the *Defamation Act 1974* (NSW) but it was of very limited usefulness to the media in NSW as the requirements of reasonableness imposed on the media organization were so stringent. Section 30 is suffering a similar fate (as to which, see above).

Protected Reports

46. There is a common law defence of qualified privilege for fair and accurate reports of certain proceedings including judicial proceedings, parliamentary proceedings and public meetings (such as council meetings). It must be shown that the public generally has an interest in being informed of what takes place during such meetings. The report is said to be fair if gives a reader a substantially accurate report of what transpired[38] even if it contains some insignificant errors.

47. Similarly section 29(1) of the Defamation Acts 2005 provides a statutory defence where the matter was published was a report of any proceeding of public concern. It specifically covers reports of parliamentary and court proceedings[39].

Fair Comment. Honest Opinion

48. At common law, the fair comment defence would apply where the imputation complained of was:

    (a) A comment – that is, it was stated as an expression of opinion and not one of fact;

    (b) Fair – in the sense that the publisher did hold the opinion if it was exaggerated, prejudiced or obstinate[40];

    (c) Based on matter of public interest; and

    (d) Based on facts that are stated or indicated and which were true or absolutely privileged.

49. Fair comment, at common law, is defeated by malice.

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[38] *Chakravati v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 540

[39] Sub-ss 29(4)(a), 29(4)(e)

[40] *Herald and Weekly Times Ltd v Popovic (*2003) VR 1

50. If an imputation is found to be conveyed which the publisher did not intend then it will be difficult to plead fair comment as it is unlikely that the publisher will have held the opinion set out in the imputation that is conveyed.

51. The requirement that all facts relied upon must be true or absolutely privileged can be a significant hurdle for a defendant to overcome in establishing the fair comment defence. If one fact cannot be proved to be true – even a relatively insignificant fact – then the defence will not be available[41].

52. Section 31(1) set out the statutory defence of honest opinion which is available if:

    (a) The material was an expression of opinion rather than a statement of fact;

    (b) The opinion related to matters of public interest; and

    (c) The opinion is based upon “proper material”.

53. An opinion will be based on proper material if it is based on material that is substantially true or was protected by absolute or qualified privilege (whether at common law or under the Act)

54. The most significant difference between the statutory defence and that at common law is that the statutory defence will not be defeated is there are insignificant factual errors in the material published (see sub-section 31(6)).

Innocent Dissemination

55. The defence of innocent dissemination will be available where a publisher can prove that he or she did not know, and could not reasonably be expected to have known:

    (a) of the defamatory material complained of; or

    (b) that the publication was of a variety likely to contain defamatory material of that nature.

56. Hence, newsagents, librarians and booksellers – all publishers – may have a defence available to them in certain circumstances. The position was somewhat complicated by the High Court in the case of *Thompson v Australian Capital Television*[42] where Brennan, Dawson and Toohey said that the important issue was whether the publisher was able to “control and supervise the material”.

57. The position of ISP’s (internet service providers) is interesting. Ordinarily, they will be able to rely on the common law defence of innocent dissemination.

[41] *Herald and Weekly Times Ltd v Popovic* (2003) VR 1 at [270]
[42] (1996) 186 CLR 574

However, once the defamation is brought to their attention they no longer have this defence available to them[43]. Where the ISP is located in Australia (or the United Kingdom) the easiest way to have defamatory material removed from the internet is to write to the ISP demanding that the material be removed. Of course, this may simply see the material re-published on another site elsewhere very soon thereafter.

Offer of Amends

58. The offer of amends was thought to be one of the most significant amendments brought about by the *Defamation Acts 2005*. In essence, it works as follows:

(a) An "aggrieved person" sends a "concerns notice" to the publisher which sets out the defamatory imputations which the person considers have been published[44];

(b) The publisher can seek further and better particulars of the concerns notice[45];

(c) If the defendant wishes to make an offer of amends then he/she must do so:

(i) within 28 days of receipt of the concerns notice – or within 28 days of being given adequate particulars;

(ii) if no concerns notice is served, prior to the service of a defence in the proceeding;

whichever is earlier;

(d) The offer of amends must:

(i) be in writing and be identifiable as an offer of amends under the relevant *Defamation Act*;

(ii) if limited to particular imputations, state which imputations;

(iii) offer to publish a reasonable correction;

(iv) offer to take steps to tell any third party to whom the material has been given that it may be defamatory; and

(v) include an offer to pay reasonable expenses including the expenses of considering the offer;

[43] *Godfrey v Demon Internet Ltd* [2001] QB 201; Broadcasting Services Amendment (On-Line Services) Act 1999 (Cth)
[44] Section 14(1)(a)
[45] Section 14(3)

(e) the offer may include an apology and an offer to pay compensation[46];

(f) the defendant must be ready and willing to carry out the terms of the offer at any time before trial[47];

(g) if the plaintiff does not accept a reasonable offer of amends that is made as soon as possible after the publisher becomes aware that the material may be defamatory then the defendant will have a defence available to him or her[48].

59. In determining whether the offer is reasonable, the Court will consider the all the circumstances including the nature and extent of the apology and/or correction, the timeliness of the offer and any other factors the Court considers relevant[49].

60. The defence is rarely used and succeeds even more rarely[50]. Concerns notices are usually sent now rather than the usual "letter of demand" but they rarely result in an offer of amends. It requires, in effect, a defendant or prospective defendant to admit the Plaintiff's imputations, concede they have no defence, offer a correction and/or apology and, to be reasonable, also almost always needs to include an offer of monetary compensation. This is not a common occurrence.

Remedies

61. The remedies available to a plaintiff in a defamation action are damages, an injunction (in limited circumstances) and costs. Orders for apologies or corrections are not available.

Damages

62. Under the *Defamation Acts*, general damages are limited to $376,500[51] and exemplary damages are not available. In Victoria in particular, awards of general damages tended to be modest even prior to the introduction of the cap. Aggravated damages remain available and may be awarded given the sensationalist nature of the publication, any re-publication of the defamatory imputation, maintaining a defence of justification without any reasonable prospect of success and any malice.

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[46] Section 15(1)(g)
[47] Section 18(1)
[48] Section 18
[49] Section 18
[50] See *Zoef v Nationwide News Pty Limited & Ors* [2015] NSWDC 232 for an example of a case where it did succeed.
[51] Section 35

63. Certain matters will reduce the damages to which the plaintiff is entitled including the plaintiff's bad reputation, previous publications of the same matter, the truth of the imputations (even if justification is not pleaded) and the publication of an apology.

Injunctions

64. The usual rules for the grant of injunctions apply to defamation. However, in the case of interlocutory injunctions, the court will be mindful of the right to free speech. As a consequence of this, a court will exercise "exceptional caution" prior to granting an interlocutory injunction in defamation cases. If the defendant can show that it has some prospects of making out a defence – in particular the defence of justification – then a court will not usually grant an interlocutory injunction[52]

Costs

65. Prior to the introduction of the uniform *Defamation Acts*, the position in relation to costs followed the usual rules – in the absence of an offer of compromise or *Calderbank* offer, the winning party will ordinarily be entitled to their costs on a standard basis. However, the *Defamation Acts 2005* change that position and place the obligation for making an offer firmly with the publisher.

66. Where the plaintiff succeeds then, ordinarily, the plaintiff will now be entitled to costs on an indemnity basis if the defendant unreasonably failed to make a settlement offer or accept a reasonable settlement offer[53]. If a defendant fails – and the defendant does not make an offer or a plaintiff achieves more than an offer than is made by the defendant – it is difficult to see how the plaintiff could be seen to have acted reasonably. However, if the plaintiff loses then, costs will be awarded against him or her on an indemnity basis only if he or she failed to accept a reasonable offer of settlement made by the defendant[54] - in essence, the same as the current position.

29 May 2016

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[52] *ABC v O'Neill* [2006] HCA 46
[53] Section 40(2)(a)
[54] Section 40(2)(b)