

Liability for the Publication of Defamatory Material via the Internet

David Lindsay

Centre for Media, Communications and Information Technology Law

Part 1: Introduction

Defamation law protects reputation. A person's reputation is constructed by the way he or she is viewed by others.¹ Reputation is shaped by societal interactions; especially, by interpersonal communications. Just as reputation may be created by the communication of positive information about a person, it is harmed by the communication of negative information. As the views and opinions of people are susceptible to change, a person's reputation may be quite fragile, and difficult to protect. Nevertheless, reputation is not the only value at stake in the regulation of defamatory communications. The protection of reputation, by restricting or penalising the communication of some information, necessarily restrains freedom of speech. In information-rich societies, the free communication of information is a highly important social value. Defamation law must therefore balance two important values: the protection of individual reputation and the protection of free speech.² The substantive law of defamation may be seen as a series of compromises between these two values.

Clearly, not all harmful communications which adversely affect a person's reputation can be restrained or penalised. The law of defamation establishes rules about which communications are wrongful, and which harmful communications are excusable. The balance between protecting reputation and freedom of speech is found in the rules establishing liability and in the defences available to an action for defamation. This paper is concerned with liability for defamatory communications, and not with the application of the main defences.

In order to maintain an action for civil defamation under English and Australian law, a plaintiff must establish the following three elements:

- that the material was published by the defendant;
- the material was defamatory; and

¹ Skolnick, for example, maintains that: "The protection defamation law affords is to the individual's projection of self in a society." Jerome H Skolnick, "The Sociological Tort of Defamation" (1986) 74 *California Law Review* 677 at 677.

² There are, however, conceptual problems with treating defamation law as balancing reputation and free speech. The essential problem is in defining what is meant by reputation. Post, for example, contends that: "The image of balancing ... implies that the characteristics of each of the competing interests have been assessed and evaluated. Although there has been considerable scholarly attention directed to the definition and articulation of "the First Amendment interest" in protecting expression, there has been relatively little discussion of the nature and importance of "the State's interest" in protecting reputation. ... Reputation is, however, a mysterious thing." Robert C Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *California Law Review* 691 at 692.

- the material was published “of and concerning” the plaintiff.

As reputation is damaged by the communication of certain information, an essential element in an action for defamation is that material must be communicated to someone other than the plaintiff. In defamation law, this element is known as “publication”. “Publication” has a technical legal meaning in the law of defamation, quite different from the common meaning of the term. In defamation law, a “publisher” is someone who is responsible for the “publication” of material, meaning the communication of material to someone other than the plaintiff. The first element of an action for defamation, publication, is therefore concerned with the means by which damage is inflicted, the act of communication. The second element, the requirement that the material communicated be defamatory, establishes the kind of material that is actionable. Finally, the requirement that the material be “of and concerning” the plaintiff, means that the material must be sufficiently connected with the plaintiff. If the material were not sufficiently referable to the plaintiff, it could not harm the plaintiff’s reputation.

Defamation law is largely the creation of the common law. As such, the substantive law is the product of a complex history, often linked to the forms of pleading historically required by English courts. The early history of English defamation law was dominated by a struggle for jurisdiction between the common law courts and the ecclesiastical courts. As the common law courts established their supremacy, the basis for the action became damage or injury to a plaintiff’s reputation, rather than the character of the insult.³ As a result, publication to someone other than the plaintiff became an essential element of the action.

Before the introduction of the printing press, defamation was naturally concerned with the spoken word. Following the introduction of the press, dissenting pamphlets began to appear. The circulation of dissident material was met with attempts to censor the press. The main concern was with political libel, or seditious publications, which fell within the jurisdiction of the Court of Star Chamber. The Star Chamber also came to exercise jurisdiction over individual libels. Proceedings in the Court of Star Chamber for seditious and individual libel were criminal in nature, and were actionable without the need to prove actual damage. This continued to be a feature of an action for civil libel after the Star Chamber was abolished in 1641, and the common law courts asserted jurisdiction over printed material. Thereafter, common law libel and criminal libel developed along separate paths. Common law libel was regarded as a tort, and developed as an action on the case for words.

In the late seventeenth century, the common law courts formulated the distinction between libel and slander. The distinction, drawn from the jurisdictional division between the common law courts and the Court of Star Chamber, continues to be important under English and Australian common law. Libel is concerned with defamatory material in a written, or permanent form. It is actionable *per se*, meaning that a plaintiff does not need to show actual damage to maintain an action for libel. In an action for slander, on the other hand, a plaintiff must establish “special” damage

³ See Raymond E Brown, *The Law of Defamation in Canada* (2nd ed, Carswell, Ontario, 1994) vol 1, p 27.

(meaning “actual” damage), unless the action falls within an established exception. This historical distinction created initial difficulties in determining how to classify broadcasting. Originally, the courts held that broadcasting consisted of spoken words, and therefore constituted slander.⁴ The Commonwealth later resolved the matter by inserting a provision in its broadcasting legislation, which was interpreted by the courts as having the effect of deeming defamatory broadcasts to be actionable for libel, rather than slander.⁵ In jurisdictions which continue to distinguish between libel and slander, the distinction may be relevant to the communication of spoken material over computer networks, including the Internet.

Australian defamation law bears the marks of the history of English defamation law, but is more complex than English defamation law. As Australia is a federation, there is no single Australian defamation law. Rather, there are separate defamation laws in each of the Australian States and Territories. There are important differences in the law of defamation between the Australian States and Territories. For example, the common law distinction between libel and slander continues to apply in Victoria, South Australia and Western Australia. In New South Wales and the Australian Capital Territory, however, the requirement to establish actual damage to maintain an action for slander has been removed.⁶ Moreover, in New South Wales, Queensland, Tasmania and the Northern Territory, the actions for libel and slander have been replaced by a unitary cause of action.⁷

In each of the Australian States and Territories, defamation law is a combination of common law and statute law. In Victoria, South Australia, Western Australia, the Australian Capital Territory and the Northern Territory, the common law is the main influence on defamation law. In Queensland and Tasmania, on the other hand, the substantive law of defamation is largely codified by statute. Queensland and Tasmania are therefore commonly referred to as the “Code States”.⁸ In New South Wales, defamation law is not codified, but the common law is significantly modified by the *Defamation Act 1974* (NSW). In all Australian States and Territories defamation may attract criminal, as well as civil, liability. There are significant differences in the criminal law of defamation between the various States and Territories.

Despite important variations in the law of defamation between the Australian States and Territories, there are many common areas. This paper is an analysis of the application of Australian civil defamation law to material published by means of the Internet. It is concerned mainly with identifying those who are liable for the publication of defamatory

⁴ See *Meldrum v ABC* [1932] VLR 425; *Mitchell v ABC* (1958) 60 WALR 38.

⁵ The current provision is *Broadcasting Services Act 1992* (Cth) s 206. On previous provisions see *Wainer v Rippon* (1979) 42 FLR 44 and *Mitchell v ABC* (1958) 60 WALR 38. On the operation of this provision see: Sally Walker, *Media Law: Commentary and Materials* (LBC Information Services, Sydney, 2000) p 119, Note 3.

⁶ *Defamation Act 1974* (NSW) s 8; *Defamation Act 1901* (ACT) s 3.

⁷ *Defamation Act 1974* (NSW) s 9; *Criminal Code* (Qld) s 8; *Defamation Act 1957* (Tas) s 9; *Defamation Act* (NT) s 2.

⁸ See, for example, *King v John Fairfax & Sons Ltd* [1983] 1 NSWLR 31. In both Queensland and Tasmania, remedies continue to be governed by the common law.

material by means of the Internet, and other computer networks. It is also concerned with the extent of liability of those involved with communicating defamatory material by means of the Internet. The paper is therefore an analysis of one of the essential elements for establishing an action for defamation, the requirement that defamatory material be published, meaning that the material must be communicated to someone other than the plaintiff. This element of an action for civil defamation has not been significantly modified by State and Territory legislation and, therefore, does not vary significantly between the various Australian States and Territories.

The paper is concerned with the element of publication because the Internet, in important respects, changes the way in which material is communicated. The Internet creates the possibility of more people becoming involved in the publication of material. At the same time, it creates the potential for the widespread production and dissemination of defamatory material. Moreover, publication by means of the Internet, and other computer networks, involves functions that are not found in previous means of communication, such as the publication of print or broadcast matter. Internet communications involve new and different kinds of intermediaries than those involved in the publication of print or broadcast matter. It is therefore important to determine whether those who perform functions involved in the communication of material by the Internet are liable for defamatory material published on the Internet, and if so, the extent of their liability.

This paper has seven parts. The first part is the introduction. The second part explains the Internet, and those features of the Internet that are most relevant for determining liability for the publication of material on the Internet. It describes the most important Internet applications, and identifies the functions involved in communicating material by means of the Internet. The third part of the paper deals with liability for the publication of defamatory material. It explains the meaning of “publication” in defamation law, and examines the legal bases of liability for defamatory publications. The fourth part of the paper is concerned with the common law defence of innocent dissemination, which is available to certain publishers. It describes the development of the defence, and analyses the main Australian authority. It examines areas of uncertainty in the application of the defence, including who is entitled to the defence. The fifth part of the paper applies the liability rules to telecommunications carriers, who are involved mainly with the carriage of communications, and to content providers and message originators, who are concerned mainly with the production of material. It explains that, even at the extremes of the content/carriage continuum, there are considerable areas of uncertainty in determining liability for defamatory Internet material. The sixth part of the paper applies the liability rules to intermediaries involved with communicating material by means of the Internet, or computer networks. These intermediaries include Internet Service Providers (ISPs), content hosts, Bulletin Board System (BBS) operators and discussion moderators. This part of the paper analyses the liability of Internet intermediaries in the United States and the United Kingdom; and examines the liability of intermediaries under Australian law. The seventh, and concluding, section of the paper assesses the rules for determining liability for the publication of defamatory material, in the context of publication of material on the Internet. It includes recommendations for clarifying and modifying the

common law liability rules, and for establishing an appropriate liability regime for those involved with publishing material by means of the Internet.