

The Tort of Defamation

Defamation is a civil wrong that compromises reputation. This tort occurs when someone feels that another person (or organisation) has made statements or comments that may have lowered the esteem in which they are held. The offensive statement may be spoken or in written form, known as slander and libel respectively. This distinction between written and spoken statements has now been abolished in New South Wales. When the Court assesses whether defamation has occurred, the intention of the defendant is irrelevant, it is the effects of the defendant's actions which are important. The judge may also award damages for the plaintiff where defamation has occurred.

Who can claim damages for Defamation in New South Wales

The goodwill of a trading corporation is a substantial asset, and damages may be awarded for loss of corporate reputation. Generally damages to corporations are awarded for established financial losses. However, as a corporation cannot have feelings, it cannot receive damages for injury to feelings.

Unincorporated associations cannot sue or be sued in a defamation action as they have no legal personality as in the case of corporations. The manner in which damages may be recovered against statements made within the context of an unincorporated association is by suing the individual members and officers who authorised the publication of such material.

It should also be noted that there can be no action for defamatory statements against a deceased person.

How is Defamation handled by the Court

An "imputation" is the specific defamatory accusation or charge that the plaintiff claims is conveyed by the defendant's words or publication. Each separate imputation is a cause of action. However, the rules of the Court state that the plaintiff may not found an action on more than one imputation which arises from the publication of the same matter unless the imputations made are different in substance.

It is not necessary for the plaintiff to prove falsity in an action for defamation. The law is generally only concerned with protecting the goodwill, confidence or esteem attached to a well-founded reputation.

In the first step of defamation proceedings the judge determines if the statement complained of is reasonably capable of carrying a defamatory meaning. The judge then determines whether the matter complained of does contain the imputation pleaded, and whether this imputation is defamatory. Judicial directions as to pleadings, particulars, discovery and other steps are then followed. It is a requirement in defamation proceedings that parties exchange witness statements.

It should also be noted that there is a limitation period for defamation actions. Currently the **limitation period** in New South Wales for actions is **six years** from the date of the publication of the matter which is the subject of the complaint.

Defences

(1) Protected reports

A report of certain proceedings which contains defamatory statements made in the course of those proceedings may be protected by a qualified privilege either at common law or by statute. This privilege recognises the public interest

in having full information about the administration of public affairs. The media, in limited circumstances may be provided with a defence of qualified privilege for publishing defamatory material. Notwithstanding that the report is a fair and substantially accurate summary of the proceedings which it purports to report, the defence is lost if the plaintiff is able to establish that it was not published in good faith for public information or the advancement of education.

(2) Absolute privilege

Absolute privilege acts as a complete defence where it can be established that the defamatory imputation was published in the interests of public policy. The instances where absolute privilege can be established are limited. It is generally recognised that the interests of the proper functioning of government requires that certain officials and citizens are completely protected from actions for defamation. An example of this policy is shown in the protection of Members of Parliament's statements in parliamentary proceedings.

(3) Fair Comment

If a defendant is expressing an honest opinion about a matter in the public interest, they are not guilty of defamation. There are a number of strict requirements to establishing this defence. For example, it must be clear that the statement is an opinion only, not an expression of fact, and the publication must point to the facts which the opinion is based on.

(4) Consent

A defence is established where the defendant can prove that the plaintiff consented to the defamatory publication. The defendant must show that the plaintiff consented to the specific imputations in the article.

Remedies – Damages

Damages for loss of credit, reputation and fame are generally awarded. Consequential economic loss may also be compensated, but this loss must be clearly established by the plaintiff.

Assessment of damages

When a judge assesses damages in a defamation case, it is important to ensure there is “an appropriate and

rational relationship between the relevant harm and the amount of damages awarded” (Section 46A of the *Defamation Act 1974*). It is often difficult to establish appropriate amounts for damage to reputation and injury to feelings. The award of damages is aimed at compensating these injuries, as well as vindicating the plaintiff's reputation. The quantum of damages awarded may be determined by reference to the amount of damages awarded in personal injury cases for non-pecuniary losses.

An individual may claim both pecuniary and non-pecuniary losses. These may include aggravated damages, which can be awarded where the conduct of the defendant has caused increased mental distress and hurt. Special damages are available for loss of office or loss of contract and such, but exemplary damages (punishment damages) will not be awarded in New South Wales.

The defendant may mitigate (lessen) damages by promptly publishing an apology. Relevant considerations for the judge to look at in mitigation of damages include the defendant's belief in the truth of their statement, provocation on behalf of the plaintiff and the defence establishing that the plaintiff did not have a good reputation prior to the defamatory statement.

The plaintiff may also seek an injunction to stop the publishing of a defamatory statement however this is seldom granted before a full trial has been heard.

Comasters is able to advise clients in defamation actions.

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Comasters Law Firm and Notary Public
Suite 101, Level 1, Capitol Terrace
743-755 George Street
Sydney NSW 2000, Australia
Phone: (612) 9288 0300 Fax: (612) 9288 0399
Email: comasters@comasters.com.au
Website: www.comasters.com.au