

MLL217 MISLEADING CONDUCT AND ECONOMIC TORTS

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FALSE AND MISLEADING STATEMENTS

Other Common Law Torts Regulating False or Misleading Statements

- Deceit
- Injurious falsehood
- Negligent misrepresentation
- Passing off

Deceit

Elements of the tort: *Magill v Magill* (2006)

- D made a false representation to the P;
- D made the statement fraudulently;
- D intended P to believe in and rely on the false representation;
- P was induced to rely on the representation; and
- P suffered damage.

Central requirement of fraud

- Onus is on P to prove fraud – negligence (that is, a failure to take reasonable steps to verify the accuracy of the information) does not suffice
- P must establish that D knew the statement was false or had no belief in its truth, or was recklessly indifferent to its truth or falsity: *Derry v Peek* (1889)
- Where fraud is alleged, ‘clear or cogent or strict proof is necessary’
 - *Neat Holdings v Karajan Holdings; Sunland Waterfront (BVI) v Prudential Investments (No 2)*

Interaction with s 18 of ACL

- Advantages of s 18:
 - Liability is strict; unnecessary to prove an intention to deceive or negligence
 - s 18 will apply in a broader range of circumstances where liability is sought to be imposed for ‘mere silence’; i.e. a failure to disclose information
 - Broader range of remedies in ACL
- Disadvantages of s 18:
 - Only applies where the conduct is ‘in trade or commerce’ – doesn’t apply to private transactions (have to use tort of deceit instead)
- Aggravated and exemplary damages not available: *Musta v Astle Corp*
- Contributory negligence reduces damages awarded for a contravention of s 18 (see s 236) but not for the common law tort of deceit: *Standard Chartered Bank v Pakistan National Shipping Co (Nos 2 & 4)*

Often easier to make out under ACL than under tort of deceit, however there are still advantages/disadvantages of both.

Interaction with Injurious Falsehood

- Deceit applies where the plaintiff is the person to whom the false rep was directed and who was induced to rely on the rep
- Injurious falsehood applies where the false rep is made to a *third party* who was induced to rely on the rep

Injurious falsehood

- An action on the case available where D has maliciously made to third parties a false representation concerning P's goods, business, profession or property that induces the third parties to act in reliance on the statement, causing loss to the plaintiff
- Available to all corporations regardless of size (in contrast to defamation), so renewed reliance on injurious falsehood

Interaction with defamation

- Injurious falsehood is often also defamatory/denigratory, but is not necessarily so
 - See *Ratcliffe v Evans*
 - *Radio 2UE Sydney v Chesterton*
 - Advantages of defamation over injurious falsehood?

Elements of injurious falsehood

- D makes a false statement about P's goods, business, profession or property
- D publishes the statement to a third party
- D makes the statement maliciously
- P suffers actual loss as a result of reliance by TP on the statement.
 - *Ratcliffe v Evans; Palmer Bruyn & Parker v Parsons; Radio 2UE Sydney v Chesterton*

(a) A false statement about P's goods, business, profession or property

- Typical examples:
 - A) Statements by competitors designed to induce P's customers to take their business elsewhere: *Swimsure (Laboratories) v McDonald*
 - B) Statements by disgruntled customer/employee: *Kaplan v Go Daddy Group*
- Must injure a person's business, trade or professional reputation: *Dye v Commonwealth Securities*
- E.g. Comparative advertising

(b) Publication to a third party

- Eg. an advertisement on TV; online post; statements to customers; statements to distributors/stockists
 - *Swimsure (Laboratories) v McDonald*

(c) Malice

- The statement must be made for a collateral or an improper purpose
- Knowledge of the falsity of the representation (or recklessness) invariably conclusive proof of malice

- As to recklessness, see *Seafolly v Madden* [2012] FCA 1346
- As to negligence (not sufficient), see *Orion Pet products v RSPCA* – the RSPCA staff believed in what they were saying, that what they were saying was true
- Contemporary authorities suggest that no material difference between test of malice for IF and for defamation
 - *Beechwood Homes (NSW) v Camenzuli* [2010] NSDWSC 521 – made in personal spite
 - *Born Brands v Nine Network Australia (No 6)* [2013] NSWSC 1651

(d) Loss to P because of reliance by TP

- Must prove actual damage: *Seafolly v Madden* [2012] FCA 1346
 - though a probability of damage suffices to obtain an interim injunction: *Swimsure (Laboratories) v MCDonald*
- Examples of loss:
 - Loss of custom
 - Costs of corrective advertising
- Also, aggravated / exemplary damages are available

Interaction with s 18 of the ACL

- Injurious falsehood also often actionable under s 18 of the ACL, but can be problems with the 'in trade or commerce' requirement
 - *Dataflow Computer Services v Goodman; Orion Pet Products v RSPCA*
- Advantage of s 18 over injurious falsehood?