Tort of deceit & misrep
(use if s 18 cannot be used)

TORT OF DECEIT
ELEMENTS
1. Defendant made a FALSE REPRESENTATION to the plaintiff;
2. Defendant made the statement FRAUDULENTLY
3. Defendant INTENDED plaintiff to believe in and rely on the false representation;
4. Plaintiff was INDUCED to rely on the representation; and
5. Plaintiff suffered DAMAGE.

NOTE: Usually s 18 is pleaded in first instance, and torts secondly if it doesn’t work

ELEMENTS IN DETAIL
1. FALSE REPRESENTATION
   • Must be false representation of fact
     o However, ‘the state of a man’s mind is as much a fact as the state of his digestion’ Edgington v Fitzmaurice (1885)
     o Thus, statements of opinion or intention can be actionable where D did not honestly hold the opinion or act in the way represented
   • Generally, people ARE NOT LIABLE for non-disclosure of information (not liable for what you dont do)
   • Exceptions:
     • However a person IS LIABLE where:
          In Krakowski: P looking to purchase commercial property and D represented to P that rent on that was being paid on that commercial property by existing tenant was $150,000.00. This was true – there was a lease agreement in place stating above. However D did not tell P about rent reductions which was less than $150,000.00 – liable in deceit because rent was not right $
       2. Knowingly fails to disclose a change of circumstances Jones v Dumbrell [1981] VR 199
          P wanted to sell family business and wanted it to remain family business and D suggested he would continue FB and he meant it then, but before he entered into contract changed his mind and didn’t tell P – liable in deceit

2. D MADE STATEMENT FRAUDULENTLY
   • 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)
   • Courts are reluctant to declare fraud. Where fraud is alleged, ‘clear or cogent or strict proof is necessary’ Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd (No 2)
3. RELIANCE
- Must show either that D made the statement to P directly, OR intended it to be passed on to P. *Commercial Banking Co of Sydney Ltd v RH Brown & Co (1972)*
  
  In CBC: P had a contract with TP to sell wool but heard rumours of $ issues so asked their bank to check with TP bank to see if they had financial standing. TP bank lied and said to P's bank that TP was in good financial position. P delivered wool and TP couldn't pay.
  - P sued bank successfully even though representation was made to bank not P.

4. INDUCEMENT
P must show that representation materially contributed to P’s decision to act (ie ‘but for’ cause).

5. DAMAGE
- Tort of deceit needs actual damage to be actionable
- Damage may encompass personal injury *Magill v Magill (2006)* HCA
  - E.g. D sells P dodgy car and says it is good condition but P injures them in car crash due to D’s deceit.
  - Only applies in commercial/contractual type context – NOT family law/personal issues

S 18 OF ACL (usually primary cause of action)

S 18 Misleading or deceptive conduct
(1) A *person* must not, in *trade or commerce*, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
(2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1). E.g. vendor selling private property (house, car) are not in trade or commerce so use tort of deceit

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’
- Aggravated and exemplary damages not available *Musta v Astle Corp Pty Ltd*
- Contributory negligence reduces damages awarded for a contravention of s 18 but not for deceit (see s 236) *Standard Chartered Bank v Pakistan National Shipping Co (Nos 2 & 4)*

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
TORT OF INJURIOUS FALSEHOOD

BACKGROUND

• 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
• Representation made to TP who acts on them causing loss to P
• Available to all corps regardless of size (contrast defamation) so renewed reliance on injurious falsehood

INTERACTION WITH DEFAMATION

• Larger corporations who can’t bring claim in defamation because of s 9 turn to injurious falsehood Seafolly Pty Ltd v Madden [2012] FCA 1346
• Can have statements that injure business but don’t injure reputation of business/anyone who works for business
  o Radio 2UE Sydney Pty Ltd v Chesterton: statements can be actionable in IF even though they are not actionable in defamation
  o E.g. Ratcliffe v Evans: D published that business was no longer operational so customers stopped going but it was still operational

ELEMENTS

1. Defendant made a FALSE STATEMENT about P’s goods, business, profession or property to TP
2. D PUBLISHES the statement to a TP
3. D makes statement MALICIOUSLY
4. P suffers ACTUAL LOSS as a result of RELIANCE by TP on the statement

ELEMENTS IN DETAIL

1. FALSE STATEMENT

   Typical examples:
   • Statements by competitors disparaging P’s good or services
     o Swimsure (Laboratories) Pty Ltd v McDonald: D represented falsely that P’s pool chlorine did not meet certain governmental standards (actionable if customers stopped buying)
     o Seafolly Pty Ltd v Madden: Competitor said Seafolly stole her designs (actionable if customers stopped buying)
   • Statements by disgruntled customers/employee
     o Kaplan v Go Daddy Group: FB page set up to critique P’s business (actionable if customers stopped buying)
   • Must injure a person’s business, trade or professional reputation
     o Dye v Commonwealth Securities Ltd [2012] FCA 242: Complaint about manager could not be IF because she was not running business – individuals who are not running business cannot bring claim

2. PUBLISHED TO TP

   Examples:
   o An advertisement on TV
   o Online post
   o Statements to customers
   o Statements to distributors/stockists
   o Statements to media Orion Pet Products Pty Ltd v RSPCA
In Orion RSPCA gave interview to newspaper articles and said electrical dog collars were a form of torture and causing brain damage and sometimes death – false (however failed because there was no malice)

3. MALICE

- Where predominant motivation is an improper purpose; eg an intention to harm D’s trade business or profession, ill will or spite
- Knowledge of the falsity of the representation (or recklessness) is generally proof of malice
  - Recklessness is sufficient
    - Seafolly Pty Ltd v Madden: Madden honestly believed Seafolly stole her designs, but failed to take ANY simple precautions to check before publication of statements.
  - Negligence is not sufficient
    - Orion Pet products v RSPCA: RSPCA honestly believed that dog collars were cruel and harmful but should have checked information they were provided MORE CAREFULLY – no IF
- Contemporary authorities suggest that no material difference between test of malice for IF and for defamation
  - Beechwood Homes (NSW) Pty Ltd v Camenzuli [2010]
  - Born Brands Pty Ltd v Nine Network Australia Pty Ltd (No 6) [2013]

4. P SUFFERS ACTUAL LOSS

- Must prove actual damage
  - Seafolly Pty Ltd v Madden [2012]:
    - Seafolly could not show that they suffered actual damage from publication by Madden so failed on IF
    - However Seafolly formulated press realise that Madden acted with malice, and court actually found Seafolly guilty of IF because they said ordinary reasonable person was not a lawyer and wouldn’t understand lawyer’s definition of malice (i.e. they wouldn’t understand Madden was reckless).
- Though a probability of damage suffices to obtain an interim injunction Swimsure (Laboratories) Pty Ltd v McDonald
- Examples of loss:
  - Loss of custom
  - Costs of corrective advertising
  - Also, aggravated/exemplary damages available

INTERACTION WITH S 18 OF ACL

- Situations involving an injurious falsehood also often actionable under s 18 of the ACL, but can be problems with ‘trade or commerce’ requirement
  - Orion Pet Products v RSPCA: was not in trade and commerce
  - CF Seafolly Pty Ltd v Madden: (where S said Madden was acting maliciously) was in trade and commerce because Seafolly was trying to protect business

- Advantage of s 18 over injurious falsehood:
  - Liability is strict: unnecessary to prove any malice existed
  - Honest but mistaken belief = D liable
  - Broader range of remedies in ACL
NEGLIGENT MISREPRESENTATIONS
TRADITIONAL RULE: NO RECOVERY
• Courts slow to recognise liability
• Special DOC: reasonable foreseeability by itself is not enough
• Why?
  Indeterminacy of liability:
  o Liability is denied where recovery will expose D to liability ‘in an
    indeterminate amount for an indeterminate time to an indeterminate class’
    Ultramares Corp v Touche, Niven & Co (1931)
  o Real concern is not the number of potential plaintiffs or size of the claims,
    but that D can not determine beforehand the number or volume of the
    claims (the ‘ripple effect’)
  o Defendant must be able to calculate (at least roughly) the likely number
    and nature of claims Perre v Apand Pty Ltd (1999)

DAMAGE
• Plaintiff must establish actual economic loss
• Cause of action accrues on the date the loss was ascertained or reasonably
  ascertainable Commonwealth v Cornwall
• E.g. person overestimated profits by a certain amount

DUTY OF CARE
Defendant will owe a duty of care to P to ensure advice is accurate where:
  1. D could reasonably foresee that P as an individual or as a member of an
     ascertainable class will suffer economic loss
  2. D knew or ought to know that P is likely in the circumstances to rely upon
     the advice, or assumed responsibility for its accuracy, and
  3. P’s reliance on the advice is reasonable.

Factors that courts will take into account whether to impose DOC:
• The nature of the subject matter (importance of the information)
• The circumstances in which the information is conveyed
  o Formal or informal? Oral or written?

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<thead>
<tr>
<th>FACTS</th>
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<tr>
<td>Oral enquiry made in regard to whether to road would widen which would affect land for business purposes</td>
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<tr>
<td>Information was very important and requested for a serious business purpose – planks on road</td>
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NOTE:
• D sole holder of the information; had total control
• P vulnerable and dependent on Council to provide correct information; no other means by which P could obtain that information

HELD:
• This was not enough to establish DOC because it was too informal and there was a formal process for enquires with the Council
• Requested or unsolicited?

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<tr>
<th>San Sebastion Pty Ltd v MEPA</th>
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<td>Where the advice is volunteered it makes it more difficult to establish DOC</td>
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**FACTS:**
- Property developers went to exhibition, which showed governments plans for Sydney
- Based on those plans they purposed property in the area
- Gov. abandoned its plans and developers sued for financial loss

**HELD:**
- Court rejected property developers claim because reliance wasn’t reasonable
- Court said it would be different had they requested plans from government department

• Whether D is in the business of providing advice of the kind given
  o *cf MLC v Evatt* (Privy Council)

• Whether D knew of the **specific purpose** for which P intended to rely on the advice

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<th>Tepko Pty Ltd v Water Board</th>
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**FACTS**
- Gov said could not get planning permit until connecting water to property
- P was requesting information for water board
- P ended up going through Gov. Minister and Tepco said to Minister the cost to connect water would be around 2.5m (actually cost around 1m)
- Tepco used estimate when dealing with bank and bank pulled out because of too much $

**HELD**
- No DOC
- Board did not know P’s circumstances with bank and did not know of issue of making an error
- Unreasonable for P to rely on the ‘ball park’ figure, as should have been clear that provisional and conservative and would likely come down
- P not vulnerable – was receiving expert advice from land development consultants

• Control of the information by D: the relative capacity of the parties to obtain the information, and whether D is the sole repository of the information
  o Whether p could have protected him/herself, or verified its accuracy in another way ie extent of p’s ‘vulnerability’

• The existence of a disclaimer of liability clause
  o *cf Hedley Byrne v Heller*

• Whether D is skilled (or has held him/herself out to be skilled) in providing information of that kind
  o *Norris v Siberas*

• Legal coherence – example interaction with defamation principles
  o *Dale v Veda Information Services and Solutions Ltd*
  o The nature of the subject matter (importance of information)
  o The circumstances in which the information is conveyed