

Deceptive Trade Practices

- A. Is the conduct 'in trade or commerce'? (TC)
- B. Does the conduct fall within the meaning of 'misleading or deceptive conduct'? (MDC)
- C. Is audience of the conduct likely to be misled or deceived?
- D. Is the MDC silence or non-disclosure?
- E. Is the representation a promise, prediction, or opinion?
- F. Is the representation in regards to a future matter?
- G. Has the claimant relied on the MDC and as a result suffered loss?
- H. Contributory negligence: has the claimant suffered loss from their own failure to take reasonable care?
- I. Assessment of damages – what damages should be awarded?
- J. Liability of "persons involved"
- K. Limitations
- L. Court orders
- M. Injunctive relief

Trade Practices Act 1974 – s 52 (old legislation)

Misleading or deceptive conduct

- (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Australian Consumer Law – s 18 (ACL has replaced the TPA)

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.

NOTE: it is easier to establish in a contractual setting that conduct is MDC given that it falls within TC, rather than establishing a tortious act or breach of contract.

Legal remedies – Establishing the cause of action

- A. Introduction
- B. Causation
- C. Contributory negligence
- D. Multiple tortfeasors
- E. Novus actus interveniens
- F. Remoteness
- G. Mitigation

A. INTRODUCTION

Date of assessment

- Right to damages accrues when the cause of action is completed:
 - Contract: day of breach
 - Negligence: when the plaintiff suffers loss
 - Trespass: when the trespass occurs
 - Detinue: when delivery of the chattel is refused

Once and for all rule

- The plaintiff has one chance to plead their case.
- Once an award is made, it is final and completely disposes of the cause of action.
- *Lim Poh Choo v Camden and Islington Area Health Authority*

B. CAUSATION

TORT:

The 'but for' test

- 5D(1)(a) CLA: was the negligence a necessary condition of the harm?
- TEST: 'But for the defendant's wrong, would the plaintiff have suffered the loss?'
 - Yes: no causation, because loss would have occurred anyway
 - No: causation proved
- *Barnett v Chelsea & Kensington Hospital*
 - FACTS: P drank tea. Got sick. Went to hospital. Hospital told him to go home. Next day he died. Died of arsenic poisoning. Argued hospital was negligent.
 - HELD: not negligent because the negligence of the hospital was not the cause of death, the arsenic was. the man would have died irrespective of the hospital's actions.

Material cause test

- In complex fact scenarios where multiple causes cause loss, the court asks whether as a matter of 'common sense' the defendant's wrong was a material cause of the loss: *March v E & M H Stramare*
- The defendant's wrong need only be a material cause of the loss, not the only cause of the loss.

Causation in exceptional cases

- 5D(2) CLA: in determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst

other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

- Exceptional case: cases where, because of the inadequacy of the state of scientific knowledge, the plaintiff is unable to attribute the harm suffered to the defendant's failure to exercise reasonable care, but it is nonetheless appropriate that the defendant be held liable.
- Two recognized categories of exceptional cases:
 1. The plaintiff's loss is caused by an accumulation of factors and it is impossible to determine the extents of the role the defendant's wrong played
 - *Bonnington Casting v Wardlaw*: plaintiff suffered lung disease contracted from exposure to silica dust. The dust came from two sources: pneumatic hammers (most of the exposure; not due to defendant's negligence) and swing grinders (some exposure; due to the defendant's negligence). Not possible to establish the extent to which the defendant's negligence caused the plaintiff's lung disease. Held defendant liable for *all* the harm even though it was not possible to apportion the harm between the different sources of exposure.
 2. The defendant's conduct materially increased the risk of harm
 - *Fairchild v Glenhaven Funeral Services Ltd*: plaintiffs were employees suffering asbestos related cancer. The evidence could not show whether the cancer was caused by the first employer, the second employer, or cumulative exposure. The plaintiffs could only show that the employers had materially increased the risk of developing cancer. Held causation established. Argued by the court that it would be contrary to ordinary notions of justice to hold that neither employer was liable just because the plaintiff could not show which of the two probably caused the mesothelioma, where their negligence created the very risk that eventuated.

CONTRACT:

The 'but for' test

- The same common law tests apply: but for the defendant's breach, would the plaintiff have suffered loss?: *Alexander v Cambridge Credit Corporation*:
 - FACTS: auditors negligently failed to discover that CCC was insolvent in 1971. CCC continued to trade for three more years. If it was wound up in 1971, losses would have been \$10m. losses increased to \$155m over the three years. The auditors were sued.
 - HELD: no causation; several factors caused the loss, such as economic downturn. McHugh JA said apply the but for test to establish causation.

Legal remedies – Assessment of damages

- A. Introduction
 - Nominal damages
 - Ordinary damages
- B. Personal injury
 - Economic loss
 - Non-economic loss
 - Earning capacity
- C. Property damage
 - Land and fixtures
 - Chattels
 - Consequential losses
- D. Expectation damages (contract)
- E. Wasted expenditure/reliance damages (contract)
- F. Loss of chance
- G. Factors that decrease an award of damages
 - Mitigation/betterment
 - Negative contingencies
 - Collateral benefits
- H. Interest

A. INTRODUCTION

Nominal damages

- If you go to court and you can prove breach but you cannot show any loss, you might get nominal damages.
- Nominal damages are not "real damages" and, in particular, they are vindictory, not compensatory. They are awarded because the plaintiff has established the liability issue, being the breach of contract, but has not established that any damages flowed from that breach: *New South Wales v Stevens*

Ordinary damages

- The is compensation for proved loss.
- Compare the actual position of the plaintiff after the wrong with the position she/he would have been in had the wrong not occurred. Award a dollar sum to reflect the difference.
- Contract:
 - Objective is to place the plaintiff in the same situation as if the contract had been performed: *Robinson v Harmon*
- Tort:
 - Objective is to put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong: *Livingston v Railyards Coal Co*
- Ordinary damages can be classified as either special damages or general damages:
 - **Special damages:** expenses that are easily quantified in exact amount. These are economic losses.
 - **General damages:** have no monetary value, such as pain and suffering, therefore difficult to assess. These are non-economic losses.

Legal remedies – Equitable Remedies

- A. Maxims of equity/equitable defences
- B. Discretionary factors
- C. Specific performance
- D. Injunctions
- E. Rectification
- F. Rescission

A. MAXIMS OF EQUITY/EQUITABLE DEFENCES

- These are not specific rules or principles; they are summary statements of broad themes that underlie equity: *Corin v Patton*

Once who comes to equity must come with clean hands

- A remedy will be denied to a plaintiff if the plaintiff acts unconscientiously in the pendency of an action: *Krakowski v Eurolynx Properties*

One who seeks equity must do equity

- To obtain equitable relief the plaintiff must be prepared to do “equity”, in its popular sense of what is right and fair to the defendant: *Chen v Marcolongo*
- Plaintiff must earn the right to equitable relief

Equity will assist the diligent and not the tardy/laches

- *Fysh v Page*
- When a plaintiff has been wronged, they should not delay seeking relief.
- If a plaintiff sits on their hands and takes unreasonable time to seek the relief, the defendant can argue this in their defence.

B. DISCRETIONARY FACTORS

- Equitable remedies are discretionary (i.e. they can be awarded at the discretion of the court)
- The court will consider the following discretionary factors when deciding whether to order an equitable remedy

Hardship

- Only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract: *Patel v Ali*:
 - FACTS: plaintiff bought a house from the Alis. Plaintiff sued for specific performance. Ali was bankrupt, Mrs Ali had bone cancer and had lost a leg and given birth, Mr Ali went to jail, Mrs Ali had another child whilst Mr Ali was in jail.
 - HELD: no specific performance, there would be too much hardship on Mrs Ali.

Impossibility/futility

- *Brunner v Greenslade*
- If performance is impossible, then court will not order specific performance.
- E.g. contract concerns unique good, but good has been sold on to a third party, then it is impossible to order specific performance.

Supervision

- Specific performance is inapplicable when the continued supervision of the Court is necessary in order to ensure the fulfilment of the contract: *JC Williamson Ltd v Lukey*:
 - FACTS: JC ran a theatre. L ran the shop next door. Oral agreement that L would sell lollies in the theatre. Contract was for 5 years, JC renounced contract after 3 years. L sought specific performance.
 - HELD: An order of specific performance would have required a continued and effective supervision of acts and services which would be impossible for any Court.
- So where the contract is complicated and requires the parties to work together for a long term, the courts will be less likely to order specific performance.

Personal services (employer/employee)

- If the contract involves the provision of services or requires continual cooperation between the parties, the court will not order specific performance: *JC Williamson Ltd v Lukey*
- Impossible to have employer and employee contract specifically performed

Mutuality

- *JC Williamson Ltd v Lukey*
- Mutuality directs the court to consider specific performance from point of view of both parties.
- The court will consider whether specific performance would benefit both parties.

Ready, willing and able

- The plaintiff must be ready, willing and able to perform the contract.
- The court will not be too concerned with minor breaches by the plaintiff. But if plaintiff breaches an essential term, then court may not order specific performance.
- The question as to whether or not the plaintiff has been and is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense: *Mehmet v Benson*

Laches

- *Fysh v Page*
- If a plaintiff delays bringing a cause of action, they may not be granted relief.

Legal remedies – Restitution

- A. Role of restitution
- B. Money had and received
 - Total failure of consideration
 - Money paid under mistake
 - Illegality
 - Waiver of tort
- C. Quantum Meruit / Quantum Valebat
 - Elements
 - Necessitous intervention
 - Reasonable remuneration
 - Claim by non-defaulting party
 - Claim by defaulting party
- D. Defences
 - Change of position
 - Good consideration
- E. Restitutionary damages
 - Account of profits
 - Reasonable fee damages

A. ROLE OF RESTITUTION

- **EXAM QUESTION:** consider whether the plaintiff has a contractual remedy (damages). Then consider whether they would have a restitutionary remedy. Decide which would provide a better outcome for the plaintiff.
- Restitution is the converse to compensation: while compensation seeks to reverse the plaintiff's loss, restitution seeks to reverse the defendant's gain
- Restitution obliges the defendant to account for benefits they received at the plaintiff's expense
- A plaintiff cannot claim both damages *and* restitution. These remedies are mutually exclusive; you can only claim one or the other: *Baltic Shipping Company v Dillon*

B. MONEY HAD AND RECEIVED

- Where a defendant has been unjustly enriched by reason of a vitiating factor such as mistake, illegality or total failure of consideration, the defendant will be obligated to make restitution (i.e. the plaintiff can recover their money): *Equuscorp Pty Ltd v Haxton*
- Four categories of cases where an action in restitution, in the form of an action for money had and received, will lie:
 1. To recover money paid upon a consideration that has failed
 2. To recover money paid under a mistake
 3. To recover money paid under an illegal contract
 4. To claim the proceeds of a tort (waiver of tort)

1. Total failure of consideration

- If a plaintiff has paid money under a contract and they have received no performance or benefit from the plaintiff, and the contract fails for another reason, the plaintiff can get their money back.
- **ELEMENTS:** if the following elements are satisfied, the plaintiff can claim back their money:
 1. The plaintiff paid money under the contract to the defendant; and

2. The contract is either terminated, is void or unenforceable; and
3. The plaintiff received no substantial performance from the defendant

Total failure

- The plaintiff must receive nothing from the defendant; the failure of consideration must be total: *Baltic Shipping Company v Dillon*:
 - FACTS: plaintiff was on a cruise liner that sank off coast of NZ. She claimed contractual damages and restitution of fare.
 - HELD: HC said she could not claim both damages and restitution of fare; the actions are mutually exclusive. HC also said that she could not claim restitution of fare because failure of consideration must be total: the plaintiff enjoyed a week of the cruise before the ship sank; this was not *total* failure of consideration.
- So total failure of consideration really means total failure of performance; that is, the defendant did not perform, the plaintiff got nothing.

Failure of foundation of the contract

- Failure of consideration is not limited to non-performance of contractual obligations. Failure of consideration also means failure for the basis or foundation of the payment: *Roxborough v Rothmans of Pall Mall Australia Limited*:
 - FACTS: Plaintiff tobacco retailer had been paying the defendant tobacco wholesaler money to cover the cost of a tobacco licence fee. Later it was found that the licence fee was unconstitutional, the NSW government had no power to demand it. The plaintiff retailer demanded a refund for the payments that the wholesaler had retained but was no longer required to pay over to the revenue authority.
 - HELD: since the fee was unconstitutional, there was no foundation for the payment. So the plaintiff was handing money over to the defendant and there was no consideration in return. Plaintiff was able to get money back under restitution.

Fault

- It does not matter that the plaintiff has breached the contract; the plaintiff can still get their money back: *Baltic Shipping Company v Dillon*
- Thus fault is irrelevant

Conditional payments

- A defendant's right to retain the payment is conditional upon performance of his or her obligations under the contract: *Baltic Shipping Company v Dillon*
- A defendant can demand prepayment of money from the plaintiff; but his right to retain the money is conditional upon the subsequent completion of the contract: *McDonald v Dennys Lascelles*:
 - A contract for the purchase of land. Purchasers were paying for the land in instalments. Purchaser did not finishing paying; purchaser repudiated. Could purchaser get money back under restitution?
 - HELD: the seller could not retain the money unless he transferred title of the property to the purchaser. And although it was the purchaser's fault, the seller still had to give the money back because of total failure of consideration.

Deposits

- If the contract is not performed by the purchaser, the deposit shall remain the property of the seller: *Howe v Smith*
 - i.e. if the purchaser does not complete, the seller can keep the deposit.
- Rationale: the deposit acts as consideration for entering into the contract.