

## ELEMENTS OF TORT OF INJURIOUS FALSEHOOD

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There are four preconditions that must be met to establish the tort (*Palmer Bruyn & Parker Pty Ltd v Parsons (2001)*):

1. A false statement must be made about the plaintiff's goods, business or profession, or property
2. Publication of the false statement to a third party
3. Malice by the defendant
  - The most difficult prerequisite to define and to establish is whether a statement was made maliciously, that is, with the intention of doing harm to the plaintiff.
4. Proof by the plaintiff of actual damage to the plaintiff's business or profession caused by the malicious statement.

## ELEMENT 1: FALSE STATEMENT

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1. Is the statement written or oral?

- a. No → has to be either or else does not satisfy prerequisite
- b. Yes → can be either to satisfy this prerequisite. Go to next Q

2. Is the statement untrue?

Note: Disparaging (critical) statements are not actionable unless they can also be shown to be false

- a. No → does not satisfy this prerequisite and therefore tort of injurious falsehood cannot apply
- b. Yes → go to next Q

3. Does the false statement disparage the goods, property, or business of the plaintiff?

Example: statements that the plaintiff was not available for future employment; that a house offered for sale was haunted; and that the plaintiff's manure was of a low quality.

Note: A statement which would be described as a 'puff' in contract law is not an injurious falsehood, even if the statement is false.

Note: A statement which merely praises the goods of the defendant as being better than those of the plaintiff is not injurious falsehood (*Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd [1899]*). A statement which includes claims intended to be taken seriously cannot be dismissed as a mere 'puff'. This is particularly relevant to comparative advertising of products or services.

Note: It has also been suggested that a failure to do something may provide a basis for action for injurious falsehood (*T J Larkins & Sons v Chelmer Holdings Pty Ltd & Anor [1965]*).

- a. No → this does not satisfy requirement
- b. Yes → this satisfies the first element

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## CASE: FAILURE TO DO SOMETHING

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*T J Larkins & Sons v Chelmer Holdings Pty Ltd & Anor [1965]*

- Suggested that where failure to give an architect's certificate of completion of building could be construed as a misrepresentation
  - it could also amount to an injurious falsehood if it caused a third party to act to the economic detriment of the plaintiff.
  - The onus is on the plaintiff to prove that the statement is false.

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### CASE: CLAIMS OF ONE PRODUCT BETTER THAN ANOTHER

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#### Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd [1899]

- the defendant had advertised that experiments had proved that his paint had a slight advantage over the plaintiff's (which was more expensive) ○ but that 'for all practical purposes they could be regarded as equal' ○ no injurious falsehood

## ELEMENT 2: PUBLICATION TO THIRD PARTY

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1. Is the falsehood communicated to a third person?

Note: It is this element that distinguishes injurious falsehood from deceit, but provides overlap with the tort of defamation.

- a. No → the tort of injurious falsehood is not applicable if this element is not satisfied
- b. Yes → go to next Q

2. Did the plaintiff prove that the publication harmed their interests?

Example: The plaintiff must prove, for example, that the statement caused the third person to act in a way that resulted in actual damage to the plaintiff. Typically, the third person decides not to, or no longer to, patronise the plaintiff's business or purchase its products as a result of the defendant's statement.

- a. No → the plaintiff needs to prove this for the second element
- b. Yes → this element is satisfied

### ELEMENT 3: MALICE BY DEFENDANT

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#### 1. Was the statement published 'maliciously'?

Note: 'Malice' does not require proof of any personal animosity towards the plaintiff.

Note: 'Malice' refers to the intention of the defendant in knowingly publishing the falsehood, and has been variously defined in terms such as calculated to cause harm to the plaintiff, known to be false, and with a dishonest motive.

Note: Hence, a false statement made honestly, but negligently, is not actionable as an injurious falsehood.

Note: Recklessness in publishing the statements will amount to malice.

- a. No → there is no tort to injurious falsehood
- b. Yes → this element is satisfied. Go to next element

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### CASE: RECKLESSNESS IS MALICE

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#### Seafolly Pty Ltd v Madden [2012]:

- The defendant (Madden) falsely claimed on Facebook and by email that the plaintiff (Seafolly) had copied some of her swimwear designs.

Held

- There were simple enquiries Madden could have made before publishing the claims to verify their accuracy, such as checking with retailers to determine when the plaintiff's garments were put on the market.
  - It was considered that a failure to take these steps was not merely careless.
  - Madden's determination to expose what she believed was misconduct – lead to her recklessly leaping into the belief that copying had occurred.
  - She did honestly believe what she was saying, albeit she had reached that conclusion recklessly
- Ultimately, the injurious falsehood claim was dismissed as Seafolly could not establish that the falsehood had caused it actual damage.

- However, Madden was found to have engaged in misleading and deceptive conduct in contravention now ss 18 and 29(1)(a) of the ACL

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#### CASE: FALSE STATEMENTS NOT AMOUNTING TO RECKLESSNESS

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##### Orion Pet Products v Royal Society for the Prevention of Cruelty to Animals (2002)

- Representatives of the RSPCA made various comments in the media that electronic dog collars inflicted burning, administered a 3,000 volt shock upon dogs, and had led to brain damage in dogs – and in some cases, death.

##### Held

- It was found that these statements were factually incorrect, and that they would be likely to damage the business of the plaintiff, which was a major supplier of these collars.
- However, it was not satisfied that the statements, whilst false, were made with malice.
  - It was found that the representatives honestly believed the truth of the claims they made.
  - While there might have been some carelessness involved in not properly checking the facts, this was not tantamount to knowledge of falsity or recklessness.
- The injurious falsehood claim failed.

## ELEMENT 4: DAMAGE TO BUSINESS/PROFESSION

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1. Did the plaintiff prove that there is actual damage to the plaintiff's business/profession caused by the malicious statement? (*Palmer Bruyn & Parker Pty Ltd v Parsons (2001)*)

Note: It is necessary for the plaintiff to prove a causal link between the falsehood and the damage suffered – either on the basis that the defendant intended the harm that materialised, or that it was the 'natural and probable consequence' of the falsehood: (*Palmer Bruyn & Parker Pty Ltd v Parsons (2001)*)

Note: The statement needs to be published maliciously and resulting in actual damage. The actual damage done is said to be the very gist of the action (*Swimsure (Laboratories) Pty Ltd v McDonald [1979]*)

- a. No → this element is not satisfied
- b. Yes → this element is satisfied. The tort of injurious falsehood can be used