

Topic 3 – Deceit and Negligent Misrepresentation

Tort of Deceit

- Where a false or fraudulent misrepresentation is directed specifically to the P and as a result of that representation the P suffers a loss or detriment
- Historically, this tort is to protect individuals from purchases they made

Elements

1. D made a false representation to the P;
 - P must make a representation to the P, and that representation must be false.
 - That representation will generally amount to a statement (may be oral or written). In certain circumstances conduct may amount as a statement (e.g. when buying a car, a representation is being made by the pedometer of the car (the cars mileage usage) and, this is conduct)
 - Where a D has made a representation by mistake, or has made a representation unconsciously, would probably not be deceit, but more likely negligence. Question to ask is whether the statement has been made knowingly false or whether it is done recklessly, then it will be fraudulent.
2. D made the statement fraudulently;
 - Fraud is generally proved when it is shown that the false representation has been made knowingly or,
 - When you knowingly make a false representation or,
 - Where you make a representation and you don't actually believe it to be true or,
 - Where you make a statement or representation recklessly (you don't really care to find out if its true or not)
3. D intended P to believe in and rely on the false representation;
 - This is where the P must prove that the D intended both to make a particular representation and also that the P would act on the basis of that representation
 - P must prove those two things – that the D intended to make the representation and that the P would act on that representation
 - D have set out to make the representation to the P and that P would rely on that representation
4. P was induced to rely on the representation; and
 - P was induced to rely on the representation to his or her detriment/loss.
 - They relied on the representation
 - P has the onus of proof to determine that they were induced to rely on it

- Has got to be a causal link between the two - 'but for my reliance of the D's statement, I would not have suffered harm or loss that I have'
- An action in deceit will fail if there is no causal link between the representation that has been made and the loss that has been suffered

5. P suffered damage.

- Generally the damages that is suffered will be economic in nature

Magill v Magill (2006) 226 CLR 551 at [59],[114]

- P sued his former wife for deceit, alleging she had falsely represented that he was the father of two children that were born during their marriage
- P claimed personal injury damages for loss of earning capacity based on anxiety and depression and non-economic loss of psychological problems that he suffered, in addition to exemplary damages.
- P claimed representations he relied on were birth certificate, also made by his wife who said she was pregnant, and a failure by his wife to disclose the fact that she was having an affair
- Then went to the high court – high court held that the tort of deceit was not established, it was unsuccessful
- Held that the tort of deceit does not extend to claims of damages that arise from representations in relation to extra-marital sexual relationships or concerns of children in course of marriage
- Generally, the tort of deceit is associated with commercial transactions, not with private intimate affairs

Central requirement of fraud

- Onus is on P to prove fraud – negligence is not sufficient (this 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) 14 App Cas 337 at 374.
- 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)*

Interaction with s18 of ACL

- Advantages of s 18 (when looking at misleading or deceptive conduct)
 - Liability is strict (strict liability); 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'; ie a failure to disclose information
- 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)*

Negligent Misrepresentations

Traditional rule – no recovery

- Indeterminacy of liability
 - Traditionally the courts were very reluctant for individuals to recover damages for negligent misrepresentation that had caused an economic loss, for policy reasons.
 - Liability 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) 174 NE 441 at p 444.
 - 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’) – D may not be able to calculate the extent of his or her potential liability
 - D must be able to calculate (at least roughly) the likely number and nature of claims
 - *Perre v Apand Pty Ltd* (1999) 198 CLR 180 per McHugh J

Damage

- P must establish actual economic loss
- Cause of action accrues on the date the loss was ascertained or reasonably ascertainable
 - *Commonwealth v Cornwall*

Duty of Care

- D 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.
 - *L Shaddock & Assoc v Parramatta CC* – key case
 - *San Sebastian v The Minister Administering the Environmental Planning and Assessment Act 1979*
 - *Tepko Pty Ltd v Water Board*
- Same general test applies regardless of whether the advice is requested or unsolicited.
 - *San Sebastian*

Factors that courts will take into account in determining whether to impose a duty of care:

- The nature of the subject matter (importance of the information)
- The circumstances in which the information is conveyed
 - Formal or informal? Oral or written?
- Requested or unsolicited?
- Whether D is in the business of providing advice of the kind given
 - cf *MLC v Evatt* (Privy Council)
- Whether D knew of the specific purpose for which P intended to rely on the advice
- 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
- 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
 - cf *Hedley Byrne v Heller*
- Whether D is skilled (or has held him/herself out to be skilled) in providing information of that kind
 - *Norris v Siberas*
- Legal coherence – example interaction with defamation principles
 - *Dale v Veda Information Services and Solutions Ltd*

Breach of Duty

- Refer to Mendelson p 587
- P must prove D made the representation negligently because:
 - D remained silent when should have disclosed information (see topic 6)
 - D gave incomplete or inaccurate information (see topic 6)
 - D did not qualify the information to negative reliance, example by providing a warning/disclaimer that information should not be relied on

Causation and Remoteness

- Normal principles apply – refer to MLL213
- Causal connection – but for D's negligent action P suffered loss
- Is it too remote to extend to the D's breach
- (Breach, causation and remoteness principles not examinable in MLL217)