

Common Law Torts

Deceit

Five Elements of Deceit

1. The defendant made a false representation to the plaintiff;
2. The defendant made the statement fraudulently;
3. The defendant intended the plaintiff to believe in and rely on the false representation;
4. The plaintiff was induced to rely on the representation; and
5. The plaintiff suffered damage. The 'gist' of the tort of deceit is the element of fraudulent

1. False representation

There must be a representation to the plaintiff, and the representation must be false.

- Includes a representation about a state of mind or intention.
- Implies a representation of fact that the representor honestly has that state of mind and intends to act in the way represented.
- 'The state of a man's mind is as much a fact as the state of his digestion': *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483

Non disclosure is not actionable. The onus is on the plaintiff to investigate all matters relevant to the transaction at hand.

3 Exceptions:

1. Partial disclosure

A defendant will be liable where the person partially disclosed certain facts where the partial disclosure creates deception: *Krakowski v Eurolynx*

2. Subsequent change in circumstances. (originally true, but became false before p relied upon) - *Jones v Dumbrell [1981] VR 199*

3. subsequent discovery of the falsity of the representation.

A person who makes a representations believing it to be true, but who discovers it to be false prior to the recipient relying on it, will be liable if they fail to disclose the knew knowledge: *Robertson v Belson*

2. Fraudulent representation

The plaintiff must establish the defendant knew the statement was false or had no belief in its truth or was recklessly indifferent to its truth or falsity: *Derry v Peak*

3. The defendant intended that the plaintiff rely on the representation

D liable only to the persons whom D intended should act upon the representation.

- *Peek v Gurney* (1873) LR 6 HL 377

However, not a requirement that the representation was made directly to P, where D does intended the representation to be passed onto and relied upon by P: *Commercial Banking Co of Sydney Ltd v RH Brown & Co* (1972) 126 CLR 337

If the defendant made a representation to a class of people of whom the plaintiff was a member, the defendant may be liable: *Commercial Banking Co of Sydney Ltd v RH Brown & Co*

4. The plaintiff was induced to rely on the representation

P must have relied upon the representation to his or her detriment: *Gould v Vaggelas*

- The false representation need not be the sole reason for the plaintiff acting to their detriment, it is sufficient the representation was a materially contributing factor to the plaintiff's decision to act: *Alati v Kruger*

5. The plaintiff suffered loss

Proof of loss essential.

- *Gates City Mutual Life Assurance Society Ltd (1986) 160 CLR 1*

Injurious Falsehood

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.

- Injurious falsehood available to all corporations regardless of size (contrast defamation) so renewed reliance on this tort: *Seafolly Pty Ltd v Madden* [2012] FCA 1346

Elements: *Palmer Bruyn & Barker v Parsons* (2001)

1. a false statement must be made about the plaintiff's goods, business or profession, or property;
2. there must be publication of the false statement to a third party;
3. there must be malice by the defendant; and
4. there must be proof by the plaintiff of actual damage to the plaintiff's business or profession caused by the malicious statement.

1. False statement to about p's goods, business, profession or property

Onus is on the plaintiff to prove the statements are false: *Hamod v State of NSW*

Typical examples:

a) Statements by competitors designed to induce P's customers to take their business elsewhere.

- *Swimsure (Laboratories) Pty Ltd 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 Ltd* [2012] FCA 242

2. Published to a third party

Tort actionable where D has published the representation to *third parties* who act in reliance on it to the detriment of P: *AAMAC Warehousing & Transpost Pty Ltd v FairFax Media*

3. Malice

Malice is established where the defendant was motivated to make a statement for a collateral, dishonest or improper motive, such as hatred for the plaintiff, or where the defendant knows the statement is false or is reckless to its truth or falsity: *Palmer Bruyn & Barker v Parsons* (2001)

A mere lack of belief in the truth is not malice, nor is mere carelessness in investigating the matter: *Roberts v Bass*

If they were reckless in not investigating, it may be seen as malice: *Seafolly*

Hatred of the plaintiff is clear indication of malice: *Beechworth Homes v Camenzuli*

So Three things to consider:

1. improper purpose
2. they knew the statement was false
3. reckless to whether it was true or not.

4. Loss to the plaintiff caused by D's statements

The plaintiff must prove a causal connection between the falsehood and the damage suffered: *Palmer v Parsons*

- The normal but for test is sufficient to prove the causal link: *Born Brands Pty Ltd v Nine Network*

Negligent Misrepresentation

Because of concerns about indeterminacy, reasonable foreseeability of loss is not sufficient to establish a duty of care.

Courts have identified the salient features of the relationship that must be present before a duty arises.

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

- 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

Salient features

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 – for example, interaction with defamation principles.
- - *Dale v Veda Information Services and Solutions Ltd*

Breach, Causation and Remoteness

Normal principles apply – refer to MLL213

Breach, causation and remoteness principles are not examinable in MLL217

Passing Off

Originally, the gist of the action was that the plaintiff claimed to have suffered, or would be likely to suffer, economic loss because either:

- Consumers may be confused by the representation and transfer their custom to the defendant; or
- Consumers, having purchased the defendant's goods believing them to be those of the plaintiff, may be disappointed that their expectations as to quality are not realised, and may simply cease buying those goods or services altogether

Reckitt & Colman Products Ltd v Borden [1990] 1 WLR 491:

1. The plaintiff has an established reputation or goodwill in its products or services; and
2. The defendant has falsely represented that the defendant's business, goods or services are those of plaintiff, or are associated with that of the plaintiff; and
3. The plaintiff has suffered actual damage, or is likely to do so.

1. Plaintiff has an established reputation

It is for the plaintiff to establish that its business or products have acquired goodwill or reputation in the locality in which the plaintiff claims protection for its goodwill. If persons are not familiar with the plaintiff or the plaintiff's product, consumers cannot be misled about a connection between the two products, nor can damage to the plaintiff be said to result: *Hansen Beverage Co v Bickfords*

There is no need for the plaintiff to have established that they were trading in the relevant jurisdiction, but that they have acquired a sufficient reputation in the jurisdiction: *Conagra v McCain Foods*

2. Defendant represented their goods are those of the plaintiff, or are associated with the plaintiff's goods

The representation must be such that a consumer is likely to mistake the goods or services offered as those of the plaintiff's.

Where appropriate, the plaintiff is required to establish that its name or mark or get-up is distinctive and identified with the plaintiff's business and that the defendant has not allayed the possibility of error by distinguishing labelling or markings

3. The plaintiff suffered actual damage, or is likely to do so

Plaintiff seeking more than nominal damages must show that customers have actually been misled, and that this has resulted in actual damage, or it is likely to do so.

The main remedies are damages, an account of the defendant's profits, and/or an injunction to prevent a further passing off.