

M/D Conduct – Common Law Torts

<p><u>Tort of Deceit</u> (<i>Magill</i>).</p> <ul style="list-style-type: none"> • Onus on P to prove fraud (negligence not enough). • Must establish D knew the statement was false/had no belief in its truth/was recklessly indifferent to the truth and falsity (<i>Peek</i>). • Where fraud is alleged – clear or cogent or strict proof is necessary (<i>Sunland</i>). 	<ol style="list-style-type: none"> 1. D made a false representation to the P; 2. D made the statement fraudulently/reckless to the truth of the rep; 3. D intended P to believe in and rely on the false rep (to their detriment); 4. P was induced to rely on the rep; and 5. P suffered damage.
<p><u>Injurious Falsehood</u></p> <ul style="list-style-type: none"> • Action on the case where D has maliciously made to TP a false rep concerning P's goods, business, profession or property that induces the TPs to act in reliance to that statement, causing P loss. • Aggravated/exemplary damages available. 	<ol style="list-style-type: none"> 1. D makes a false statement about P's goods, profession or property. 2. Publication to a TP. 3. Malice – statement must be made for collateral/improper purpose. Knowledge of the falsity/recklessness invariably conclusive of malice. 4. Loss to P because of reliance by TP – must prove actual damage (<i>Ratcliffe</i>).
<p><u>Negligent Misrepresentations</u></p> <ul style="list-style-type: none"> • Liability denied where recover will expose D to liability in an indeterminate amount for an indeterminate time to an indeterminate class (<i>Ultramares</i>). • P must establish actual economic loss • Cause of action accrues on the date the loss was ascertained or reasonably ascertainable (<i>Cornwall</i>). 	<ol style="list-style-type: none"> 1. D owes a DoC to P to ensure advice is accurate. <p>NOT EXAMINABLE:</p> <ol style="list-style-type: none"> 2. P must prove D made the rep negligently (breached). 3. Causation and remoteness.
<p><u>Passing Off</u></p> <ul style="list-style-type: none"> • P must establish goodwill/reputation in the locality – if consumers not familiar, cannot be misled. • Main remedies – compensatory damages, account of profit, injunction. 	<ol style="list-style-type: none"> 1. P has an established rep or goodwill in its products or services; and 2. A false rep by D that D's business, goods or services are those of P or are associated with that of P; and 3. D has suffered actual damage, or is likely to do so (<i>Reckitt</i>).

M/D Conduct – ACL Torts – s 18

GENERAL PRINCIPLES FIRST – SEE OTHER DOC.

1. Spot the Issues/Complaints Made/What's Alleged.	Divide discussion into the complaints made in the scenario.
2. Person/Corporation.	<ul style="list-style-type: none">• ACL applies to the conduct of corporations: s 131 CCA.• Corporation: s 4(1) CCA.• Natural persons: s 6(3) CCA.• Substantial current activities test: <i>E v Red Cross</i>.• Except info providers: s 19(1).
3. Trade or Commerce.	<ul style="list-style-type: none">• s 2 CCA.• Conduct itself is of a trading or commercial character: <i>Concrete Constructions</i>.
4. Pick Sections & Apply! (see next doc). Can be considered within the context of an advertisement.	<ul style="list-style-type: none">• Silence/Non-Disclosure.• Contractual misrep.• Puffery.• Relaying incorrect info.• Literal truth.• Statements about the future.• Contractual promises.• Expressions of opinion and law.• Negligent Advice/Conduct.• Defamation.
5. Remedies.	See Topic 9 because it depends on who is bringing the action (ACCC vs private litigant, etc).

<u>Silence/Non-Disclosure</u> Was D's conduct M/D, judged in light of all the circumstances, including acts, omissions, statements or silence (Johnson)?	<ul style="list-style-type: none"> • P must show D deliberately withheld the info (<i>Costa</i>). • Where P's claim is based on a combo of circs, deliberateness is not an essential element (<i>Johnson</i>). • D will be liable for failing to disclose info where the failure to disclose is one of the elements in the surrounding circs that render the conduct M/D. • 3 main situations that will contravene: provision of incomplete info; failure to disclose a change of circs; where P has reasonable expectation of disclosure. • May also apply to commercial transactions.
<u>Contractual Misrepresentations</u>	<ul style="list-style-type: none"> • Pre-contractual. • Post-contractual.
<u>Puffery</u>	<ul style="list-style-type: none"> • Test is whether it would be reasonably self-evident to the audience to whom the claims are addressed that they are simply sales talk and not meant to be taken seriously (<i>Eveready Australia v Gillette</i>).
<u>Relaying Incorrect Information</u>	<ul style="list-style-type: none"> • Person who merely relays info provided by TP will contravene where info is M/D. • Intention not an element however if a person makes it clear that they are merely passing on a TP's info for what it's worth and they themselves make no claim as to its truth or accuracy – MC would not be made out.
<u>Literal Truth</u>	<ul style="list-style-type: none"> • Statement literally true will contravene where it conveys a secondary false meaning (<i>Henjo Investments</i>). • Use of D's actual name can be M/D where it suggests a false rep with another person or business (<i>Bridge Stockbrokers</i>). • Correct info may still be M/D where absence of other info permits them to draw a reasonably open by erroneous conclusion (<i>ACCC v Coles Supermarkets</i>).
<u>Statements About the Future</u> Consider s 4.	<ul style="list-style-type: none"> • Contravention where D does not honestly believe in the prediction/forecast or does not intend to act in the way represented; or • Has no reasonable grounds for believing in the prediction or for believing it will be possible to act in the way represented (<i>Sykes</i>). • Statement made on an unqualified basis, but there was a real risk it would not occur and the statement should have been qualified (not s 4).
<u>Contractual Promises</u>	<ul style="list-style-type: none"> • P must show a breach of an implied rep of fact – a

<p>Consider s 4 if it relates to a future matter.</p>	<p>rep that D has an intention to fulfil the promise and has present ability to do so (<i>Futuretronics</i>).</p> <ul style="list-style-type: none"> • A contractual promise about a future matter will often convey the reps that the promisor honestly intends to fulfil the promise and has the present ability to fulfil the promise. • Contravened where the promisor does not honestly intend to fulfil the contractual obligation and/or does not have reasonable grounds for believing they will be capable of doing so.
<p><u>Expressions of Opinion and Law</u> Consider s 4 if it relates to a future matter.</p>	<ul style="list-style-type: none"> • A statement of opinion ordinarily conveys a rep that it was honestly held and that there was a reasonable basis for it but if not honestly held or lacking in foundation, contravention (<i>Thompson</i>).
<p><u>Negligent Advice/Conduct</u></p>	<ul style="list-style-type: none"> • Will contravene where a rep of fact is breached: lack of honest belief or reasonable grounds for the advice (<i>Warnock v ANZ</i>); or • Advisor has failed to attach appropriate qualifications to the advice (<i>Astonland</i>).

False or Misleading Reps – ACL – ss 29-35, 47, 48

1. General Principles & Preconditions to Liability.	See other doc.
2. Identify Complaint/Issue/Alleged.	Separate answer into each.
3. Person/Corporation.	<ul style="list-style-type: none">• ACL applies to the conduct of corporations: s 131 CCA.• Corporation: s 4(1) CCA.• Natural persons: s 6(3) CCA.• Substantial current activities test: <i>E v Red Cross</i>.
4. Trade or Commerce.	<ul style="list-style-type: none">• s 2 CCA.• Conduct itself is of a trading or commercial character: <i>Concrete Constructions</i>.
5. Pick Sections & Apply! Make sure they are goods or services: s 2(1) ACL.	About goods/services: s 29(1)(a)-(n). About sale of land: s 30. Employment: s 31. Rebates, gifts, prizes, etc: s 32. Nature of goods: s 33. Nature of services: s 34. Bait advertising: s 35. Multiple pricing: s 47. Single price in certain circumstances: s 48.
6. Remedies.	See Topic 9 because it depends on who is bringing the action (ACCC vs private litigant, etc).

Consumer Guarantees – s 54, 56, 58, 59

1. Prerequisites.	<ul style="list-style-type: none"> • Provision of action: s 271. • Goods must have been supplied to a consumer: s 3(1). • Title to sue: affected persons: s 2. • Have to be goods under s 2(1). • 3 grounds: prescribed amount; personal, domestic or household use; commercial vehicles. • Manufacturer: s 7.
2. Pick provision & Apply!	s 54 – Acceptable Quality. s 56 – Correspondence with description. s 58 – Repairs and spare parts availability. s 59 – Express warranties.
3. Remedies (damages).	s 272(1)(a)(ii). s 272(1)(b). No limitation of loss or damage.

Safety Defects – ss 138-141

1. General Principles.	<ul style="list-style-type: none"> • Applies where a good has a defect rendering it unsafe. • Strict liability remedy. • Focus on manufacturer's liability.
2. Manufacturer.	s 7(1).
3. Goods.	s 2(1).
4. Trade or Commerce.	<i>Concrete Constructions.</i>
5. Safety Defect. Test in Glendale. 3 broad categories: design, instructional, manufacturing.	s 9 within ss 138-141 (apply!).
6. Defect Causes Loss.	Causation – doesn't have to be economic. But for test.
7. Defences (if relevant).	Pick the elements missing; or s 142. Contributory negligence.
8. Remedies (damages – with limitation periods).	PI: s 138. Another individual: s 139. Damaging/destroying other goods: s 140. Damaged or destroyed land, buildings or fixtures: s 141.