What causes of action can arise concurrently?
- Defamation is a tort that is principally concerned with protection of reputation
- But, other causes of action may also protect reputation directly/indirectly, or protect aspects of reputation

Foaminol Laboratories v British Artid Plastics

<table>
<thead>
<tr>
<th>Facts</th>
<th>Damage to reputation – tried to address this as a breach of k claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue</td>
<td>Could the claim be amended to include a claim for breach of k to allow consequential damages for damage to reputation? No</td>
</tr>
<tr>
<td>Principle</td>
<td>In the ordinary course of events, where a claim is for a mere loss of reputation, the proper cause of action is in defamation</td>
</tr>
</tbody>
</table>

**INJURIOUS FALSEHOOD**

Elements (to be proven by P):

*Palmer Bruyn v Parsons (Gummow)*

1. **False statement by D about P’s goods/services**
2. **Publication** of that false statement to a person other than P
3. **Malice** (improper motive) on the part of D
   - Trying to infer the state of mind of D
   - That D was actuated by an improper motive in making the statement
   - This needs to be a dominant motive
4. **Actual damage** as a result of D’s false statement

*Palmer Bruyn v Parsons*

<table>
<thead>
<tr>
<th>Facts</th>
<th>M engaged a surveyor (P) in preparation for opening a new store and seeking council approval</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>D was a council member and sent out a false statement (detrimental to P) to other councillors in a meeting</td>
</tr>
<tr>
<td></td>
<td>Media found out about this statement and published it</td>
</tr>
<tr>
<td></td>
<td>M terminated k due to the messiness of the situation (on grounds other than the publication)</td>
</tr>
<tr>
<td>Decision</td>
<td>1. False statement</td>
</tr>
<tr>
<td></td>
<td>2. Published to persons other than P</td>
</tr>
<tr>
<td></td>
<td>3. There was arguably malice</td>
</tr>
<tr>
<td></td>
<td>4. May have been actual damage due to cancellation of k</td>
</tr>
</tbody>
</table>
But, is the cancellation of k (damage done) a natural and probable consequence of the circulation of the document in the council (wrong done/tort)? No

- Even though there was a wrong and damage, there was no causal connection between them
- There was no damage resulting from a natural and probable consequence of the publication to the other council members, as M’s cancellation of k did not result from D’s circulation of the statement in the council meeting

Principle
- Must have an economic interest in goods/services
- Fault-based tort (intentional tort)

Need causal connection between D’s wrongful conduct + harm suffered by P

Extent of causal responsibility for:
- **Negligence** → liable for all loss that is reasonably foreseeable
- **Intentional tort** → liable for natural/probable consequences of conduct

<table>
<thead>
<tr>
<th>Injurious falsehood</th>
<th>Defamation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Protection of economic interest/goodwill in goods/services</td>
<td>Protection of reputation</td>
</tr>
<tr>
<td>False statement about P’s goods/services</td>
<td>False statement + disparages P’s reputation</td>
</tr>
<tr>
<td>Greater forensic burden on P, as damage is not presumed (P must prove damage)</td>
<td>Forensically easy for P, as presumption that material is false + P’s reputation has been damaged (if P proves the publication of a matter that is defamatory of him)</td>
</tr>
</tbody>
</table>
| Easier to obtain an injunction to restrain an apprehended injurious falsehood (as this tort does not protect freedom of speech) | • Difficult to obtain an injunction if P suspects that D will defame him  
• Court generally allows D to say what he wishes (freedom of speech), then P sues for damages after publication |

**Ajinomoto Sweeteners v Asda Stores**

**Facts**
- D promoted its product by stating ‘no hidden nasties, no artificial colours, no Spartan (artificial sweetener)’
- P (produced Spartan), sued for injurious falsehood

**What do those words mean?**
- Words were directed towards goods, as P manufactured Spartan
- Words implied that P’s goods were harmful, or potentially harmful, or something to be avoided (different imputations/meanings)

**Issue**
- Does single meaning rule apply in injurious falsehood (as in defamation)? No
Principle
• The single meaning rule is an artificial aspect of defamation law (even in defamation law, no one really wants it)
• No reason to import the single meaning rule into injurious falsehood
• Can impose liability on basis of multiple reasonably available meanings

N.B. Must be a single meaning in defamation:
• Words used, even though they may be understood in different ways by different people, are only capable of bearing a single meaning
• 3 different meanings from words here (can only mean one thing). What is the one true meaning of the words? Liability is imposed on that basis

Menulog v TCN Channel Nine

Facts
• T wanted to broadcast a story which suggested that people ordered from a mid-tier restaurant on M, but M sourced the food from a cheaper restaurant and pocketed the difference
• M contacted T (said it was C’s (previous operator of the restaurant) fault)
• T did not change its position
• M sought an injunction to prevent the broadcast
• (M used injurious falsehood to get an injunction instead of defamation)

Issue Can an injunction be granted on the grounds of injurious falsehood? Yes

Decision Injunction requires a prima facie case on the balance of convenience? Yes
[1] Yes, prima facie case that there is
• A false statement about P’s services
• Publication to persons other than P (D going hard on promotion)
• Malice (D was aware of P’s view but did not investigate further)
• Special damage in the sense of actual pecuniary losses (no actual damage needs to be proved at the injunction stage, but there is a risk of loss of customers and actual damage would be probable)

[2] Balance of convenience (injustice in granting vs. not granting injunction)
• Injustice = D cannot broadcast the story, impacts freedom of speech, but can investigate further
• Balance of convenience in favour of P (harm suffered by P is greater than that of D, if the story is broadcasted)

Mahon v Mach 1 Financial Services
Prefers the test of actual damage (rather than special damage)
• Do not need to plead and prove actual pecuniary losses
• Sufficient to point to economic harms likely to result if the matter is published
**DHR v Challis**

Recent example where corporation sued in injurious falsehood against a private individual (internet publication) where the corporation might have previously sued in defamation

- Rationale for restricting corporations from being able to sue for defamation was that they could use the threat of defamation to chill speech
- But, forcing corps to rely on injurious falsehood means can stop speech altogether
- The fact that corporations presumptively cannot sue for defamation under DA does not mean they cannot bring a claim in injurious falsehood

**Orion Pet v RSPCA**

**Facts**

- O manufactured electronic dog collars designed to train dogs not to bark
- R campaigned to have collars banned in Vic (via radio, website, article)
- Dr H (President of R in Vic) made a range of allegations, many of which were statements of fact, but were overstatements (re voltage strength)
- O sued R for defamation + injurious falsehood + m/d conduct

**Claim**

O’s claimed that the representations were made in knowledge that they were untrue and with the intention from discouraging purchasers from acquiring the products and thereby destroying its business

**Decision**

No liability for injurious falsehood

1. False statements (re voltage strength)
2. Publication
3. No malice, no improper motive, as R believed the statements were true

**Defamation**

- False statement which disparages O’s reputation
- O is identified
- It is published
- Thus, onus shifts to R to provide a defence (forensic advantage for O/P)
- R unable to establish any defences, thus damages

**Principle**

**Malice**

- If D knows that the statements are false/if he is reckless (makes the statement not caring whether it is true/false)
- If D is actuated by some indirect/dishonest/improper motive

**No malice**

- If false publication made w/ mere lack of care/honest belief in its truth
- (Carelessness is not equivalent to recklessness)
Examples of statements amounting to injurious falsehood:

**False assertion that:**
- P’s products were inferior;
- P’s employees were engaged in immoral conduct;
- P’s employees had an infectious disease;
- P has ceased to trade;
- P’s house was haunted;
- P was not available for future employment;
- The vendor of goods/land was not the true owner of the goods/land;
- P was complicit in the theft of goods, overcharged and managed its business incompetently; and
- P was engaged in fraud and conspiracy, was negligent, contravened relevant legislation and perverted the course of justice

**MISLEADING/DECEPTIVE CONDUCT & DEFAMATION (‘OVERLAP ISSUE’)**

**s 28 Fair Trading Act**

*ACL applies as part of the law of NSW*

**s 32 Fair Trading Act**

*ACL applies to corporations + persons engaging in misleading/deceptive conduct in NSW*

**s 131 Competition and Consumer Act**

*Application of ACL in relation to corporations*

**s 18 ACL (replaced s 52 TPA)**

*A person must not, in trade/commerce, engage in conduct that is misleading/deceptive, or is likely to mislead/deceive*

**ss 232, 236 ACL**

*Remedies (damages, injunctions)*

**Global Sportsman v Mirror Newspapers**

<table>
<thead>
<tr>
<th>Facts</th>
<th>Cricketer (K) entered agreement with G to do promotional activities</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>M, unaware of this agreement, published matter that implicated K in the factionalism and mutiny said to be afflicting Australian cricket at the time</td>
</tr>
<tr>
<td></td>
<td>G sued for misleading/deceptive conduct</td>
</tr>
<tr>
<td></td>
<td>K sued for defamation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Issue</th>
<th>Can M read down s 18 to exclude defamatory speech? No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claims</td>
<td>Statutory interpretation</td>
</tr>
</tbody>
</table>
1. M argued that misleading/deceptive conduct under s 18 ACL only applies to non-defamatory speech (and should be read down to exclude defamatory speech, which is covered by defamation law)

2. Alternatively, M argued that the defences for defamation should be imported into the interpretation and application of ACL (otherwise it would impact freedom of speech and press)

**Decision**

*This case acknowledges the possibility of overlapping causes of action in misleading/deceptive conduct and defamation*

[1] *s 18 ACL cannot be read down to exclude defamatory speech [Versace]*

- No express words in s 18 that exclude defamatory speech
- No necessary implication (looking at the words and what they reasonably mean) that ‘misleading/deceptive’ excludes defamatory speech (words say nothing about defamatory/non-defamatory speech, no textual basis to read it down, not absurd and not ambiguous)

[2] Must construe Statute as a whole. If no CL defences in Statute, drafters must have turned minds to it, decided not to import defences to misleading/deceptive conduct, thus cannot import defences for defamation to s 18

- Legislature provided cause of action with intention to protect consumers
- **Purpose = consumer protection** (cf defamation = reputation)

**Orion Pet v RSPCA**

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- O sued R for defamation + injurious falsehood + m/d conduct

**Decision**

*No liability for misleading/deceptive conduct*

- Likely to mislead/deceive
- R has a commercial aspect, but the conduct in question is not in the course of trade/commerce, but for the purpose of political advocacy/education

**Principle**

*Trade/commerce*

- Requires the **conduct in question** to be in the course of **trade/commerce**

‘Information provider’ defence:

- Unintended consequence of media outlets being held liable for misleading/deceptive conduct (for material published in certain circumstances) w/o any effective defence
- Broad level of protection (but not an absolute immunity)

*s 19 ACL (replaced s 65A TPA)*
**Versace v Monte**

**Facts**
- M (private investigator) self-published a book (promoted on his website)
- M claimed that he provided personal security services to V and that V was a front for laundering mafia money
- V sued M for defamation + misleading/deceptive conduct

**Issue**
Should M be able to rely upon a defence of being an info provider for the purpose of s 19 ACL (equivalent s 65A TPA)? Is M, in substance, providing info? No

**Decision**
- It is conduct in trade/commerce (investigation services)
- It is defamatory + misleading/deceptive, or likely to mislead/deceive

*M was outside the ambit of s 19 on either analysis, thus unable to rely on defence*

1. M was not purporting to provide information, but was using the book to promote his security services. Given that the book was not for the purpose of providing information, M did not fall within the definition of a ‘prescribed information provider’

2. Even if M were a ‘prescribed information provider’, he falls outside the ambit of this if the misleading/deceptive conduct he engaged in is in relation to the promotion of his own services, as compared to the provision of information

**Bond v Barry**

**Facts**
- A involved in the Mesotho Diamond Company
- Shareholders upset with A’s purported intention to strip the company of assets to the detriment of the shareholders
- B wrote a story on a freelance basis detailing the conflict in the company
- A sued for misleading/deceptive conduct;
- B claimed defence under s 65A TPA (now s 19 ACL)

**Issue**
Does the defence apply to freelance journalists such as B? Yes

**Claim**
Argued s 65A did not apply to freelance journalists (only employed journalists)

**Decision**
B was an information provider, investigating matter of public interest

**Principle**
- The defence extends to freelance journalists that were engaging in the ordinary tasks of journalists for an information provider
- Nothing in the text of the Statue drew a distinction between freelance vs. employed journalists

**ACCC v Channel Seven Brisbane**

**Facts**
- 2 women formed ‘Widely Wealthy Women’ which aimed to make women rich in 18 months through property transactions
| Issue | C had an understanding (no k) with WWW to broadcast 6 stories of women who had been tracked over 18 months (and went from having 0 capital to becoming property millionaires)  
ACCC pursued WWW and C for contravening *TPA*  
Given that ACCC had established that WWW had engaged in misleading/deceptive conduct, could C, by providing WWW with a platform, have engaged in misleading/deceptive conduct itself? Yes  
Did C have the benefit of defence under s 65A *TPA*? No |
|---|---|
| Decision | C had an arrangement with WWW to **promote uncritically** WWW’s services in return for content  
This fell **outside** the ordinary practices of journalism and was thus not covered by the defence  
(The nature of what had been published exceeded any protection the information provider (C) could have)  
If C entered into **critical reporting** of WWW then it would have been **within** the ordinary practices of journalism |
| Principle | The defence does **not** extend to practices by information providers that fall **outside** the **ordinary practices** of **journalism**  
Exception where info provider entered **k/understanding/arrangement** with a provider of goods/services (**blends own commercial interests** with people they purport to report about) |