

TORT OF DEFAMATION IN CONTEXT – OTHER ACTIONS PROTECTION REPUTATION & OTHER OVERLAPPING INTERESTS

<ul style="list-style-type: none"> • 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
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Foaminol Laboratories v British Artid Plastics

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

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 <ul style="list-style-type: none"> • 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

Facts	<ul style="list-style-type: none"> • M engaged a surveyor (P) in preparation for opening a new store and seeking council approval • D was a council member and sent out a false statement (detrimental to P) to other councillors in a meeting • Media found out about this statement and published it • M terminated k due to the messiness of the situation (on grounds other than the publication)
Decision	<ol style="list-style-type: none"> 1. False statement 2. Published to persons other than P 3. There was arguably malice 4. May have been actual damage due to cancellation of k

	<p><i>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</i></p> <ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • Must have an economic interest in goods/services • Fault-based tort (intentional tort) <p><u>Need causal connection between D's wrongful conduct + harm suffered by P</u></p> <p><i>Extent of causal responsibility for:</i></p> <ul style="list-style-type: none"> • <i>Negligence</i> → liable for all loss that is reasonably foreseeable • <i>Intentional tort</i> → liable for natural/probable consequences of conduct

Defamation + injurious falsehood can be concurrently pleaded:

<u>Injurious falsehood</u>	<u>Defamation</u>
Protection of economic interest /goodwill in goods/services	Protection of reputation
False statement about P's <u>goods/services</u>	False statement + disparages P's <u>reputation</u>
Greater forensic burden on P, as damage is not presumed (P must prove damage)	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)
Easier to obtain an injunction to restrain an apprehended injurious falsehood (as this tort does not protect freedom of speech)	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • D promoted its product by stating 'no hidden nasties, no artificial colours, no Spartan (artificial sweetener)' • P (produced Spartan), sued for injurious falsehood <p><i>What do those words mean?</i></p> <ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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.	<p><i>Must be a single meaning in defamation:</i></p> <ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<p><u>Injunction requires a <i>prima facie</i> case on the balance of convenience? Yes</u></p> <p><i>[1] Yes, prima facie case that there is</i></p> <ul style="list-style-type: none"> • 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) <p><i>[2] Balance of convenience (injustice in granting vs. not granting injunction)</i></p> <ul style="list-style-type: none"> • 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

<p><i>Prefers the test of actual damage (rather than special damage)</i></p> <ul style="list-style-type: none"> • Do not need to plead and prove actual pecuniary losses • Sufficient to point to economic harms likely to result if the matter is published 	
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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	
	<ul style="list-style-type: none"> • 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 <i>DA</i> does not mean they cannot bring a claim in injurious falsehood

Orion Pet v RSPCA

Facts	<ul style="list-style-type: none"> • 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	<p><i>No liability for injurious falsehood</i></p> <ol style="list-style-type: none"> 1. False statements (re voltage strength) 2. Publication 3. No malice, no improper motive, as R believed the statements were true <p><i>Defamation</i></p> <ul style="list-style-type: none"> • 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	<p>Malice</p> <ul style="list-style-type: none"> • 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 <p>No malice</p> <ul style="list-style-type: none"> • 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

Facts	<ul style="list-style-type: none">• Cricketer (K) entered agreement with G to do promotional activities• M, unaware of this agreement, published matter that implicated K in the factionalism and mutiny said to be afflicting Australian cricket at the time• G sued for misleading/deceptive conduct• K sued for defamation
Issue	Can M read down s 18 to exclude defamatory speech? No
Claims	<i>Statutory interpretation</i>

	<ol style="list-style-type: none"> 1. M argued that misleading/deceptive conduct under <i>s 18 ACL</i> 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 <i>ACL</i> (otherwise it would impact freedom of speech and press)
Decision	<p><u><i>This case acknowledges the possibility of overlapping causes of action in misleading/deceptive conduct and defamation</i></u></p> <p><i>[1] s 18 ACL cannot be read down to exclude defamatory speech [Versace]</i></p> <ul style="list-style-type: none"> • No express words in <i>s 18</i> 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) <p><i>[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</i></p> <ul style="list-style-type: none"> • Legislature provided cause of action with intention to protect consumers • Purpose = consumer protection (cf defamation = <u>reputation</u>)

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Decision	<p><i>No liability for misleading/deceptive conduct</i></p> <ul style="list-style-type: none"> • Likely to mislead/deceive • R has a commercial aspect, but the conduct in question is <u>not</u> in the course of trade/commerce, but for the purpose of <u>political advocacy/education</u>
Principle	<p><i>Trade/commerce</i></p> <ul style="list-style-type: none"> • Requires the conduct in question to be in the course of trade/commerce

‘Information provider’ defence:

<ul style="list-style-type: none"> • 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)
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s 19 ACL (replaced s 65A TPA)

Versace v Monte

Facts	<ul style="list-style-type: none"> • 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 <i>s 19 ACL</i> (equivalent <i>s 65A TPA</i>)? Is M, in substance, providing info? No
Decision	<ul style="list-style-type: none"> • It is conduct in trade/commerce (investigation services) • It is defamatory + misleading/deceptive, or likely to mislead/deceive <p><i>M was outside the ambit of s 19 on either analysis, thus unable to rely on defence</i></p> <ol style="list-style-type: none"> 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	<ul style="list-style-type: none"> • 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 <i>s 65A TPA</i> (now <i>s 19 ACL</i>)
Issue	Does the defence apply to freelance journalists such as B? Yes
Claim	Argued <i>s 65A</i> did not apply to freelance journalists (only employed journalists)
Decision	B was an information provider, investigating matter of public interest
Principle	<ul style="list-style-type: none"> • The defence <u>extends to</u> freelance journalists that were engaging in the ordinary tasks of journalists for an information provider • Nothing in the text of the <i>Statute</i> drew a distinction between freelance vs. employed journalists

ACCC v Channel Seven Brisbane

Facts	<ul style="list-style-type: none"> • 2 women formed 'Widely Wealthy Women' which aimed to make women rich in 18 months through property transactions
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	<ul style="list-style-type: none"> • 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 <i>TPA</i>
Issue	<ul style="list-style-type: none"> • 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 <i>s 65A TPA</i>? No
Decision	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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 (<u>blends own commercial interests</u> with people they purport to report about)