

## LIABILITY FOR STATEMENTS

There are a number of ways in which a person may be liable for statements. Consider the following scenarios adapted from *Winfield & Jolowicz on Tort*:

|                | 1                                                                                           | 2                                                                                                                                                                                         | 3                                                                                                                                                                                                                                                                                                                                      | 4                                                                                                                                                                                                                   | 5                                                                               |
|----------------|---------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| Scenario       | Words may cause a person to act in reliance upon them and suffer loss or damage as a result | The defendant may knowingly or recklessly make a false statement to the claimant with intent that it shall be acted upon by the claimant, who does act upon it and thereby suffers damage | A false statement may be made, with “malice”, to some person other than the claimant, as a result of which the claimant suffers damage                                                                                                                                                                                                 | There may be the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him | Words may cause direct injury by shock to the person to whom they are addressed |
| Example        |                                                                                             |                                                                                                                                                                                           | A newspaper may publish incorrectly that a trader has closed his business, with the result that potential customers do not approach him; or a manufacturer may circulate false information that because of technological developments his product is now twice as effective as the plaintiff’s and thereby take business away from him |                                                                                                                                                                                                                     |                                                                                 |
| Liability/Tort | Negligent misstatement                                                                      | Deceit                                                                                                                                                                                    | Injurious/malicious falsehood                                                                                                                                                                                                                                                                                                          | Defamation                                                                                                                                                                                                          | <i>Wilkinson v Downton</i>                                                      |

### ECONOMIC LOSS CAUSED BY NEGLIGENT MISSTATEMENT

In 1963 the House of Lords held that a duty of care in making statements was a legal possibility:

*Hedley Byrne v Heller & Partners* [1963] 2 All ER 575

#### **“Special relationship”**

The usual principles of *Donoghue v Stevenson* do not apply to negligent misstatement. In order for there to be a duty of care not to make negligent misstatement, there must be a “special relationship” between the parties. In *Caparo plc v Dickman* (below) Lord Oliver stated that the necessary relationship would have four characteristics:

1. The adviser actually or inferentially knew that the advice was required for a purpose;
2. The adviser knew that the advice would be communicated to the advisee;
3. It was known that the advice would be acted upon by the advisee without independent inquiry; and
4. It was acted upon by the advisee to his detriment.

The House of Lords considered *Hedley Byrne* in two later cases:

*Smith v Eric Bush* [1989] 2 All ER 514

*Caparo plc v Dickman* [1990] 1 All ER 568

### ***Persons to whom a duty is owed***

The range of persons to whom the duty is owed was discussed in *Caparo plc v Dickman* (above), which was distinguished by the Court of Appeal in:

*Morgan Crucible Co v Hill Samuel Bank* [1991] 1 All ER 148

### ***Advice on social occasions***

There will be no duty in respect of advice requested and given on a purely social occasion but liability was imposed upon a friend assessing a used car for the plaintiff in:

*Chaudhry v Prabhakar* [1988] 3 All ER 718

### ***The “assumption of responsibility” principle***

A duty of care in tort can co-exist with a contractual obligation where there has been an assumption of responsibility in relation to the provision of services:

*Henderson v Merrett Syndicates* [1994] 3 All ER 506

The principle of “assumption of responsibility” has been extended beyond liability for statements, eg by the House of Lords to a solicitor who was held to be in a special relationship with the intended beneficiaries of a will:

*White v Jones* [1995] 1 All ER 691

The extended *Hedley Byrne* principle (established in *Henderson*) was considered by the House of Lords in:

*Williams v Natural Life Health Foods* [1998] 2 All ER 577

The Court of Appeal recently followed *White v Jones* in a case involving an insurance company advising a customer about pensions and life cover:

*Gorham v British Telecom* [2000] The Times LR, August 16

### ***Disclaimers***

Advisers may protect themselves by a disclaimer, eg in *Hedley Byrne* the information was given “without responsibility”. Today, s2(2) of the Unfair Contract Terms Act 1977 provides that a person cannot by means of any contract term or notice restrict his liability for loss or damage other than personal injury (which cannot be excluded) caused by negligence in the course of a business unless he shows that the term or notice is reasonable. This issue was considered by the House of Lords in *Smith v Eric Bush* (above).

### ***Statements and third parties***

There may be liability for negligence where the defendant makes a statement to a third party which causes the third party to act in a manner detrimental to the claimant, but in respect of which the claimant has no redress against the

third party. An example would be a former employer/employee/prospective employer situation. See:

*Spring v Guardian Assurance* [1994] 3 All ER 129

It has been held in the QBD that a doctor carrying out a medical assessment on behalf of a prospective employer could owe a duty of care to the prospective employee:

*Baker v Kaye* [1997] IRLR 219

However, a duty of care was not owed where the prospective employee filled-in a medical questionnaire which was considered by the doctor. The Court of Appeal doubted the correctness of *Baker v Kaye* in:

*Kapfunde v Abbey National* [1999] ICR 1

## THE TORT OF DECEIT

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Viscount Maugham in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211A explained the tort of deceit:

“My Lords, we are dealing here with a common law action of deceit, which requires four things to be established.

First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit...

Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true...

Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him... If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made...

Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing...

I am not, of course, attempting to make a complete statement of the law of deceit, but only to state the main facts which a plaintiff must establish.”

Although in civil cases the standard of proof is the balance of probabilities, in an allegation of deceit the degree of probability will vary according to the gravity of the allegation to be proved. See:

*Hornal v Neuberger Products* [1956] 3 All ER 970

This tort was recently considered by the Court of Appeal in:

*Standard Chartered Bank v Pakistan National Shipping Corp (No. 2)* [2000] 1 Lloyd’s Rep 218

## INJURIOUS/MALICIOUS FALSEHOOD

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This tort is committed where the defendant:

1. made a false statement to a third party,
2. with malice,
3. as a result of which the claimant suffered damage.

The leading case is *Ratcliffe v Evans* [1892] 2 QB 524, where Bowen LJ stated (at p527):

“That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred.”

This statement was considered by Roxburgh J in:

*Joyce v Motor Surveys Ltd* [1948] 1 Ch D 252

The claimant must prove special (ie, actual, pecuniary) damage or claim under s3(1) of the Defamation Act 1952 which provides:

“In an action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage – (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.”

It was recently decided that aggravated damages for injury to feelings may be recoverable:

*Khodaparast v Shad* [2000] 1 All ER 545