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MALICIOUS FALSEHOOD

Malicious falsehood is primarily concerned with damage to profits or earnings caused by the publication of untrue statements of fact. For the purposes of this cause of action, it is immaterial whether the untrue statement causes damage to the claimant's reputation. A statement may be actionable as a falsehood even though it is not defamatory. On the other hand, the fact that the untrue words are also defamatory will not exclude a claim being made in malicious falsehood, although the courts will not allow the claimant to recover damages for both defamation and malicious falsehood for the same loss.¹

ESTABLISHING MALICIOUS FALSEHOOD

To succeed in a malicious falsehood claim the claimant must show all of the following.

The defendant has published an untrue statement of fact about the claimant

In malicious falsehood cases, the law does not presume that the words are false. The onus is on the claimant to prove that they are.

The court must first determine the meaning of the words in the same way as it would in defamation cases. The meaning that the maker of the statement *intended* will be irrelevant to meaning. Having determined the natural and ordinary meaning, the court will go on to consider whether the claimant has proved that that meaning is not true. Note that the statement has to be an untrue statement of *fact*. An expression of opinion is unlikely to give rise to a claim in malicious falsehood, provided that it is clear from the statement that it is an expression of opinion and not a statement of fact.²

The defendant published the words maliciously

Malice bears the same meaning as it does in defamation law. The concept of malice is broader than wickedness or evil intent. The claimant must show either:

1 *Joyce v Senagupta* [1993] 1 All ER 897.

2 *Emaco v Dyson Appliances* (1999) *The Times*, 8 February.

- (a) that the defendant did not have a positive belief in the truth of his statement (where he is reckless as to whether a statement is true or false he will be treated as if he knew that it was false); or
- (b) that the defendant's *dominant* motive in making the statement was dishonest or improper. If a statement is made maliciously, it must be made with the *dominant* object of injuring the claimant's business. The mere fact that the statement has damaged the claimant's business will not in itself be sufficient to prove malice.³ Similarly, a statement is not made maliciously simply because the maker of the statement wanted to improve his own business. As in defamation cases, the claimant will rarely be in a position to give evidence about the claimant's state of mind. Malice will generally have to be inferred from what he said or did or knew. The difficulties involved in establishing malice are described below, p 158.

The words have caused the claimant pecuniary loss as a natural and direct result of the publication

The claimant must prove: (a) that pecuniary loss has been suffered; and (b) that the loss is attributable to the defendant's statement. The second limb of this test is often difficult to satisfy. It is usually difficult to find witnesses who will say that they stopped doing business with the claimant as a result of the untrue statement. It will not usually be sufficient to show a downturn in sales for about the time that the statement was made, unless the claimant can also show that the downturn could not be attributable to other factors such as a seasonal downturn or the economic climate generally.⁴

It is vital that loss or the likelihood of it is established. As Lord Robertson cautioned in *Royal Baking Powder v Wright Crossley and Co*:⁵

Unless the plaintiff has in fact suffered loss which can be and is specified, he has no cause of action. The fact that the defendant has acted maliciously cannot supply the want of special damage, nor can a superfluity of malice eke out a case wanting in special damage.

Where the words are published in writing or other permanent form, the claimant does not have to show *actual* loss. It is sufficient to prove that the untrue words were likely to cause pecuniary loss.⁶ The likelihood of pecuniary loss should be judged objectively.

3 *Dunlop Pneumatic Tyre Company v Maison Talbot* (1904) 20 TLR 579.

4 In relation to comparisons see *Emaco v Dyson Appliances* (1999) *The Times*, 8 February.

5 *Royal Baking Powder v Wright Crossley and Co* (1900) 18 RPC 103.

6 Defamation Act 1952, s 3(1)(a).

Similarly, where the untrue words are likely to cause pecuniary damage to the claimant in respect of any office, profession, calling, trade or business held by or carried on by him at the time of publication, it will not be necessary for the claimant to prove actual damage.⁷

The loss or likelihood of loss must be a natural and probable consequence of the falsehood. In *Stewart Brady v Express Newspapers*,⁸ the convicted murderer, Ian Brady, brought proceedings for malicious falsehood against the *Express* over an allegation that he had assaulted a female prison visitor. The court held that Mr Brady did not have a reasonable cause of action, as he could not show that the publication was likely to cause him financial loss. Mr Brady tried to rely on the possibility that the prison authorities would remove his discretionary weekly allowance as a result of the report. The court ruled that the natural and probable consequence of the publication was that there would be an internal prison inquiry into the allegation, at which the claimant would have an opportunity to put his case. If the inquiry decided to withdraw his allowance, that would be as a result of their findings, rather than as a natural and probable result of the newspaper report.

The limitation period in relation to malicious falsehoods is one year from the date that the cause of action arose, although the court has discretion to extend the period in appropriate cases.⁹ The same position applies in defamation cases.

The burden of proof in relation to all three of the above requirements is on the claimant. A claim in malicious falsehood tends to be a difficult claim for a claimant to bring successfully. Where a claimant has a choice of a claim for defamation or malicious falsehood, his burden of proof in the defamation claim will be lighter.

Differences in the burden of proof in defamation cases and malicious falsehood cases

- In defamation cases, a factual statement is presumed to be false, unless the defendant can show that it is true. In malicious falsehood, the burden of showing that the statement is untrue rests on the claimant.
- In defamation cases, a defamatory statement is presumed to cause damage to the claimant without the need to produce evidence to establish damage.¹⁰ In malicious falsehood cases, the claimant must prove actual damage or the likelihood of such damage.

7 Defamation Act 1952, s 3(1)(a).

8 *Stewart Brady v Express Newspapers* (1994) unreported.

9 Defamation Act 1996, ss 5–6.

10 The position is different in relation to some forms of slander where loss must be proved – see Chapter 3 for further detail.

- In defamation cases, the claimant does not have to establish malice, unless the defendant is able to rely on the defences of fair comment or qualified privilege. In malicious falsehood cases, the claimant must show that the defendant made the statement maliciously.
- Unlike defamation claims, there is no right to trial by jury in malicious falsehood cases. Most malicious falsehood claims are heard by, and damages are assessed by, a judge sitting alone.

Potential advantages of bringing a claim in malicious falsehood rather than in defamation are:

- an interim injunction to restrain publication of the falsehood for the period up to trial may be easier to obtain for a malicious falsehood than it would be in proceedings for defamation;¹¹
- legal aid is not available to claimants who wish to bring defamation claims. It is available in theory to claimants in malicious falsehood cases. In *Joyce v Senagupta*,¹² the claimant obtained legal aid for, and brought proceedings in, malicious falsehood. Her claim could equally have been brought for defamation. An attempt to strike out the malicious falsehood claim on the ground that it was in reality a defamation claim was unsuccessful. The Court of Appeal found that the claimant had an arguable case in malicious falsehood which she could choose to pursue at her option;
- a cause of action in defamation cases cannot be commenced or continued on behalf of a dead claimant. A cause of action in malicious falsehood may be commenced or continued by the estate of a deceased person.

MALICIOUS FALSEHOOD – SOME TERMINOLOGY

The cause of action known as malicious falsehood is also referred to as injurious falsehood. The terms are interchangeable. There are also particular types of malicious/injurious falsehood, known as slander of title and trade libel (the terms 'slander' and 'libel' in this context are misleading. They do not bear the same meaning as for defamation law. A trade libel can be made orally and a statement which amounts to slander of title can be made in writing or other permanent form). Whatever terminology is used in each case, the claim is essentially one for redress for loss caused as a result of false statements.

11 The award of interim injunctions in malicious falsehood cases is considered at the end of this chapter.

12 *Joyce v Senagupta* [1993] 1 All ER 897.

Trade libel (also known as slander of goods)

A trade libel arises from an untrue statement which is critical of the claimant's *goods* or *services*. At the beginning of Chapter 3, an example was given concerning disparaging comments made in relation to a company's goods (in the example, the goods were electric fans). Where the disparaging comment could be understood to be an attack on the manufacturer's reputation (for example, by inferring that it is cavalier about health and safety issues), a claim in defamation might lie. However, where the criticism is in reality a criticism of the manufacturer's *product*, defamation will not be an appropriate cause of action, because the statement will not have caused damage to the claimant's reputation (despite the fact that it has damaged the claimant's profits). The manufacturer can bring a claim in malicious falsehood, provided that it can satisfy the criteria set out above. This type of malicious falsehood is often referred to as trade libel, because the untrue statement is critical of the claimant's goods or services, rather than of the claimant itself.

Slander of title

A false statement in relation to the claimant's title to property is known as slander of title.

Other types of malicious falsehood

The cause of action is not confined to trade libel cases or slander of title cases. It extends to all types of untrue statements which cause or are likely to cause pecuniary loss.

Examples

*(a) Kaye v Robertson*¹³

The claimant was an actor. He was in hospital recovering from extensive surgery to his head and brain following an injury sustained in a severe storm. The defendant was the editor of the *Sunday Sport* newspaper. Journalists from the newspaper gained access to Mr Kaye's private hospital room, ignoring notices which prohibited such entry, and interviewed Mr Kaye at length and took photographs of him, despite the fact that he was only in partial command of his facilities – as the journalists were well aware. Eventually, the hospital staff realised what was going on and the journalists were ejected from the

¹³ *Kaye v Robertson* [1991] FSR 62.

room. Shortly after the 'interview' had taken place, Mr Kaye had no recollection of it. The newspaper threatened to publish the interview in such a way as to create the impression that Mr Kaye had consented to it. Mr Kaye sought an interim injunction to restrain publication. He claimed that he had not given his consent to the interview and, indeed, he had been in no fit state to give his consent in any event, as the defendant would have appreciated.

The Court of Appeal held that the publication of the defendant's story as an 'interview' would be a falsehood, in that it would represent that the claimant had willingly consented to the process. The falsehood was made maliciously, because the defendant was well aware that Mr Kaye had not consented to the story. The story was also likely to cause Mr Kaye pecuniary loss, as he has a potentially valuable right to sell the story of his accident to the media. If the defendant published its story, the value of Mr Kaye's rights would be seriously reduced.

(b) Comparisons

One of the main areas in which malicious falsehood claims are brought is manufacturers' comparison of their goods with the goods of a trade rival. These types of comparison are often referred to as 'knocking copy' and they usually involve trade libels in the form of disparaging comments about the competitor's products.

There have been a number of important cases involving claims of malicious falsehood in the field of comparisons, especially in relation to comparative advertising. The cases have involved allegations that the comparative advertisements in question contain untrue statements about the defendant's goods and services.¹⁴

*The construction of natural and ordinary meanings
in relation to advertising and marketing material*

When construing the claims made in comparative advertisements, the court is concerned to determine what the reasonable man would find the claim to mean taken in the context in which the words were intended to be read or viewed.¹⁵ The courts are aware that the public tends to take most kinds of advertising with a pinch of salt. They therefore consider whether the reasonable man would take the claims made in the advertising seriously. If not, the claim is unlikely to succeed. In the *Dyson* case,¹⁶ which involved the

14 Note that in *Cable and Wireless plc v BT plc* [1998] FSR 383, Jacob J observed that, where a claimant also had a cause of action for trade mark infringement in addition to malicious falsehood, the claim in malicious falsehood added little to the trade mark claim; the implication being that the malicious falsehood claim would be superfluous in such circumstances.

15 *Emaco v Dyson Appliances* (1999) *The Times*, 8 February.

16 *Ibid.*

construction of the meaning of certain promotional literature produced by Electrolux and Dyson making comparisons between their respective vacuum cleaners, the court held that the material must be read and viewed through the eyes of a potential customer interested in purchasing a vacuum cleaner who is being subjected to sales patter designed to persuade him or her to purchase one machine rather than the other. In the same case, comments made to a trade journalist were to be interpreted in the sense that they would have been reasonably understood by someone in the journalist's position. When interpreting statements made in advertisements the following will apply:

- the court will not make a minute word for word analysis of the content of an advertisement. The court will take a more broad brush approach in recognition of the way that the majority of people would consider an advertisement;¹⁷
- the court will make an allowance for puffery (exaggerated claims which are not intended to be taken seriously). It will ask would the reasonable man take the claim seriously? If the answer is yes, the claim may be a trade libel if it is unsupported by evidence;
- it follows that the use of puffery will not in itself make an advertisement dishonest or the claims made false.¹⁸ In *Timothy White v Gustav Mellin*,¹⁹ Lord Herschell LC observed that, to hold puffing actionable, 'the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was better;
- the advertisement should be considered as a whole so that, for example, constituent parts of a mail shot should be read together;²⁰
- each advertisement should be considered on its own merits. What would be understood as mere puffery by a reasonable man in an advertisement for, say, soap powder, might be taken seriously in an advertisement for a pharmaceutical product.

This point was illustrated in the case of *Ciba-Geigy plc v Parke Davis and Co Ltd*.²¹ The case concerned comparative advertising of competing drugs. The judge observed:

I have no doubt that statements such as A's flour is as good as B's or A's flour can be substituted in all recipes for B's flour are puffs and are not actionable. However, that does not mean that a similar statement would be a puff and not actionable if made in relation to a pharmaceutical product. Parliament has thought it necessary to regulate the sale of pharmaceutical products in ways

17 *Barclays Bank plc v RBS Advanta* [1996] RPC 307; and *McDonald's v Burger King* [1986] FSR 45.

18 *Vodafone v Orange* [1997] FSR 34.

19 *Timothy White v Gustav Mellin* [1895] AC 154.

20 *Barclays Bank plc v RBS Advanta* [1996] RPC 307.

21 *Ciba-Geigy plc v Parke Davis and Co Ltd* [1994] FSR 8.

which have not been applied to flour and therefore the common law could apply different standards to statements about pharmaceuticals to those made about flour.

The more specific or precise a statement is, the more likely that it will be taken to mean what it literally says as opposed to be conveying a more general message. The case of *De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd*²² concerned a pamphlet which was presented to be a scientific comparison of the claimant and the defendant's products. The court held that, because the defendant's pamphlet gave the impression that it was a scientific test, it would be likely to be taken seriously by the reasonable reader or viewer.

Some examples

Vodafone v Orange²³

The case concerned an advertising campaign mounted by Orange, which compared its operating tariff with those of certain of its competitors, including Vodafone. The advertising included the phrase: 'On average, Orange users save £20 every month.' The saving was expressed to be in comparison with Vodafone and Cellnet's equivalent tariffs. Vodafone sued Orange over the use of the comparison, alleging malicious falsehood. Jacob J observed as follows:

This is a case about advertising. The public are used to the ways of advertisers and expect a certain amount of hyperbole. In particular, the public are used to advertisers claiming the good points of a product and ignoring the others ... and the public are reasonably used to comparisons – knocking copy, as it is called in the advertising world. This is important in considering what the ordinary meaning may be. The test is whether the ordinary man would take the claim being made as one made seriously. The more precise the claim, the more it is likely to be so taken – the more general or fuzzy, the less so.

In interpreting the advertisement, the judge took its natural meaning to be that it was a statement about an average rate. The public would understand it to mean that if Orange users had been on Vodafone or Cellnet making the same use as they did on Orange they would, as a mathematical average, have had to pay £20 more a month. He held that it did not mean that if Vodafone users transferred to Orange, £20 per month would automatically be saved.

Taken objectively, the phrase was not dishonest. The cause of action failed.

22 *De Beers Abrasive Products Ltd v International General Electric Co of New York Ltd* [1975] 2 All ER 599.

23 *Vodafone v Orange* [1997] FSR 34.

McDonald's v Burger King²⁴

The claimant objected to an advertisement placed by Burger King which featured a photograph of their whopper burger with a strapline 'It's Not Just Big, Mac' and in smaller writing the words 'Unlike some burgers, it's 100% pure beef, flame grilled, never fried, with a unique choice of toppings'.

McDonald's sought an interim injunction to restrain the use of the advertisement alleging that it was a passing off and a malicious falsehood. In relation to the malicious falsehood claim, they alleged that the natural and ordinary meaning of the advertisement was that McDonald's hamburgers were not 100% pure beef, a statement which was untrue.

The judge refused to grant the injunction on the basis of the malicious falsehood claim. He did not agree that reasonable readers of the advertisement would find that it bore McDonald's pleaded meaning. Most people would not read the words in smaller print and would not even realise that it was an advertisement for Burger King. He cautioned against a close analysis of the wording, saying: 'Advertisements are not to be read as if they were some testamentary provision in a will or a clause in some agreement, with every clause being carefully considered and the words as a whole being compared.'

Malice and comparisons

A claimant in a comparative advertising claim will generally find it difficult to show malice. As we have seen, the mere fact that the comparison has damaged the claimant's sales will not in itself be sufficient. The claimant must either prove that the defendant had no positive belief in the truth of what he published or that his dominant motive in making the statement was to harm the claimant's business or was otherwise improper. The claimant often tries to show that the defendant was reckless in making the comparison. However, recklessness is difficult to establish. It cannot be equated with carelessness or negligence. The difficulties associated with proving recklessness are illustrated by the *Dyson* case,²⁵ where Electrolux complained about a graph produced by Dyson, which sought to show that the Dyson cleaner had greater suction power than Electrolux's equivalent machine. The graph referred to the results shown as being 'independent test results'; at the time that the graph was published, no independent tests had actually been carried out. The reference to the tests had not appeared in the draft version of the graph, but had been inserted into the final version. The Dyson employee who was responsible for making the change had not realised that no independent tests

²⁴ *McDonald's v Burger King* [1986] FSR 45.

²⁵ *Emaco v Dyson Appliances* (1999) *The Times*, 8 February.

had been carried out. The court held that the employee was manifestly guilty of gross negligence in not checking the reference to independent tests. After the graph had been put into circulation amongst the public, the error came to light. Dyson did not withdraw the graph. They felt confident that independent tests would verify the results shown in the graph and they subsequently commissioned the tests. In the meantime, Dyson had taken no steps to correct the inaccurate reference to independent tests.

The court held that Dyson had not acted maliciously. They had been careless, but this did not equate to recklessness.

The *Dyson* case illustrates the real difficulties that claimants can face when they seek to establish malice.

Remedies for malicious falsehood

Damages

The usual remedy in a claim for malicious falsehood is compensation for financial loss in the form of damages for losses which the claimant must prove were caused by publication of the falsehood.

It used to be a moot point whether the claimant could also recover damages for distress and injury to feelings caused by the falsehood. In the 1967 case of *Fielding v Variety Inc*,²⁶ Lord Denning MR expressed the view that claimants could only recover for their probable money loss and not their injured feelings.

However, in the more recent case of *Khodaporast v Shad*,²⁷ the Court of Appeal awarded damages for distress as aggravated damages.²⁸ It was stressed that, in order to recover such damages, the claimant must as a precondition be able to show that it has suffered pecuniary loss as a natural and direct result of the publication.²⁹ In other words, a claimant may not recover aggravated damages, unless it can satisfy all three elements of the cause of action described above. If the claimant seeks aggravated damages, it must plead them in its claim form and statement of case.

Injunction

A final injunction will normally be awarded at trial to restrain further publication of the falsehood. Sometimes, the defendant will give an undertaking in lieu of the undertaking. Breach of the injunction or of an

26 *Fielding v Variety Inc* [1967] 2 All ER 497.

27 *Khodaporast v Shad* [2000] All ER (D) 21 (provided that the claimant pleads them).

28 For more detail on aggravated damages, see Chapter 2.

29 Or a likelihood of such loss under the Defamation Act 1952, s 3.

undertaking to the court is likely to be a contempt of court potentially punishable by a fine or imprisonment.

Interim injunctions: prior restraint

Often, claimants in malicious falsehood cases are anxious to restrain repetition of the alleged falsehood as a matter of urgency and will seek an interim injunction to restrain repetition during the period to trial. In what circumstances will the claimant be able to obtain such relief?

The cases on this point are not altogether clear and they pre-date the coming into force of the Human Rights Act 1998. The following guidance can be extracted:

- in most instances, an interim injunction to restrain publication of the falsehood will be an interference with the defendant's freedom of expression. Where the statement in question is not obviously untrue or where the defendant indicates on oath that it is intending to prove the truth of the statement at trial, the rule in *Bonnard v Perryman*³⁰ will apply. This means that no injunction ought to be granted unless the court is satisfied that the defendant will not be able to prove the truth of the statement;³¹
- in the case of *Microdata v Rivendale*,³² the Court of Appeal indicated that the rule in *Bonnard v Perryman* ought not to be extended any further than is necessary to preserve 'the fundamental right' of free speech. The mere fact that a claim brought under one cause of action could also have been framed in defamation will not mean that the rule in *Bonnard v Perryman* should automatically apply if, in reality, the case is not a defamation case. The claim in the *Microdata* case was for interference with contractual relations. The court held that the rule in *Bonnard v Perryman* ought not to apply simply because the claimant could have reframed the claim in defamation if it had wanted to. Griffiths LJ observed:

Although the claimant might have framed his cause of action in defamation he has in fact a different, and separate, cause of action on which he chooses to rely. In those circumstances the court weighs in the balance the right of free speech against the right asserted by the claimant in the alternative cause of action. If the court were to conclude that though the claimant had framed his claim in a cause of action other than defamation, but nevertheless his principal purpose was to seek damages for defamation, the court will refuse interim relief. If, on the other hand, the court is satisfied that there is some other serious interest to be

30 *Bonnard v Perryman* [1891] 2 Ch 269.

31 *Boscobell Paints v Bigg* [1975] FSR 42.

32 *Microdata v Rivendale* (1984) unreported, 11 September.

protected, such as confidentiality, and that outweighs considerations of free speech, the court will grant an injunction.

In *Consorzio del Prosciutto di Parma v Marks and Spencer*,³³ Morritt J followed *Microdata*, holding that a claim brought in passing off was not subject to the rule in *Bonnard v Perryman* simply because the grant of an interim injunction might interfere with the defendant's freedom of speech. In the malicious falsehood case, *Compaq v Dell*,³⁴ Aldous J followed *Microdata* and the *Parma Ham* case. He held the rule in *Bonnard v Perryman* was not applicable in circumstances where the defendant's case was a denial that they had made the alleged representations and there had been no attempt to prove the truth of the alleged falsehoods.

If the rule in Bonnard v Perryman is not applicable, what test should be applied?

Both Morritt J in the *Parma Ham* case and Aldous J in *Compaq v Dell* applied the *American Cyanamid v Ethicon* test to decide whether an interim injunction ought to be granted.³⁵ When applying the test, the fact that an interim injunction would interfere with the defendant's freedom of expression was a factor to be taken into account in the balance of convenience.³⁶ In *Macmillan Magazines v RCN Publishing*,³⁷ Neuberger J held that, where on an application for interim relief the balance of justice favoured neither party, the fact that the granting of relief would effectively interfere with the defendant's right of free speech meant the injunction should be refused. In both the *Compaq* and *Parma Ham* cases an interim injunction was granted, leading one to conclude that although interference with freedom of speech is acknowledged to be a factor to take into account in deciding whether or not to grant an interim injunction, it will not necessarily be the determining factor. This is also implicit in the extract from Griffiths LJ's judgment (cited above) where he refers to interests which might outweigh considerations of free speech in a particular case.

Following the coming into force of the Human Rights Act 1998, the *American Cyanamid* test will no longer be appropriate in deciding whether to grant an interim injunction in cases involving freedom of expression issues.³⁸ Under the Act, the claimant must demonstrate a likelihood of obtaining relief at trial and consideration must also be given to the importance of the right to freedom of expression (which includes the right to receive as well as to impart information).

33 *Consorzio del Prosciutto di Parma v Marks and Spencer* [1991] RPC 351.

34 *Compaq v Dell* [1992] FSR 93.

35 *American Cyanamid v Ethicon* (1975) AC 396, analysed in Chapter 2.

36 Discussed in Chapter 2.

37 *Macmillan Magazines v RCN Publishing* [1998] FSR 9.

38 Human Rights Act 1998, s 12 – see Chapter 1 for more detail.

But the Act may not usher in a brave new world in relation to the commercial information which is typically at issue in malicious falsehood cases. The European Court of Human Rights allows Contracting States a wide margin of appreciation in relation to commercial information,³⁹ especially where the information involves no public health or safety issues. It is therefore possible that, given the fundamental preference of the courts for safeguarding the commercial interests of the claimant, rather than the broader public interest in freedom of expression, the position may not be greatly changed by the Act where commercial information is concerned.

³⁹ See, eg, *Muller v Switzerland* (1991) 13 EHRR 212.

