

# When the Boot is on the Other Leg

**With a corporation's right to an action for defamation in NSW removed, John Corker and Jessica Morath examine the alternative tort of injurious falsehood in the light of the recent High Court decision of Roberts v Bass.**

New section 8A of the *Defamation Amendment Act 1974* (NSW) denies corporations with ten or more employees a right of action in defamation. It commenced operation on 17 February 2003.

This article examines the possibilities and difficulties associated with a defamed corporation taking an action for the alternative tort of injurious falsehood of which malice is a key element.

Malice in defamation law has been recently examined by the High Court in the decision of *Roberts v Bass* [2002] HCA 57 and is a common component of the law of defamation and injurious falsehood. In *Spring v Guardian Assurance plc* [1993] 2 All ER 273 at 288, the English Court of Appeal stated: "In our judgment, the test of what constitutes malice in the tort of malicious falsehood is the same as the test in relation to the torts of libel and slander."

## **INJURIOUS OR MALICIOUS FALSEHOOD**

The actionable wrong of injurious or malicious falsehood is the publication of a false statement made maliciously, and resulting in actual damage to the plaintiff (Tobin & Sexton, *Australian Defamation Law and Practice*).

However, an action in injurious falsehood is very different to an action in defamation law:

*"These two actions must be kept distinct. They have very different consequences. In libel the law presumes everything against the writer: the words are presumed to be false and malicious: and it is for the writer to prove, if he can, that the words were true and the comment was fair, or otherwise make good his defence. But in*

*malicious falsehood the boot is on the other leg. The writer is presumed to be acting honestly and without malice: and it is for the plaintiff to prove, if he can, that the words were written by the defendant falsely and maliciously and were calculated to damage the plaintiff in his calling"* (*Drummond-Jackson v British Medical Association* [1970] 1 WLR 689 at 694) [our emphasis].

Unlike defamation, injurious falsehood is concerned with disparagement of the plaintiff's property, the plaintiff's title to property and the plaintiff's financial or business interests, and not reputation.

Also, unlike defamation, the false statement may be made about a third party. In *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1976) 134 CLR 1 at 23, Mason J gave the example of a newspaper report that a particular model of car was unsafe. His Honour said that such a report was "likely to injure the distributors of the car in their business" as well as the car manufacturer. The statement, if untrue and made maliciously, would be actionable in injurious falsehood by the distributors, independent of the car manufacturers, if they could prove actual loss.

To establish injurious falsehood, a plaintiff must prove that a published matter:

- was false;
- was malicious; and
- caused actual loss.

### **Falsity**

The plaintiff must prove that the statement made by the defendant was false. Exaggeration, puffery or

hyperbole, for example, by means of an advertising campaign in favour of a defendant's products over a plaintiff's products, does not necessarily give rise to a cause of action in injurious falsehood.

### **Malice**

The plaintiff must prove that the statement made by the defendant was malicious. Malice has been repeatedly defined over the years to include the following.

*"Malice...means any corrupt motive, any wrong motive, or any departure from duty."* (*Turnbull v Bird* (1861) 2 F & F 508 per Earl CJ at 524; 175 ER 1163).

*"Malice means making use of the occasion for some indirect purpose."* (*Browne v Dunn* (1893) 6 R 67 per Lord Herschell at 72).

*"Malice in common acceptance, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse."* (*Bromage v Prosser* (1825) 4 B & C 255; 107 ER 1051 per Bayley J, cited in *Clark v Molyneux* (1877) 3 QBD 237 per Brett LJ at 247).

*"Any indirect motive, other than a sense of duty, is what the law calls malice."* (*Dickson v Earl of Wilton* (1859) 1 F & F 419 per Lord Campbell at 427; 175 ER 790).

Tobin and Sexton, in *Australian Defamation Law and Practice*, note four common states of mind relevant to an understanding of malice:

- knowledge that the statement is untrue;
- recklessness as to its truth;

- honest belief as to its truth; or
- intention to injure the plaintiff's business.

Honest belief in the truth of a statement will rebut an inference of malice in almost all circumstances. However, Lord Diplock noted, in *Horrocks v Lowe* [1975] AC 135 at 150, that where it can be proved that the defendant's dominant motive is to "give vent to his personal spite or ill-will", then even the honest belief in the truth of what is published may not be sufficient to negate a finding of malice.

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### ROBERTS V BASS

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The latest interpretation of malice by the High Court in *Roberts v Bass* rejects the long-established principle that a statement made with knowledge of falsity is malicious. Their Honours held that it is the motive or purpose that is ultimately decisive, not the defendant's belief in the truth of the matter.

Departing from earlier authorities, such as *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 51 and *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 102-103, ill-will, knowledge of falsity and recklessness are not different kinds of malice and thus conclusive in and of themselves. Instead, they are all evidence which goes towards proving that publication of the false statement was actuated by an improper motive.

#### Difficulties in proving malice

Take the example of a journalist who publishes an article disparaging a corporation's business practices. To establish malice for injurious falsehood, the corporation must prove that the journalist was actuated by an improper motive in publishing the article. To prove the existence of an improper motive, consideration may be given to whether there was any ill-will, bias, prejudice, knowledge of falsity or recklessness on the part of the journalist. If it could be proved that the publication of the false statement was actuated by the journalist's ill-will, bias or prejudice, this is likely to suggest the existence of an improper motive. However, it may be difficult to establish evidence of ill-

will, bias or prejudice motivating the publication of that particular false statement. Alternatively, if it could be proved that the journalist knew the statement was false, this would almost certainly infer the existence an improper motive. Such a finding would be consistent with the requirement that the conduct of a publisher in the media industry, in defamation law, must be reasonable. The Privy Council, in *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 360, stated:

*"A newspaper with a wide circulation that publishes defamatory comments on untrue facts will in the ordinary course of events have no light task to satisfy a judge that it was reasonable to do so. Those in public life must have broad backs and be prepared to accept harsh criticism but they are at least entitled to expect that care should be taken to check that the facts upon which such criticism is based are true."*

Therefore, if knowledge of falsity could be proved, it would be very difficult for the journalist to rebut the inference of an improper motive. However, it is likely to be very difficult for the corporation to prove that the journalist knew the statement was false. Alternatively, if it could be proved that the journalist was reckless as to the truth of the statement, this, in combination with other circumstances, may provide enough evidence to establish the existence of an improper motive.

#### Actual Loss

To be successful, the plaintiff must also prove that actual loss was the natural and probable consequence of the publication of the false statement. The most obvious example of actual loss is loss of money. Actual loss may also include general loss of business (*Ratcliffe v Evans* [1892] QB 524), yet does not include damages for injury to feelings.

Actual loss must be specifically proved. In *Ratcliffe v Evans*, the English Court of Appeal stated (at 533):

*"As much certainty and particularity must be insisted on,*

*both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done."*

However, the fact that a plaintiff can not assess the loss with certainty does not mean that he or she cannot prove actual damage. That is, provided actual loss can be proved, it is not essential for the plaintiff to point to a particular customer or the loss of a particular contract or order to prove that loss.

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### CONCLUSION

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As of 17 February 2003, only corporations with fewer than 10 employees and no subsidiaries have a right of action in defamation in NSW. Corporations which do not satisfy this description may still take action in other Australian States and Territories for defamation. Individual directors may still take actions for defamation if personally libelled but if injunctive action in NSW is required corporations may have to consider turning to the tort of injurious falsehood.

An action in injurious falsehood is very different to an action in defamation. The primary obstacle for corporations bringing an action in injurious falsehood is onus of proof. It is the corporation's burden to prove that the statement was published, was false, was malicious and caused actual damage. Having regard to the recent statement of the law from the High Court in *Roberts v Bass* that it is the motive or purpose that is ultimately decisive of whether malice is made out, it is likely to be rather difficult for a corporation to provide evidence of a defendant's improper motive or malicious state of mind. Invariably the evidence of such a motive is inferential at best. A secondary obstacle is, of course, the need to prove actual loss.

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