

Review

Commercial & Dispute Resolution



Malicious Falsehood

Where a false statement is made about an individual or business, it may be possible to make a claim on the basis of malicious falsehood, where more common causes of action, such as defamation, are not appropriate. For example, it is becoming increasingly common to use malicious falsehood as a cause of action to prevent disparaging statements about a company's goods or services being made by a competitor in a comparative advertisement.

What are the requirements for malicious falsehood?

To succeed in an action for malicious falsehood, a claimant needs to prove that:

- the defendant published to third parties words which are false;
- that they refer to the claimant or its property or its business;
- that they were published maliciously; and
- that special damage has followed as a direct and natural result of their publication.

Malice will be inferred if it is proved that the words were calculated to produce damage and that the Defendant knew when he published the words that they were false or was reckless as to whether they were false or not. For example, if the defendant did not believe what was said or did not care whether or not it was true then this may be enough to infer malice.

When can a claim for malicious falsehood be brought?

A claim for malicious falsehood must be brought within one year from date of publication of the offending statement.

It is becoming increasingly common to use malicious falsehood as a cause of action.

Changing requirements?

In *Marathon Mutual Ltd and another v Waters and another*¹, Marathon was a mutual protection fund specialising in insuring care homes which was managed by Regis (the second defendant) who took a management fee of 11.5% of Marathon's income. A director of Marathon resigned and transferred to Primecare (the second defendant) a competitor of Marathon. Subsequently Primecare contacted a number of Marathon's customers and allegedly made various disparaging remarks about Marathon. Marathon brought proceedings against both the individual director and Primecare for malicious falsehood.

Despite the fact that no mention of Regis had been made in Primecare's communications, Regis also sued for malicious falsehood, arguing that its income was directly linked to the income of the companies it managed, including Marathon. Hence when Marathon suffered damage by way of a fall in business as a result of the words complained of, Regis also suffered damage in the form of reduced income.

The court held that, for a malicious falsehood claim, there must be some reference, direct or indirect, in the words complained of to the claimant or his/her business, property or other economic interest, although it was not necessary that the words caused the recipients to actually identify the claimant. Even though Primecare's communications did not refer to Regis, Regis could still proceed with its claim. The reason being that the essential subject matter of Regis' business was the management of Marathon. As such, the interests of Regis and Marathon were so closely connected that any attack on Marathon would also be an attack on Regis and would sufficiently refer to Regis' business.

Comment

This case appears to have expanded the requirement that the words complained of must 'refer to the claimant'. It seems that a business will be able to bring a claim in malicious falsehood in respect of words that do not identify it or refer to it at all provided that its interests are so closely linked with the business that is the subject of the words that the words, by extension, also 'refer' to it.

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¹*Marathon Mutual Ltd and another v Waters and another* [2009] EWHC 1931

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