Misrepresentation and the Liability of Universities

Norman Katter

Queensland University of Technology

Abstract

This article focuses on misrepresentation and the exposure of universities to legal liability for innocent, fraudulent or negligent statements by academics or administrative staff made to students or prospective students.

A greater public awareness of consumer rights through media coverage of damage awards, speculative actions by lawyers, and a changed perception of universities by students has led to litigation' against universities where defects in the provision of services have occurred.

This article seeks to highlight the importance of oral and written statements made by universities and staff and the legal consequences resultant on inaccurate or careless misrepresentations

Introduction

Universities in the 21st century are no longer cloistered sanctuaries but are perceived by students as business enterprises providing professional services for a fee (whether paid to the university or government). This attitudinal change has been reflected in some universities by a proposed identity of .com rather than .edu and the terminology of client or consumer rather than student.

Inevitably, this changed perception is accompanied by a focus on consumer rights and an expectation that services (delivery of tertiary education) will be of a professional standard. A further by- product is that students within the tertiary sector are prepared to pursue their rights into the courts if necessary, where the services are substandard or inadequate. This area of the law has been described as 'educational malpractice'[2] or 'professional error'[3].

Academic and administrative staff within universities need to be aware of their exposure to potential litigation and the significant legal obligations relating to the accuracy of their written and oral statements.

Misrepresentation- What is it!

The classic statement of a misrepresentation involves a false (untrue) statement of fact which induces the person to whom the statement is directed (representee) to take a course of conduct (for example entry into a contract)[4] .

If the maker of the statement knew that the statement was false at the time of making the statement or made the statement recklessly, not caring whether it was true or false, then the statement may qualify as a fraudulent misrepresentation.[5]

If the maker of the statement believed the statement was true at the time of making the statement, this would be an innocent misrepresentation.[6] An innocent misrepresentation may involve negligence if the inaccurate statement was made carelessly.[7]

Misrepresentation may be verbal or written statements and may take the form of information or advice. The law does not draw a distinction between information or advice[8] and if either is fraudulent or negligent or even innocently inaccurate, legal liability may arise.

Potential Misrepresentations in the Delivery of Higher Education

Inaccurate and misleading statements verbal or written, made or provided to students or prospective students, whether in the form of advice or information may provide a cause of action against the university (as a corporate entity) and as well against the person making the statement.[9]

A misrepresentation may be made to a student or prospective student on a one to one basis[10] or the misrepresentation may be made to a class of students[11] or published for the information of existing or prospective students.[12]

Misrepresentations to Prospective Students

Inaccurate or misleading statements may be made to prospective students. This is particularly so in the competitive environment in which universities operate and the financial rewards associated with attracting student numbers domestically and internationally. This is not to suggest that universities are engaging in fraudulent statements but the risk of overstatement of the university's resources and capabilities in the delivery of courses may be exacerbated by the incentive to attract student numbers.

Misrepresentations may concern recognition or standing of a university's qualifications by professional bodies or other universities; time taken for students to complete courses; attrition rates; qualifications and experience of academic staff; availability of academic assistance or supervision; size of classes; details of assessments or timetables; grading in the unit[13]. Untrue or misleading statements concerning these matters may provide a foundation for litigation against the university.

Some representations made to prospective students have led to litigation. In *Fennell* v *Australian National University*[14] before the Federal Court of Australia, the applicant claimed among other things, that he was induced by false representations to enrol in the Master of Business Administration (Managing Business in Asia) Program offered by the Australian National University. The fee for the program was at the time $25,000. The applicant's case was that ANU represented to him that the fourth semester of the MBA course consisted of a twelve week supervised work placement in Asia and that the ANU would arrange a work placement in Asia for him in that semester. The latter representation was said to have been made in an advertisement published by the ANU in the *Age* newspaper in Melbourne and was reinforced in an interview between a professor and the applicant. The allegation of the applicant was that the representation was false because the ANU did not intend to provide the applicant with a work placement in Asia for the fourth semester of the course, had no reasonable grounds for representing that they could do so and, in the event, did not provide him with such a placement. Both the university and the professor were sued for the alleged misrepresentation. It was alleged the misrepresentation was a term of a collateral contract and that the university had breached this term. The applicant also claimed damages under the Trade Practices Act for misleading and deceptive conduct (ss.52,75B,and 82 TPA).

Sackville. J who heard the case in the Federal Court commented that:

> This case might be said to be a by-product of a relatively new phenomenon in Australian tertiary education, namely competition among universities for full fee-paying graduate students[15]

Sackville. J, found that the advertisement placed in the *'Age'* was ambiguous and careless and could have implied to an enrolling student that the university would arrange a work placement with a leading company for every student admitted to the program.

Sackville J however, found that any such confusion raised by the advertisement was clarified in the interview between the professor and the student and that the student should have been aware prior to enrolment, that it was the student's responsibility to organise their own placement.

Sackville. J, consequently dismissed the application for damages based on misleading and deceptive conduct (ss.52,75B, and 82 Trade Practices Act) and also dismissed the application for breach of contract.

While the ultimate outcome for the university was favourable in this case, the potential for a successful claim based on the negligent advertisement to prospective students raises the need for care in the drafting of promotional materials published by universities.

In *Ogawa* v *University of Melbourne*[16], an enrolling PhD student claimed for a misrepresentation made to her about the manner in which her studies would be supervised and resourced. She claimed in her application to the court that her candidature for PhD was withdrawn or cancelled by the University and that this resulted because the supervision that she was given was inadequate.

Her claims for damages arising from misrepresentation, were based on misleading and deceptive conduct under s52 of the Trade Practices Act; unconscionable conduct under s51AB of the Trade Practices Act; breach of natural justice; breach of contract; and defamation.

While the pleadings were struck out as failing to disclose a cause of action, the court permitted the applicant to file a fresh statement of claim as she was unrepresented.

This case also highlights a range of potential causes of action arising from misrepresentations and the willingness of students to pursue all potential rights available against the university.

In *Grant and Ors v Victoria University of Wellington*[17] a claim was made by a postgraduate student for damages based on alleged misrepresentations contained in a prospectus provided to the student, prior to enrolling in the postgraduate course. The claim also alleged breaches of implied terms in the contract between the student and the University.

Such a prospectus was provided to prospective postgraduate students by the University and was aimed at attracting postgraduate enrolments. It was pleaded by the applicant that the misrepresentations formed implied terms of the contract between the university and the student upon enrolment The alleged implied terms based on the misrepresentations in the prospectus were set out in the report of the judgment of Ellis.J, as follows:[18]

(a) The Course would provide the plaintiffs with a thorough knowledge and understanding of environmental issues.

(b) The Course would be of a reasonable Masters degree standard.

(c) There would be a range of optional theory papers specifically designed for the Course.

(d) The practicum component of the Course would be adequately planned, resourced, and supervised.

(e) The thesis component of the Course would be adequately supervised.

(f) Financial resources allocated to the Course would be adequate and of a level to be reasonably expected of a Masters degree course.

It was alleged the university breached these implied terms since,

(a) The Course did not provide the plaintiffs with a thorough knowledge and understanding of the areas outlined.

(b) No environmental economics paper was offered by the defendant.

(c) The Course was not of a reasonable Masters degree standard.

(d) There were no optional theory papers specifically designed for the Course.

(e) The practicum component of the Course was inadequately planned, under resourced, and lacked proper supervision.

(f) Supervision of the thesis component of the Course was inadequate and of a poor standard.

(g) The financial resources allocated to the Course were inadequate, in that they were not at a level that could reasonably be expected of a Masters degree course.

The damages claimed in the action were $345,482 for tuition fees, loss of employment opportunities and general damages.[19]

The Victoria University of Wellington sought to have the statement of claim struck out on the basis of not disclosing an arguable case. The court dismissed the university's application to strike out, holding that there was an arguable case based on the traditional areas for adjudication by the courts such as misrepresentation, breach of contract, tort and judicial review.

This case focuses on the risk to universities of possible misrepresentations in a prospectus outlining resources and benefits provided to students in a particular course, when those resources etc. may not ultimately be provided.

Causes of Action

Breach of Contract

A breach of contract action may arise from an implied term in the contract between university and student that the services to be provided by the university will be provided with all reasonable care.[20] A clear misrepresentation made to an enrolled student that has caused some disadvantage or loss (for example caused exclusion from a course or failure, or additional fees, or additional time to complete a course) would arguably breach this implied term and provide a legal ground to sue for damages.

Furthermore, a misrepresentation may be found to have formed directly, a term of the contract between student and university and thereby providing the student with remedies for breach of contract such as damages and/or discharging the contract.[21] For example, a

misrepresentation in a course prospectus published by a university may be found to be, not merely an inducing statement, but to be of such importance that it should be treated as promissory (term of the contract).

Rescission of Contract for Misrepresentation

A misrepresentation whether innocent or fraudulent that has induced a prospective student to enrol in a course at the university would provide a basis for the student to seek rescission[22] of the contract with the university, thereby recovering any fees or outlays. Such a remedy is unlikely to be available if the student has attended a significant number of classes prior to seeking rescission. However, a misrepresentation made to a prospective student prior to enrolment may, as outlined below, provide a tort action for damages

Damages in Tort for Deceit or Negligent Mis-statement

A fraudulent misrepresentation provides the representee with an action for damages for the tort of deceit.[23] In the university context a deliberately fraudulent misrepresentation is far less likely than an innocent misrepresentation. The significant risk, however, is that while no attempt is made to deliberately mislead, error or carelessness is involved in the misrepresentation, thereby providing a legal ground to sue for damages for the tort of negligence.[24] An untrue or misleading statement is negligently made if the maker of the statement had no reasonable grounds on which to base the statement and had not taken reasonable care in investigating the accuracy of that statement.[25]

Both academic and administrative staff within a university are exposed to the potential risk of negligent advice or information being provided to potential or enrolled students.

Statutory Cause of Action for Damages

While the application to universities of consumer protection legislation is yet to receive detailed analysis by the courts, there would seem to be no reluctance by courts, so far, to entertain claims based on 'misleading and deceptive conduct' or 'false representation' provisions. These provisions are found in the Trade Practices Act (Cwth)[26] and equivalent provisions are contained in Fair Trading Acts[27] in the States. Where

damage is caused through contravention of these provisions a statutory cause of action to recover such damage is provided in the legislation.[28]

Additionally, some States[29] and Territories[30] have legislation specifically targeting misrepresentation and providing a statutory claim for damages to the representee. The above statutes go beyond the common law by providing a remedy in damages for a purely innocent misrepresentation which is neither negligent nor fraudulent.[31]

Potential Heads of Damage for Breach of Contract

What heads of damage may potentially be claimed for a misrepresentation that has formed a term of the contract between university and student? The principle underlying damages in this context is that such damage is compensatory or remedial and is not punitive (punish the offender) nor exemplary. Fundamentally, the claimant should be restored by the award of damage, to the position they would have been in had the breach not occurred.

Generally a plaintiff is entitled to be fully compensated for the losses sustained from the defendant's breach, subject only to principles of remoteness of damage and the plaintiff's duty to mitigate the loss. Potential losses to a prospective student might include recovery of fees where a student would not have enrolled in a course but for the mis-statement. Additionally, if a student was induced by the mis-statement to resign from employment or bypassed a career opportunity to undertake tertiary studies, then such lost income and lost opportunity may be compensated. For example, where there has been a mis-statement by the university about recognition of its degrees or certificates by professional bodies or other universities, a student may claim compensation if they establish that they would not have enrolled had they been made aware of the true position. Another example may involve a misrepresentation made to a full fee- paying research student about the availability of supervision and the consequential time taken to complete the course. The student may claim for the additional fees incurred on the ground that they would have enrolled in a shorter course at another university if the misrepresentation had not been made.

An inaccurate statement about the timetable for classes or assessments may also ground a claim for damages where, for example, a part time student is forced to forego income from planned work hours due to the unexpected changed times for classes or assessments. This is not intended as an exhaustive list of possible heads of damage but is

indicative of the types of claims that may arise from misstatements made to students by academic or administrative staff.

Conclusion

Controlling the risk of inaccurate and misleading statements in the delivery of tertiary education requires more than a plea for care by academic and administrative staff. Risk management requires processes for ensuring that statements are accurate and will be adhered to. The legal consequences flowing from misrepresentations are significant providing a basis for litigation not only against the university, but also against the individual making the statement.[32]

While liability insurance held by universities may ultimately provide some financial solace in the event of litigation against the university or its staff, the potential harm to the status of the university through adverse publicity surrounding the litigation should not be underestimated.

The use by the university of exclusion clauses or disclaimers in relation to the statements of the university or staff, while superficially attractive, may offer no legal protection where the university is the sole source of such information, and the professional ethics of attempting to negate liability for unprofessional conduct is to say the least questionable.

While there is unlikely to be a flood of litigation against universities for misleading statements, the changed persona of universities and the commercial environment in which they now compete has led to a more demanding attitude by students to the provision of services and a willingness to litigate, if necessary, to rectify or remedy defects in the delivery of those services.

NOTES

1. See eg *Ogawa* v *University of Melbourne* [2004] FMCA 515; *Fennell* v *Australian National University* [1999] FCA 989; *Grant and Ors* v *Victoria university of Wellington* per Ellis J CP 312/96 High Court Wellington [2003] NZAR 185; 1997NZAR Lexis 62

2. See the use of this terminology by IM Ramsay, 'Educational Negligence and the Legalisation of Education' (1988) 11 UNSW Law Journal 184; E Thompson 'In a Class Apart?' (1985) 1 Qld Institute of Technology LJ 85; P Williams 'Suing for Negligent Teaching: An Australian Perspective' (1996) 25 Journal of Law and Education 281; TE Loscalzo 'Liability for Malpractice in Education' (1985) 14 Journal of Law and Education 595.
3. For use of this terminology see B Thompson 'In a Class Apart?' (1985) 1 Qld Institute of Technology LJ 85
4. *Redgrave* v *Hurd* (1881) 20 ChD 1; *Leighton Properties* v *Hurley* [1984] 2 Qd R 534
5. *Derry* v *Peek* (1889) 14 AC 337; *Edington* v *Fitzmaurice* (1885) 29 ChD 459
6. *Leaf* v *International Galleries* [1950] 2 KB 86; *Redgrave* v *Hurd* (1881) 20 ChD 1
7. *Esanda Finance Corporation Ltd* v *Peat Marwick Hungerfords* (1997) 188 CLR 241; *Mutual Life and Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 565; *Shaddock & Associates Pty Ltd v Parramatta City Council* [No. 1] (1981 150 CLR 225 at 232-234.
8. *Mutual Life and Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 565; *Shaddock & Associates Pty Ltd v Parramatta City Council* [No. 1] (1981 150 CLR 225 at 232-234
9. See N. Katter 'Negligence in the Delivery of Higher Education' (2002) 40 Journal of Educational Administration 390
10. *Chandler v Crane Christmas & Co.* [1951] 1 KB 164; *Hendley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Mutual Life and Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556; *Shaddock & Associates Pty Ltd v Parramatta City Council* (No. 1) (1981) 150 CLR 225; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.
11. *San Sebastion Pty Ltd v Minister Administering Environmental Planning Assessment Act 1979 (New South Wales)* (1986) 162 CLR 340; *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Edgeworth Construction n N D Lea & Associates* [1993] 4 FCR 206; *Meates v Attorney-General* [1983] NZLR 308.
12. *Fennell v Australian National University* [1999] FCA 989 (22nd July, 1999); *Meates v Attorney- General* [1983] NZLR 308.
13. N. Katter 'Negligence in the Delivery of Higher Education' (2002) 40 Journal of Educational Administration' 390
14. [1999] FCA 989
15. Ibid. at 3
16. [2004] FMCA 515
17. CP 312/96 High Court Wellington [2003] NZAR 185; 1997 NZAR Lexis 62
18. Ibid
19. Ibid
20. *Astley v Austrust Ltd* [1999] HCA 6 (4th March, 1999) at 40; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.
21. *Kramer* v *McMahon* [1970] 1 NSWLR 194; *Alatti* v *Kruger* (1955) 94 CLR 216
22. *Alati* v *Kruger* (1955) 94 CLR 216; *Car and Universal Finance Co Ltd* v *Cardwell* [1965] 1 QB 525
23. *Edington* v *Fitzmaurice* (1885) 29 ChD 459; *Derry* v *Peek* (1889) 14 AC 337
24. *Esanda Finance Corporation Ltd* v *Peat* Marwick *Hungerfords* (1997) 188 CLR 241
25. *Mutual Life and Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 561; *Shaddock & Associates Pty Ltd v Parramatta City Council [No. 1]* (1981) 150 CLR 225 at 233
26. s 52,53 and 82
27. See eg s 38 and 99 Fair Trading Act 1989 (Qld)
28. Trade Practices Act s 82;

29. See Misrepresentation Act 1972 (SA)
30. See Civil Law (Wrongs) Act 2002 (ACT)
31. *Demagogue Pty Ltd* v *Ramensky* (1992) 39 FCR 31 at 38
32. *Ogawa* v *University of Melbourne* [2004] FMCA 515; *Fennell* v *Australian National University* [1999] FCA 989; *Grant and Ors* v *Victoria University of Wellington* (1997) per Ellis J, CP 312/96 High Court Wellington [2003] NZAR 185; 1997 NZAR Lexis 62