

LAW FOR BUSINESS STUDENTS

TWELFTH EDITION



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Smith v Hughes (1871)

A racehorse trainer assumed that he was buying old oats, when actually they were new, but he did not ask the seller their age.

Held: no misrepresentation had occurred. The seller had said nothing about the age of the oats and it was irrelevant that he was aware of the importance of this to the buyer.

Liability for failure to disclose information may arise, however, in any of the following circumstances:

- 1 *Half-truths.* A statement may be true as it stands, but still mislead because it is incomplete.

Nottingham Patent Brick & Tile Co. Ltd v Butler (1886)

A solicitor who, without checking, told the buyer of some land that he 'did not know' of any restrictive covenants affecting it, was liable for misrepresentation.

Similarly, misrepresentation was held to have occurred in *Dimmock v Hallett* (1866), where the seller described the land as occupied by certain named tenants, but did not also tell the buyer that they had given notice.

- 2 Circumstances change between making the statement and acceptance.

With v O'Flanagan (1936, CA)

A doctor, who was selling his practice, gave the buyer correct information about its value. However, before the buyer notified acceptance the value had considerably diminished, as many patients went elsewhere when the doctor became ill.

Held: his failure to notify the buyer of the drop in value amounted to a misrepresentation as his original statement was no longer true and the buyer should have been notified of this.

Fiduciary relationship:

a legal relationship with a very high degree of trust by one party in another's expertise, knowledge etc., giving that other party the capacity to influence their decisions.

- 3 A *fiduciary relationship* exists between the parties. A **fiduciary relationship**, involving a high degree of trust between the parties, exists, for example, between partners, and between solicitor and client. It is also relevant to insurance contracts, which are voidable unless full disclosure is made of all material facts, meaning those 'which would influence the judgment of a prudent insurer' (Marine Insurance Act 1906). For example, in a contract for carriage of goods by sea, the fact that goods are to be transported on deck, not in the hold, would be material (*Hood v West End Motor Car Packing* (1917)).

It is irrelevant that the failure to disclose was not careless or intended to deceive. Some people have found that they were deprived of insurance cover because they quite innocently failed to reveal that their cars had modified features (e.g. alloy wheels and sun roof) that were not standard on a particular model.

The statement acted as a material inducement

The misrepresentation must be a sufficiently important influence on the misrepresentee. It must be enough to incline a reasonable person to enter the contract, but it need not be the only reason for them doing so.

Vahey v Kenyon (2013, CA)

Mr Vahey was negotiating buying land from Mr Kenyon and asked him about its flooding history, because it was near a flood plain. Mr Kenyon said that, despite local flooding 30 years previously, his land had not been affected. Later, when the house was found to be damp, Mr Kenyon admitted, after further questioning, that the stream which flowed through the grounds occasionally burst its banks but had never flooded the house. The sale went ahead subject to a £10,000 discount. Soon after completion the property was flooded and Mr Vahey discovered that the garage and house had been flooded some years before, during Mr Kenyon's occupancy.

Held: the contract was voidable for fraudulent misrepresentation. It was clear from his enquiries that the issue of flooding concerned Mr Vahey and that the reassurances from Mr Kenyon had been material in getting him to enter the contract; otherwise he would have sought to negotiate a higher discount.

Evidence that a misrepresentee was prepared to take unreasonable risks in pursuit of large profits may incline the court to discount the weight of the misrepresentor's statement. In *Hurst & Others v Hone & Others* (2010) a well-known former footballer was persuaded by the defendants' fraudulent statements suggesting huge financial gain in return for a substantial loan to further a building project in Spain. He lost all his money but it was held that the misrepresentations had not materially induced him. The prospect of quick and substantial profits had encouraged him to participate in the deal and he had been prepared to ignore third party advice about the risks.

Where the misrepresentor has technical knowledge the court is inclined in favour of a consumer who trusts in that, especially where third party advice is unlikely to be sought, as in the following case.

Webster & Others v Liddington & Others [2014] EWCA

The claimants were all women who had been treated with a skin-rejuvenating product by the defendants who were clinics using a particular manufactured product.

Prior to buying the treatment, the claimants had all been given information brochures by the clinic they were contracting with. Some brochures had been produced by the manufacturer, others composed by the clinic based on the manufacturer's information. These all stressed the efficacy of the product due to its natural purity and claimed that, unlike Botox and similar treatments, it did not contain non-natural substances and that it contained only the patient's skin. The product was an injectate based on a small sample of the patients' skin which was sent by the clinic to the manufacturer. Bovine products were used in the process of creating the injectate; traces of these products sometimes remained, which in 3–10 per cent of cases could cause an allergic reaction. None of this information appeared in the brochures.

The claimants sued the clinics for misrepresentation. None had suffered ill effects but all wanted damages for having been sold an adulterated product of a different quality from what they had been led to believe.

Held: the defendants were liable for misrepresentation since they were liable for the contents of all the brochures which they had distributed and thereby implied were an accurate, safe, reliable information source for patients. The patients were consumers who trusted in the superior specialist knowledge of the clinicians. The defendants had not issued any disclaimer for inaccuracies in the brochures. The misrepresentation about the content of the injectate was material. Had the patients known about the bovine product content and the medical risk they might well have decided against buying the treatment.

The misrepresentee must both *know* of the statement and *rely* on it.

Re Northumberland & Durham District Banking Co., ex parte Bigge (1858)

A contract with a shareholder was not voidable: he was unable to prove that when he bought the shares he had already seen reports which had been issued about the company which later proved to be false.

Attwood v Small (1838)

The seller of a mine misrepresented its capacity. However, the contract was not voidable because the buyer had not relied on the seller's statement, but had commissioned his own survey which also turned out to be inaccurate.

The misrepresentee is entitled to take the statement at face value and has no obligation to check the truth of the statement, even if the misrepresenter offers the opportunity to do so.

Redgrave v Hurd (1881)

A solicitor who was selling his practice gave information about its income and told the buyer that he could check the figures against relevant documentary evidence. The buyer did not choose to do so, and it was held that this did not prevent the contract from being voidable.

Exclusion of liability for misrepresentation

The Misrepresentation Act 1967, s 3, as amended by the Unfair Contract Terms Act 1977, permits exclusion or limitation of liability for misrepresentation so far as is reasonable in a contract between business parties. Reasonableness must be proved by the party who seeks to enforce the exemption. The Consumer Rights Act 2015 has further amended s 3 so that it does not apply to a term in any consumer contract covered by the CRA 2015, so misrepresentation cannot be excluded in a consumer contract governed by the CRA 2015.

The remedies for misrepresentation

The remedies available to the misrepresentee depend on the perceived state of mind of the misrepresenter at the point at which the statement was made. A misrepresentation may be made fraudulently, carelessly or wholly innocently.

Fraudulent misrepresentation

Misrepresentation is **fraudulent** if the misrepresenter knows that the statement is untrue, or makes the statement recklessly, not caring whether it is true or false. The misrepresentee may sue in the tort of deceit and obtain damages and/or **rescission** of the contract. Rescission is an equitable remedy issued at the discretion of the court; it seeks to return the parties to their pre-contractual position. This enables the misrepresentee to recover any money paid to the fraudulent party.

Fraudulent misrepresentation: an untrue statement made intending to deceive or recklessly not caring whether it is true or false.

Rescission: an equitable remedy requiring a party to a voidable contract to give back money/property to the other party who has avoided the contract.

In practice, successful deceit actions are quite rare, though fraudulent misrepresentation is common. It happens, for example, every time somebody obtains goods with a stolen credit card, thus fraudulently representing themselves as the card holder. In situations like these, the misrepresentors quickly disappear and action against them is not possible. If action is taken, the burden of proof of intention is a very heavy one for the claimant to discharge.

Negligent misrepresentation

Under s 2(1) of the Misrepresentation Act 1967, a representor who induces the claimant to enter into a contract, by a statement which the representor did not reasonably believe, may be liable in damages. Rescission may also be granted. It is up to the representor to prove reasonable belief in the statement.

Howard Marine & Dredging Co. Ltd v Ogden & Sons Ltd (1978, CA)

The defendant was informed that barges chartered from the claimant had a certain capacity. The claimant's manager made this statement on the basis of insurance documentation. In fact, this was incorrect, as reference to the ship's papers would have shown. (Ship's papers are the equivalent of a birth certificate issued with a new vessel at sale and held by the current owner.)

Held: the claimant was liable under s 2(1). The claimant had not discharged its burden of proof that it had reasonable belief: in such an important matter reference to a primary source of information was necessary.

Negligent misrepresentation: an untrue statement made without reasonable belief in its truth.

Section 2(1) thus provides a remedy for **negligent misrepresentation**. Also, since a potentially fraudulent misrepresentor cannot be said to have had a reasonable belief in the truth of the statement, the victim may claim under s 2(1) instead of pursuing an action in deceit. This relieves the claimant of the burden of proof but gives access to an identical remedy. In *Doyle v Olby (Ironmongers)* (1969, CA) it was held that, since deceit is an intentional tort, the defendant was liable for all the direct consequences of its behaviour. In *Royscot Trust Ltd v Rogerson* (1991) the Court of Appeal decided that damages under s 2(1) should be calculated in the same way as damages for fraud. This sometimes means that a party may recover a more generous measure of damages than if calculated according to contract principles that attempt to put the claimant in the position he or she would have enjoyed if the contract had been properly performed.

The victim of negligent misrepresentation may also have a remedy in negligence under the rule in *Hedley Byrne v Heller* (which is explained in Chapter 14). This is helpful where parties have been misled and suffer loss, but then find out that the statement is incorrect before they enter the contract. It may also be used by someone

who was misled by a third party. Such parties are not assisted by s 2(1) which relates *only* to misrepresentors who have actually succeeded in making the misrepresentee contract with them.

Quilter v Hodson Developments [2016] EWCA Civ

Ms Quilter bought a flat from a developer in a complex of buildings, served by a common heating system, for £240,000. Her pre-purchase questionnaire asked whether there were any past or ongoing disputes concerning the building or its use and the reply from the developer was there were none. However, when she moved in, Ms Quilter discovered that the central heating system was defective due to the boiler not working properly and that this issue had arisen before she bought the flat and was known to the developer, since other tenants had already complained and the problem had not been addressed. Two years later she sold the property for £275,000. The boiler was still causing problems, but she was able to reassure her buyer that the problem was now being dealt with through the National House Building Council guarantee scheme.

Ms Quilter then claimed damages in misrepresentation from the developer and the court awarded her £15,000 to represent the difference in value of the property at the point she bought it and the sum which she paid. The builder appealed and argued that as she sold the property for a sum that made good her previous loss these damages were not legitimate.

The Court of Appeal held: the trial judge's decision was correct: the flat was £15,000 less valuable than the purchase price at the point of Ms Quilter's purchase. It was irrelevant that due to a rise in property prices she was getting back more than she had paid originally. She was entitled to take full advantage of this and had no duty to account for it to the developer. The misrepresentation had induced her to buy something which was not in the condition it claimed that it was and therefore not worth the price.

Wholly innocent misrepresentation

Even if a misrepresentation is made in good faith, with no intention to deceive and without carelessness (**innocent misrepresentation**), the contract is rendered voidable. Rescission is the usual remedy.

Damages may be an alternative remedy under s 2(2) of the Misrepresentation Act 1967, which states that it is applicable to any misrepresentation which is *not made fraudulently*, so it can apply to careless misrepresentations as well as wholly innocent ones. It gives the court the discretion to award damages instead of rescission. This discretion is likely to be used if the misrepresentation did not have a major impact on the contract and would, if it were a contract term, be classified as a warranty rather than a condition. This section therefore may apply to a careless misrepresentation.

Innocent misrepresentation:
an untrue statement
not made fraudulently.
May be made care-
lessly or with reason-
able belief.