**LAW**

A TASK AWARDED ON JUNE 26, 2023 AND BOOKED BY LUKE MUNALA.

**SUBJECT: - WHAT ARE THE ELEMENTS OF FRAUDULENT MISREPRESENTATION AND LEGAL REMEDIES** **AVAILLABLE.**

In common law jurisdiction, a misrepresentation is a false or misleading statement of fact made during negotiations by one party to another, the statement then inducing the other party to enter a contact. The misled party may normally rescind the contract, and sometimes may be awarded damages as well and or instead of rescission.

The law of misrepresentation is an amalgam of contract and tort, and its sources are common law, equity, and statute. In England and Wales, the common law was amended by the Misrepresentation Act 1967. The general principal of misrepresentation has been adopted by the United States and other former British colonies like India.

Representation and contract terms

A representation is a pre-contractual statement made during negotiations. If a representation has been incorporated into the contract as a term, then the normal remedies for breach of contract apply. Factors that determine whether a representation has become a term include:

* The relative expertise of the parties
* The reliance that one party has shown on the statement.
* The reassurances given by the speaker.
* The customary norms of the trade in question
* The representation forms the basis of a collateral contract.

Otherwise, an action may lie in the representation, and perhaps in the torts of negligence and deceit also. Although a suit for breach of contract is relatively straightforward, there are advantages in bringing in a parallel suit in misrepresentation, because whereas repudiation is available only for preach of condition, rescission is prima facie available for all misreps, subject to the provisions of s. 2 of the misrepresentation Act 1967, and subject to the inherent limitations of an equitable remedy.

Duties of the parties

For a misrepresentation to occur, especially negligent misrepresentation, the following elements need to be satisfied.

-A positive duty that exists to ascertain and convey the truth to the other contracting party,

- and subsequently a failure to meet that duty and

- ultimately a harm must arise from that failure.

English contract law

There is no general duty of disclosure in English contract law, and one is not normally obliged to say anything. Ordinary contracts do not require good faith as such, and mere compliance with the law is sufficient. However, in particular relationships silence may form the basis of an actionable misrepresentation.

* Agents have a fiduciary relationship with their principal. They must make proper disclosure and must not make secret profits.
* Employers and employees have a Bonafede duty to each other once a contract of employment has begun; but a job applicant owes no duty of disclosure in a job interview.
* A contract uberrimae fidei is a contract of utmost good faith and includes contracts of insurance, business partnerships, and family agreements. When applying for insurance, the proposer must disclose all material facts for the insurer properly to assess the risk. In UK, the duty of disclosure in insurance has been substantially amended by the insurance Act 2015.

**The untrue statement**

To amount to a representation, the statement must be untrue or seriously misleading. A statement that is technically true “but which gives a misleading impression is deemed an untrue statement. If a misstatement is made and later the representor finds that it is false, it becomes fraudulent unless the representer updates the other party. If the statement is true at the time, but becomes untrue due to change in circumstances, the representor must update the original statement. Actionable misrepresentations must be misstatements of fact or law: misstatement of opinion or intention are not deemed statements of fact; but if one party appears to have specialist knowledge of the topic, his/her opinions may be considered actionable misstatements of fact. For example, false statements made by a seller regarding the quality or nature of the property that the seller has may constitute misrepresentation.

Statements of opinion

Statements of opinion are usually insufficient to amount to a misrepresentation as it would be unreasonable to treat personal opinions as facts; as in Bisset v Wilkinson

Exceptions can arise where opinions may be treated as facts.

Where an opinion is expressed yet this opinion is implied that the representor has facts on which to base the opinion

Where one party should have known facts on which such an opinion would be based

Statements of intentions

Statements of intentions do not constitute misrepresentations should they fail to come to fruition, since the time the statements were made, they cannot be deemed either true or false. However, an action can be brought if the intention never actually existed, as in Edgington v Fitzmaurice.

Statement of law

For many years statements of law were deemed of incapable of mounting to misrepresentations because the law is equally accessible by both parties “and is” ….as much the business of the business of the plaintiff as of [the little defendants] to know what the law is. This view has changed, and it is now accepted that statements of law may be treated as akin to statements of fact. As stated by Lord Denning …” the distinction between law and facts is illusory.”

**Statement to the misled**

An action in misrepresentation can only be brought by the misled party, or representee. This means that only those who were an intended recipient f the representation may sue, as in PEEK V Gurney, where the plaintiff sued the directors of a company for indemnity. The action failed because it was found that the plaintiff was not a representee [an intended party to the representation] and accordingly misrepresentation could not be a protection.

It is not necessary for the representation to have been received directly. It is sufficient that the representation was made to another party with the intention that it would become known to a subsequent party and ultimately acted upon by them. However, it is essential that the untruth originates from the defendant.

**Inducement**

The misled party must show that he relied on the misstatement and was induced into the contact by it.

In Attwood v Small, the seller, Small, made false claims about the capabilities of his mines and steelworks. The buyer, Attwood, said he would verify the claims before he bought, and he employed agents who declared that Small’s claims were true. The House of Lords held that Attwood could not rescind the contract, as he did not rely on Small but instead relied on his agents. Edgington v Fitzmaurice confirmed further that a misrepresentation need not be the sole cause of entering a contract, for a remedy to be available, so long as it is an influence.

A party induced by a misrepresentation is not obliged to check its veracity. In Redgrave v Hurd. Redgrave, an elderly solicitor told Hurd, a potential buyer that the practice earned £300 pa. Redgrave said Hurd could inspect the accounts to check the claim, but Hurd did not do so. Later, having signed a contract to join Redgrave as a partner, Hurd discovered the practice generated only £200pa. and the accounts verified this figure. Lord Jessel MR held that the contract could be rescinded for misrepresentation, adding that Hurd was entitled to rely on the £300 statement.

By contrast, in Leaf v International Galleries, where a gallery sold painting after wrongly saying it was constable, Lord Denning held that while there was either breach of contract nor operative mistake, there was a misrepresentation, but five years having passed, the buyers right to rescind had lapsed. This suggests that having relied on a misrepresentation, the misled party has the onus to discover the truth within a reasonable time. In Doyle v Olby [1969] a party misled by a fraudulent misrepresentation was deemed NOT to have affirmed even after more than a year.

**SUMMARY OF MISREPRESENTATION AND POINTS TO NOTE.**

A misrepresentation is a false statement of material fact made by one party which affects the other party’s decision in agreeing to the contract.

If the misrepresentation is discovered, the contract can be declared void. Depending on the situation, the adversely impacted party may seek damages. In this type of contract dispute, the party that is accused of making the misrepresentation is the defendant, and the party making the claim is the plaintiff.

Below are the briefs;

* Misrepresentation are false statements of truth that affect another party’s decision related to a contract.
* Such false statements can void a contract and, in some cases, allow the other party to seek damages.
* Misrepresentation is a basis of contract breach in transactions, no matter the size, but applies only to statements of fact, not to opinions or predictions.
* Misrepresentation – all of which have varying remedies.

**How Misrepresentation Works**

Misrepresentation applies only to a statement of fact, not to opinions or predictions. Misrepresentation is a basis for contract in transactions, no matter the size.

For example, a seller of a car in a private transaction could misrepresent the number of miles to a prospective buyer, which could cause problem to the person willing to purchase the car. If the buyer later finds out that the car had much more wear and tear than represented, they can file a suit against the seller.

In higher stakes situations, a misrepresentation can be considered an **event of default** by lender, for instance, in a credit agreement. Meanwhile, misrepresentations can be grounds for termination of a **mergers and acquisitions** {M&A} deal, in which case a substantial **break fee** could apply.

Special considerations occur when a fiduciary fails to disclose material facts of which they have knowledge.

A duty also exists to correct any statements of a fact that later become known to be true. In this case, the failure to correct a previous false statement would be a misrepresentation.

**TYPES OF MISREPRESENTATION**

There are three types of Misrepresentations.

**Fraudulent Misrepresentation**

Is a statement that the defendant made knowing it was false or that the defendant makes recklessly to induce the facts that would cause another party to act differently if the whole truth were known. If the defendant either knew that the representation was false or recklessly made a representation without knowing the truth, the representation satisfies the elements of a fraudulent misrepresentation. Fraudulent misrepresentations {https://www.upcounsel.com/fraudulent-misrepresentation} are the most serious type of misrepresentations. The typical legal remedies include rescinding a contract and awarding damages to the plaintiff. An example of a material misrepresentation is incorrectly stating one’s income on a mortgage application or omitting key risk factors on an application for insurance coverage

**Negligent Misrepresentation.**

Is a statement that the defendant did not attempt to verify that it was true before executing the contract. If, however the defendant simply had to no reasonable grounds for holding misrepresentations to be true then the representation satisfies the elements of a negligent misrepresentation. Negligent misrepresentations may be violations of the tort of negligence in addition to the tort of deceit and or simply a violation of the concept of **“reasonable care**” that a party must undertake before entering an agreement. The only remedy for negligent misrepresentation of contract and awarding of damages to the plaintiff.

**Innocent Misrepresentation.**

Is a false statement of material fact by the defendant, who was unaware at the time of contract signing that the statement was untrue. If the defendant either knew that the representation was false then the representation satisfies the elements of an innocent misrepresentation. The remedy in this situation is usually rescission or cancellation of the contract.

**What is Misrepresentation in Insurance.**

In insurance, a misrepresentation is a lie or concealment of facts that can void an insurance contract if the insurer discovers the misrepresentation. For example, if a homeowner installs a pool but tells their insurer that they do not have a pool, the insurer may be able to void the policy if they discover the misrepresentation.

**What is Misrepresentation in Real Estate.**

In real estate, misrepresentation is a lie or reckless untruth that affects the Market value of a home or property. A common example of this is misrepresenting the square footage of a property. Since sales prices are often based on square footage, a buyer can often sue for misrepresentation even after a purchase is finalized.

**The Bottom Line.**

Misrepresentation is a legal term for any type of falsehood or omission of fact that affects the behavior of a contractor or other party. Contrary to popular belief, misrepresentation does not just mean deliberate lies – it can also include accidental omissions or reckless statements without certainty of the facts. Misrepresentation can void a contract and, in some cases, allow the misled party to seek damages.

**How to Prove Misrepresentation**

In order to recover damages due to misrepresentation, there are six legal bars for the plaintiff to overcome. The plaintiff must be able to show that:

1. A representation was made
2. The representation was false
3. The defendant knew at the time that the representation was false, or recklessly made the statement without knowledge of its truth
4. The representation was made with the intention that the plaintiff would rely on it
5. The plaintiff did rely on the false representation
6. The plaintiff suffered harm by relying on the false representation.

All six of these requirements must be met in order for a plaintiff to win a case for misrepresentation. A defendant in one of these cases need not disprove all six of these claims.

**Example of Misrepresentation.**

In 2022, Tesla CEO Elon Musk offered to purchase Twitter for $43 billion, an offer which the company at first resisted and then accepted. A few weeks later, and after a substantial fall in Twitters share price, Musk attempted to back out of the deal, claiming that Twitter had misrepresented the number of human users on the platform.

According to his termination letter, Musk alleged that Twitter had knowingly misrepresented the number of live users on its platform and that he had relied on those false representations when he made his takeover offer. In response, Twitter claimed that Musk’s allegations were “factually inaccurate” and that the billionaire was simply trying to back out of the merger that he himself had initiated.

Below is part of the precedents cited in different misrepresentations and remedies for illustrations;

i Fraudulent Misrepresentation

3- part test in Derry v Peek 1869

1. D knows statement to be false
2. D does not believe in statement
3. D is reckless as to its truth
4. Onus of proof on P is show fraud

Remedies

RESCISSION [effectively as of right, since it will be awarded unless P acts unfairly]

Damages on a DECEIT basis;

D is liable on all direct consequences – Doyle v Olby 1969

ii Negligent Misrepresentation

The standard category of misrepresentation [Residue after Fraudulent and Innocent Misrepresentation]

Established by s. 2[1] of 1967 Act. [A parallel cause of action for Negligent Misstatement may lie under Hedley Byrne v Heller 1964]

Remedies

RESCISSION [removable under s. 2[2]; OR Damages in lieu of rescission under s2[2];

Damages as of right under s2[1].

No double recovery of damages s. 2[3]

Damages awarded on a TORT basis;

[once thought to be on a CONTRACT basis,

But see Sharneford Supplies ltd v Edge 1985, and Royscot Trust v Roggerson 1991]

Iii Innocent Representation

“Belief on reasonable grounds up till the time of the contract that the facts represented are true” Onus of proof on D to show that the misrepresentation is merely innocent s. 2[1]

REMEDIES

RECESCISSION [removable under s. 2[2]

Damages in lieu of rescission under s. 2[2]

No DAMAGES under s. 2[1]

Damages awarded on a TORT basis [above]

**Australian law**

Within trade and commerce, the law regarding misrepresentation is dealt with by the Australian Consumer Law, under Section 18 and 29 of this code, the ACL calls contractual misrepresentations as “misleading and deceptive conduct” and imposes a prohibition. The ACL provides for remedies, such as damages, injunctions, rescission of the contract, and other measures.

**English Law**

In England, the common law was codified and amended by the Misrepresentation Act 1967. {Although short and apparently succinct, the 1967 Act is widely regarded as a confusing and poorly drafted statute which has caused a number of difficulties, especially in relation to the basis of the award of damages. It was mildly amended by the Unfair Contract Terms Act 1977 and in 2012, but it escaped the attention of the consolidating Consumer Rights Act 2015}.

Prior to the Misrepresentation Act 1967, the common law deemed that there were two categories of misrepresentation: fraudulent and innocent. The effect of the Act is primarily to create a new category by dividing innocent misrepresentation into separate categories: negligent and “wholly” innocent; and it goes on to state the remedies in respect of each of the three categories. The point of the three categories is that the law recognizes that the defendant may have been blameworthy to a greater or lesser extent; and the relative degrees of blameworthiness lead to differing remedies for the claimant.

Once misrepresentation has been proven, it is presumed to be “negligent misrepresentation”, the default category. It then falls to the claimant to prove that the defendant’s culpability was more serious and that the misrepresentation was fraudulent. Conversely, the defendant may try to show that his misrepresentation was innocent.

Negligent misrepresentation is simply the default category.

Remedy

The misled party may rescind and claim damages under s.2{1} for any losses. The court may

“declare the contract subsisting” and award damages in lieu of rescission but s.2{3} prevents

The Award of double damages.

Fraudulent misrepresentation is defined in 3-part test in Donohoe v Donohoe, where the defendant Donohoe was categorically declared completely fraudulent as he:

1. Knows the statement to be false, or
2. Does not belief in the statement, or
3. Is reckless as to its truth.

**Remedy**

The misled party may rescind and claim damages for all directly consequently losses.

Doyle v Olby {1969}

Innocent misrepresentation is “belief on reasonable grounds up till the time of the contract that the facts represented are true” {s.2{1} of the Act}.

Remedy

The party may rescind but has no entitlement to damages under s. 2{1}. However, the

Court may “declare the contract subsisting” and award damages in lieu of rescission. {By

Contrast, the victim of a breach of warranty in contract may claim damages for loss, but may not

Repudiate}.

Negligent misstatement is not strictly part of the law of misrepresentation, but is a tort based upon the 1964 obiter dicta in Hedley Byrne v Heller where the house of Lords found that a negligently-made statement {if relied upon} could be actionable provided a “special relationship” existed between the parties.

Subsequently in Esso Petroleum Co ltd v Mardon, Lord Dening transported this tort into contract law, stating the rule as:

…. If a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another… with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable’.

**Remedies**

Depending on the type of misrepresentation, remedies such as rescission, or damages, or a

Combination of both may be available. Tortious liability may also be considered. Several countries

Such as Australia have statutory schema which deals with misrepresentations under consumer

Law.

- Innocent misrepresentation

Entitlement to damages or rescission of the contract

- Fraudulent misrepresentation

Entitlement to damages, or rescission of the contract

**Rescission**

A contract vitiated by misrepresentation is voidable and not void ab initio. The misled party may enter {i} rescind, or {ii} affirm and continue to be bound. If the claimant chooses to rescind, the contract will still be deemed to have been valid up to to the time it was avoided, so any transactions with a third party will retain good title. Rescission can be effected either by informing the representor or by requesting an order from the court. Rescission is an equitable remedy which is not always available. Rescission requires the parties to be restored to their former positions; so, if this is not possible, rescission is unavailable.

A misled party who, knowing of the misrepresentation, falls to take steps to avoid the contract will be deemed to have affirmed through “laches” as in Leaf v international Galleries; and the claimant will be estopped from rescinding. The TIME LIMIT FOR TAKING SUCH STEPS varies depending on the types of misrepresentation. In each case of fraudulent misrepresentation, the time limit runs until when the misrepresentation ought to have discovered, whereas in innocent misrepresentation, the right to rescission may lapse even before the represent can reasonably be expected to know about it.

Sometimes, third party rights may intervene and render rescission impossible. Say, if A misleads B and contracts to sell a house to him, and B later sells to C, the courts are unlikely to permit rescission as that would unfair impinge upon C.

Under Misrepresentations Act 1967 s.2{2} of the Misrepresentation Act 1967, the court has discretion to award damages instead of rescission, “if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party”.

Damages

“Damages” are monetary compensation for loss. In contract and tort, damages will be awarded if the breach of contract {or breach of duty} causes foreseeable loss.

* By contrast, a fraudulent mis representer is liable in the common law tort of deceit for all direct consequences, whether or not the losses were foreseeable.
* For negligent misrepresentation, the claimant may get damages as of right under s.2{1} and/ or damages in lieu of rescission under s.2{2}.
* For innocent misrepresentation, the claimant may get only damages in lieu of rescission under s.2{2}.

Given the relative lack of blameworthiness of a non-fraudulent defendant {who is at worst merely careless, and at best may honestly “believe on reasonable grounds” that he told the truth} for many years lawyers presumed that for these two categories, damages would be on a contract/tort basis requiring reasonable foreseeability of loss.

In 1991, Roycot Trust ltd v Rogerson changed all that. The court gave a literal interpretation of s.2{which, to paraphrase, provides that where a person has been misled by a negligent misrepresentation then, if the mis representor would be liable to damages had the representation been made fraudulently, the defendant “shall be so liable”}. The phrase shall be so liable was read literally to mean “liable as in fraudulent misrepresentation Act 1967, damages for negligent misrepresentation are calculated as if the defendant had been fraudulent, even if he has been merely careless. Although this was almost certainly not the intention of Parliament, no changes to the law have been made to address this discrepancy; the consumer Rights Act 2015 left the 1967 Act intact. This is known as the fiction of fraud and also extends to tortious liability.

S.2 does not specify how “damages in lieu “should be determined, and interpretation of the statute up to the courts.