

## Deceit Also Known As Fraudulent Misrepresentation

Involves Untruthful Statements With Resulting Harm

### Helpful Guide to Understanding the Tort of Deceit Also Known As Fraudulent Misrepresentation



Deceit, also known as fraudulent misrepresentation, is a cause of action within the business tort family of case matters. Although deceit is a cause of action in tort law, deceit is relevant to contract law in that a usual remedy for deceit includes the rescission of the contractual relations within which the deceit occurred. Typically, when successfully argued that 'but for' the deceit, the Plaintiff would have avoided entering into contractual relations with the Defendant, the contract becomes void at the option of the Plaintiff. However, deceit may also be alleged against an outsider who was without contractual relations with the Plaintiff. This situation might happen where it is alleged that a Defendant made knowingly false statements that directly or indirectly encouraged the Plaintiff to do business with a third party per doctrine established within the centuries old English case of *Pasley v. Freeman (1789)*, [100 E.R. 450](#), which was cited in Canadian law within the case of *Toronto-Dominion Bank v. Mapleleaf Furniture Manufacturing Ltd.*, [2003 CanLII 22203](#) wherein it is stated:

[86] Quite apart from the allegations of conspiracy and the allegations of “knowing assistance” of the fraud of the DeLucas, the Pastore defendants are liable to the plaintiff by virtue of their having acting in ways constituting the tort of deceit, which is sometimes referred to as fraud or fraudulent misrepresentation. In that regard I adopt the following statements from Klar: Tort Law (3d ed.), 2003, Thomson Canada Limited:

At pp.599-600:



Deceit, as an independent tort, must be distinguished from deceitful or fraudulent conduct, as a type of dishonest behaviour. Its existence as an independent tort, not linked to a contractual relationship between two parties, was confirmed in the case of *Pasley v. Freeman*. This case decided that an individual could be held liable for a fraudulent misrepresentation made by that person to another, even though the representor had no direct interest in the matter at hand, nor was in collusion with the party who had an interest. The tort is based on a false representation made by one person to another, knowingly, whereby damage is caused to the other. (2.(1789) 100 E.R.)

At pp.600-1:

To succeed in deceit, a plaintiff must prove that (1) a false representation or statement was made by the defendant, (2) which was knowingly false, (3) was made with the intention to deceive the plaintiff, and (4) which materially induced the plaintiff to act, resulting in damage.

### Required Elements

To succeed in a case based on the deceit (fraudulent misrepresentation) cause of action, a Plaintiff must prove five specific elements. The elements were well defined in *CMHC v. Hollacid*, [2014 ONSC 911](#) as:

[72] Newbould J. in *Fiorillo v. Krispy Kreme Doughnuts, Inc.*, supra, wrote the following on the elements of the tort of fraudulent misrepresentation:

66 Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it. See *Parna v. G.& S. Properties Ltd.*, [1971] S.C.R. 306.



67 The elements of the tort of fraudulent misrepresentation can thus be distilled to five criteria which a plaintiff must demonstrate, in order to establish a defendant's liability:

(a) The defendant made a false statement;

(b) The defendant knew that the statement was false or was indifferent to its truth or falsity;

(c) The defendant had the intention to deceive the plaintiff;

(d) The false statement was material in that it induced the plaintiff to act; and

(e) The plaintiff suffered damages as a result of so acting.

68 Deceit can be by way of a false statement or, in appropriate circumstances, by the making of a half truth. As early as 1803, in *Tapp v. Lee (1803)*, 3 Bos. & P. 367, 127 E.R. 200 at 203, it was stated:

An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for the defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, selects those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood.



69 A more recent statement of the same principle can be found in Spencer Bower and Turner, *Actionable Misrepresentations*, 4th ed, (London: Butterworths, 2000) at 85: A half truth may be a misrepresentation. To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a "lie", and a most dangerous and insidious form.

### Blaming the Plaintiff for Naivete

Occasionally in deceit actions the Defendant will attempt to defend the case on the basis that the Plaintiff was excessively naive or failed to investigate the truth of the statements and thus failed to uncover the deceit. Thankfully, the law is unwilling to allow liars to avoid accountability by pointing fingers at the innocent as generally both, contributory negligence and the foreseeability test are inapplicable in intentional tort matters.

**Lewis Klar, Tort Law**, 3d ed (Toronto: Carswell, 2003 at p. 30):

Normally, intentional trespasses are considered to be the most serious breaches, deserving the harshest of sanctions. Courts, for example, traditionally have refused to permit defendants liable for an intentional trespass to plead contributory negligence and have not limited the damages recoverable against them by the reasonable foreseeability test.

**Lewis Klar, Tort Law**, 3d ed (Toronto: Carswell, 2003 at p. 608):

It has been held that a fraudulent defendant cannot defend the action on the grounds that the plaintiff was unwise in acting upon the representation, or had the opportunity, which was not taken up, of verifying the information.

This inability to blame the Plaintiff was stated clearly in *United Services Fund (Trustees of) v. Richardson Greenshields*, [1988 CanLII 2955](#) at paragraphs 56 to 64

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[56] Carelessness on the part of the victim has never been a defence to an action for fraud. As Lord Chelmsford said in *Central Ry. Co. of Venezuela (Dir., etc.) v. Kisch* (1867), L.R. 2 H.L. 99 at 120-21:

But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." I quite agree with the opinion of Lord Lyndhurst, in the case of *Small v. Attwood* 6 Cl. & F. 395, that "where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised; and in a Court of equity a foundation is laid for setting aside the contract which was founded upon that basis." And in the case of *Dobell v. Stevens* 3 B. & C. 623, to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he thought proper.

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[62] It is not difficult to grasp that in an action for negligence, want of reasonable care for one's own safety may go to both. Take the case of a man knocked down by a motor vehicle. The collision may have been caused by his running across the street and by the driver failing to keep a proper lookout. If after the accident the plaintiff fails to obtain appropriate medical treatment and then suffers greater permanent injury than he might have, the defendant may raise that failure. But whether that is fault contributing to the loss within the Negligence Act or merely a breach of the duty to mitigate is a nice question. I do not propose to decide it.

[63] But I cannot see how that concept arises in fraud. Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.

[64] And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue.

### Summary Comment

Deceit, as is also known as fraudulent misrepresentation, involves a false statement, that was known as false, that is relied upon by a person who suffers harm as a result of false statement. The falseity of the statement must be known at the time that the statement was made rather than a statement that was made and subsequently became false. The knowledge of falseity can arise constructively where a statement is made recklessly without due regard for truth. Additionally, the victim of the deceit is without 'contributory negligence' should the victim reasonably rely on the false statement without first confirming the truth as the law disallows those who utter false statements from blaming the victim for being naive.