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TORTS-LIABILITY FOR MISREPRESENTATION MADE WITH HONEST BELIEF IN ITS TRUTH

C. E. Lombardi, Jr.
University of Michigan Law School

TORTS—LIABILITY FOR MISREPRESENTATION MADE WITH HONEST BELIEF IN ITS TRUTH—Defendant, a liquor broker, was authorized to make contracts for a liquor wholesaler. He represented to plaintiff that the wholesaler had sufficient liquor immediately available to supply plaintiff with an "unlimited amount," and that he had investigated the company and it was "financially all right." Defendant honestly believed his representations to be true. Relying on the representations, plaintiff placed a large order with the wholesaler and paid a deposit which he lost when the wholesaler went bankrupt shortly thereafter. Plaintiff sued for damages. On appeal from judgment for plaintiff, *held,* affirmed. Petition for rehearing denied. *Stein v. Treger,* (D. C. Cir. 1950) 182 F. (2d) 696.

Courts in the United States generally have taken the following views as to the state of mind requisite to tort liability for misrepresentation: (1) The defendant is liable if he actually knows the representation is untrue, or acts with the equivalent of a reckless disregard of consequences.[1] (2) He may be liable for speaking negligently, i.e., without reasonable grounds for believing that the statement is true, though he actually does so believe.[2] (3) He may be held strictly liable.[3] (4) He may be liable if the representation was made "as of his own knowledge." The theoretical justification of this last view is that since the representation was untrue, he could not have known it was true, and therefore must necessarily have knowingly misrepresented his state of mind.[4] Thus by means of the conclusive presumption that he who knows not, knows he knows not, the courts impose strict liability, or at least liability for a negligent misrepresentation. And the question of what constitutes a representation "as of one's own knowledge" as distinguished from any other representation is seldom looked into; any positive statement seems to satisfy the requirement. Though decisions seldom expressly so state, liability under this fourth theory seems to be, in fact, restricted against those standing to gain from the actions induced by the representation. Actually the courts do not break cleanly along the lines of the four "views" suggested above. There is often a mixture of facts and language such that it is difficult to discern the true grounds of decision. The instant case is an example. In the main opinion, the court seems to rely on an "as-of-one's-own-knowledge" theory.[5] But in dismissing the petition for rehearing, it speaks

[1] Dwyer v. Redmond, 103 Conn. 237, 130 A. 108 (1925). Courts taking this view follow the leading English case of Derry v. Peek, 14 App. Cas. 337 (1889).

[2] Such liability has been imposed in negligence actions, Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). For a discussion of the negligence action and its limitations, see Ultramares Corporation v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). It has been frequently asserted that in some American courts it will similarly be imposed in deceit actions. Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty," 42 HARV. L. REV. 733 at 735 (1929). PROSSER, TORTS 734 (1941). No cases have been found which expressly hold the latter. However, it seems to be the true basis in a number of cases in which the reason is ambiguous, or in which the holding is ostensibly on another ground. Paretti v. Rebenack, 81 Mo. App. 494 (1899); Scholfield Gear and Pulley Co. v. Scholfield, 71 Conn. 1, 40 A. 1046 (1898).

[3] Such strict liability has been limited to particular classes of persons, though the courts have not always expressly so limited it. Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785 (1929). It is usually achieved by imposing a "duty to know" whether the representation is true under certain circumstances, particularly where the parties are "on an unequal footing," i.e., where one is in a substantially better position to know and would normally be expected to know. Whitehurst v. Life Ins. Co. of Va., 149 N.C. 273, 62 S.E. 1067 (1908). Cases of this type have been cited as supporting liability in deceit for negligent misrepresentation, but this is inaccurate as the duty is to know, and not merely to use reasonable care to know.

[4] Litchfield v. Hutchinson, 117 Mass. 195 (1875); Chatham Furnace Co. v. Moffat, 147 Mass. 403, 18 N.E. 168 (1888).

[5] ". . . if made by appellants, as upon their own knowledge, or as a matter of fact, even though not known by them to be untrue, they would be false and fraudulent." Principal case at 698.

more along lines of negligence,[6] which theory the facts of the case would probably justify.[7] If this case is decided on an "as-of-one's-own-knowledge" basis, the theory of a knowing misrepresentation of state of mind is frankly abandoned.[8] It is submitted that the "as-of-one's-own-knowledge" line of cases serves merely to confuse the issue. If its professed theory is logically followed, then to the already difficult task of defining and determining a state of mind is added the correspondingly more difficult one of defining and determining a state of mind as to a state of mind. If its theory is not to be fully followed, as seems to be the case, then it is a needless fiction. It is difficult to see why the element of the degree of positiveness of the assertion cannot be satisfied by the requirement of justifiability of reliance. And if strict liability is to be imposed upon the class of people standing to benefit from the actions induced by the representation, it should be done expressly on that basis.[9]

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[6] "Where a party innocently misrepresents a material fact by mistake; or makes such representation without knowing it to be true or false, even though he believes it to be true; or without reasonable grounds for believing it to be true—such representation will support an action for fraud." Principal case at 699.

[7] The company's officials were "known to be blackmarket racketeers"; ". . . one of the officials had a rather lengthy criminal record. . . ." Principal case at 699.

[8] The court says statements made "as of one's own knowledge" are "fraudulent if, in fact, false; and though innocent of any wrongful intent . . ." appellant is liable. Principal case at 699.

[9] On grounds of policy, Professor Williston favors moving in the direction of strict liability for the sake of consistency with other phases of misrepresentation law, as warranty, estoppel, rescission, and defamation. Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 (1911). Professor Bohlen favors restricting strict liability to particular cases, limited by principles of warranty, and determining liability for negligent misrepresentations by general principles of negligence, rather than an extension of the law of deceit. Bohlen, "Misrepresentation as Deceit, Negligence, or a Warranty," 42 HARV. L. REV. 733 (1929). Professor Green thinks that the present network of formulas is desirable because of its flexibility: it permits the judge to "range as freely as his judgment dictates." Green, "Deceit," 16 VA. L. REV. 749 at 769 (1930).