owner, had no factual basis for making it.[5]

1 *Duffell v Wilson* (1808) 1 Camp 401.
2 *Gerhard v Bates* (1853) 2 E & B 476.
3 *Mathias v Yetts* (1882) 46 LT 497, 503 CA; para 2.27 n 10.
4 *Smith v MacKenzie* (1881) 1 NZLR 1 CA.
5 *Forum Development Pte Ltd v Global Accent Trading Pte Ltd* [1995] 1 SLR 474 CA (*Forum Development*).

STATEMENTS OF OPINION, BELIEF OR INFORMATION

2.17 'It is often fallaciously assumed', said Bowen LJ, 'that the statement of an opinion cannot involve the statement of a fact.'[1] A statement of the opinion, belief, information or other state of mind, of the representor or a third person, involves at least one statement of fact, namely that the representor or third person has that state of mind at that time.[2] It is not a statement about the subject matter provided it purports to be no more than a statement of opinion, belief or information. However, if a person expresses in a statement of fact what he merely believes as opinion or information etc, that statement is a representation.

1 *Smith v Land and House Property Corpn* (1884) 28 ChD 7, 15 CA; *Brown v Raphael* [1958] Ch 636, 642 CA; *Root v Badley* [1960] NZLR 756.
2 *Edgington v Fitzmaurice* (1885) 29 ChD 459, 483 CA; *Angus v Clifford* [1891] 2 Ch 449, 470 CA.

REPRESENTATIONS OF REPRESENTOR'S OPINION, BELIEF OR KNOWLEDGE

2.18 The principles which apply to statements of a person's intention[1] apply to statements of his opinion, belief or knowledge. If it later transpires that the factual situation at the time was not as the speaker believed or if the future turns out differently, this will not falsify the statement; but the non-existence of the declared state of mind will, because this was the only fact asserted. An opinion by directors of a railway company that there was no probability of a rival line being constructed was a statement of opinion, and the construction of a rival line later did not make it a misrepresentation, and there was no proof that they did not believe what they said.[2] A bank's valuation was a statement that it had *bona fide* formed the opinion expressed, not that the valuation was correct.[3] A book purporting to be a journal of bores handed to railway contractors was a representation that it was a faithful record of information supplied by those who had sunk the bores.[4]

1 Paras 2.06–2.08.
2 *New Brunswick and Canada Rly and Land Co v Conybeare* (1862) 9 HL Cas 711 (*Conybeare*).
3 *Melbourne Banking Corpn v Brougham* (1882) 7 App Cas 307, 319–20; *Bisset v Wilkinson* [1927] AC 177 (statement of carrying capacity of land a statement of opinion. It had not previously been used for grazing); *Esso* [1976] QB 801 CA.
4 *Boyd and Forrest v Glasgow and South Western Rly Co* 1911 SC 33, 73; revsd [1913] AC 404 on other grounds.

2.19 The obstacles which face a representee relying on statements of opinion are not as great as those for statements of intention. There is the same difficulty

of proving another's state of mind,[1] but the difficulty in credibly asserting that he relied upon the statement of fact as fact is not as great.[2] Where the opinion, belief or information relates to a subject requiring special knowledge or skill, a layman must trust in the reputation of a known expert. In most cases of this description, the representee can truthfully affirm that he relied, not upon the correctness of the opinion, as to which there was no representation, but on the fact that a well-known authority *actually held the opinion expressed*, as represented. 'I was told', he might fairly say, 'that Mr X, an eminent (patent lawyer, scientist, literary or art critic, valuer, accountant, financier, stockbroker or trade expert etc) whose name was well-known to me, was of such and such an opinion as to the merits and value of (an invention, picture, drama, book, business, enterprise, security or estate etc). I would not have entered into the transaction if I had known that he did not hold that opinion.'

This principle does not apply where it is known that the person professing the opinion is not an expert. Both parties are then on an equal footing, and no importance is normally attached to the fact that either of them has the opinion, or to the opinion itself.[3] Where the representor gives the facts on which he bases his opinion, the parties are again on an equal footing.[4] The general rule codified in s 20(5) of the MIA 1906 is that 'a representation as to a matter of . . . belief is true, if it be made in good faith'. The importance of this principle in relation to statements of opinion by non-experts is illustrated by *Economides*.[5] An owner proposing for contents insurance declared that his answers were, to the best of his knowledge and belief, true and complete. He stated their value was £16,000, a significant undervalue. The honesty of the answer was not questioned, but the insurer contended that the proponent impliedly represented that he had objectively reasonable grounds for his belief. Peter Gibson LJ noted that the statement was 'made by a layman with no relevant skills', and continued:[6]

> '. . . the statutory test . . . is one of good faith which is necessarily subjective and I find it impossible to see how, consistently with s 20(5) an objective test of reasonableness can be imported by way of an implied representation. Once statute deems an honest representation in a matter of belief to be true, I cannot see that there is scope for enquiry as to whether there were objectively reasonable grounds for that belief.'

Where a representation of belief is an assertion of a specific fact, the case is governed by the common law rule codified in s 20(4),[7] not s 20(5).[8]

1 Para 2.06.
2 Paras 2.07–2.08.
3 *Smith v Land and House Property Corpn* (1884) 28 ChD 7, 15 CA per Bowen LJ: '. . . where the facts are equally well known to both parties what one of them says to the other is frequently nothing but an expression of opinion. The statement of such an opinion is in a sense a statement of fact, about the condition of a man's own mind, but . . . an irrelevant fact'; *Root v Badley* [1960] NZLR 756, 758.
4 *Legge v Croker* (1811) 1 Ball & B 506, 515–6.
5 *Economides v Commercial Union Assurance Co plc* [1998] QB 587 CA.
6 Ibid at 606.
7 Para 4.04 n 2.
8 Above at 598 per Simon Browne LJ.

[5] (1884) 28 ChD 7, 17; *Ferguson v Wilson* (1904) 6 F (Ct of Sess) 779, 783 (statement of profits not a speculative forecast or estimate).

2.23 A later example is *Brown v Raphael*.[1] The reversion of a trust fund after the death of a life tenant was offered for sale by auction. The particulars stated:

> 'The Trustee is the Public Trustee. Estate duty will be payable on the death of the annuitant, who is believed to have no aggregable estate.'

The successful bidder learned before completion that the life tenant had assets which would increase the estate duty payable out of the fund. The particulars were held to involve a representation of fact, Lord Evershed MR stating:[2]

> '. . . the real question . . . is . . . whether . . . the representation that the vendor has reasonable grounds for his belief ought to be imported. Counsel argued that to hold, as the judge did, affirmatively on that point was to lay down the principle that wherever it is stated that one party entertains a particular belief, then it must follow that there is a representation that he has grounds reasonably supporting his belief. But I lay down no such general proposition. The question here is whether in this case, and in the context of these particulars concerning Lot 11, such a representation of reasonable grounds to support the belief ought to emerge; and, as the judge held . . . the answer is in the affirmative.'

In support of this conclusion Lord Evershed listed the following:

(i) the value of the property would be substantially reduced if the life tenant had aggregable estate;
(ii) a well-known and reputable firm of solicitors was named as acting in the estate leading to the inference that the vendor had been competently advised;
(iii) the vendor could find out the true position;
(iv) a potential bidder would find it very difficult to ascertain the facts in time.

It is important to consider by whom, and in what circumstances, the statement was made. The statement in *Brown v Raphael* was made by solicitors. No such representation would normally be implied where the statement was made by a layman without relevant skills.[3] Gleeson CJ summarised the principles[4]:

> 'A statement of opinion . . . may carry . . . one or more implied representations according to the circumstances . . . There will ordinarily be an implied representation that the person offering the opinion actually holds it. Other implied representations may be that the opinion is based on reasonable grounds, which may include the representation that it was formed on the basis of reasonable enquiries. In the case of a person professing expertise or particular skill or experience the opinion may carry the implied representation that it is based upon his or her expertise, skill or experience.'

The Court of Appeal of Singapore held that an employee of the landlord who stated that a wall would be demolished and replaced made a misrepresentation of fact because he had no basis for making that statement.[5]

[1] [1958] Ch 636 CA; para 13.05 n 7.
[2] Ibid at 642.
[3] *Economides* [1998] QB 587, 606 CA; para 2.10, nn 5–8.
[4] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 321.
[5] *Forum Development* [1995] 1 SLR 474 CA.

PLEADINGS

2.24 Statements in unverified pleadings are not representations of fact, because as Parke B said:[1]

> 'Pleadings . . . are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite party, and if denied to be proved, and ultimately submitted for judicial decision.'

This passage was applied by the High Court of Australia[2] when it quashed an indictment which charged plaintiffs with attempting to obtain money by deception by serving statements of claim. The court said:[3]

> '. . . in the absence of contrary provision . . . the mere service upon a defendant of an unverified statement of claim does not, at least insofar as criminal liability is concerned, of itself constitute an express or implied positive representation by the plaintiff that the individual allegations of fact or of law which the statement of claim contains are objectively true or correct . . . the traditional nature of such an unverified pleading was not that of a representation . . . of the objective accuracy of the assertions of fact which it contained. Similarly an unverified defence is not an assertion of belief in the correctness of the matters pleaded because a defendant is entitled to put a plaintiff to proof and raise alternative defences without asserting their truth.'

The principle that a compromise of a bona fide claim is good consideration has been thought to require a qualification to this rule. In *Callisher v Bischoffsheim*, Cockburn CJ said:[5]

> '. . . if he bona fide believes he has a fair chance of success he has a reasonable ground for suing and his forbearance to sue will constitute good consideration. It would be another matter if a person made a claim which he knew to be unfounded and by a compromise derived an advantage under it; in that case his conduct would be fraudulent.'

On this basis allegations in an unverified statement of claim or equivalent have been held to involve an implied representation that the claimant honestly believed he has a fair chance of success which, if false, would entitle the opposite party to have a compromise or consent judgment set aside for fraud.[6]

[1] *Boileau v Rutlin* (1848) 2 Exch 665, 680–1; *Buckmaster v Meilkejohn* (1853) 8 Ex 634, 637 Ex Ch.
[2] *Jamieson v R* (1993) 177 CLR 574.
[3] Ibid at 579, 592.
[4] *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 85–6.
[5] (1870) LR 5 QB 449, 452.
[6] *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691, 697–8 CA (Spies); *Bainbridge v Moss* (1856) 3 Jur NS 58 (bill to set aside compromise alleged that party who claimed testator was insane knew he was not).

DISTINCTION BETWEEN REPRESENTATIONS OF LAW AND FACT

2.25 Judges have sometimes distinguished representations of fact from representations of law as if they were mutually exclusive. In many cases a statement of law is only a statement of opinion which will not be falsified if the law is otherwise.[1] It will be a statement by the representor that he or a third person has the opinion stated, and to that extent is a representation of fact. He who expresses his views on law to another is in the same position as one who

negligence failed. The House considered that the claim by the buyer in *Ward v Hobbs* for the loss of other pigs would probably now succeed in negligence, but thought that the claim in deceit had been correctly rejected.[8]

1 *Bodger v Nicholls* (1873) 28 LT 441, 449.
2 (1878) 4 App Cas 13 affirming (1877) 3 QBD 150; *W Scott Fell & Co Ltd v Lloyd* (1906) 4 CLR 572, 584.
3 Ibid at 22.
4 Ibid at 23.
5 Ibid at 25–6, 28.
6 Ibid at 29.
7 (1877) 3 QBD 150, 157, 162, 164, 166 CA; *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 422.
8 *Hurley v Dyke* [1979] RTR 265, 281, 302 HL.

3.08 A person who conducts himself as if he has a particular qualification or was acting in a particular capacity represents that he has that qualification or capacity. Thus a broker, by sending bought and sold notes to his client, represents that he is acting as an agent, and not as a principal.[1] An agent's warranty of authority is based on an implied representation which will be actionable in deceit if made fraudulently.[2] Cases where non-disclosure has resulted in a misrepresentation often depend on an implied representation that the transaction is of the normal and usual type, and nothing has been withheld which would show it to be otherwise.[3]

1 *Wilson v Short* (1848) 6 Hare 366; *Waddell v Blockey* (1879) 4 QBD 678 CA.
2 Para **10.06**.
3 Para **4.22**.

3.09 Personation, as old as Jacob and Esau[1], is a representation as is an alias. A person wearing the cap and gown of a member of a university represents that he is one.[2] A person using the business card of a firm represents that he is its agent.[3] A man who had ceased to be agent for a known principal, but continued to do business with former customers, impliedly represented that he was still acting for that principal.[4] An agent or partner may, by conduct, represent himself to be a principal.[5] One who produces to another leases to fictitious persons represents that there are such persons and the leases are genuine.[6]

1 Genesis 27.
2 *R v Barnard* (1837) 7 C & P 784.
3 *Hardman v Booth* (1863) 1 H & C 803; *Cundy v Lindsay* (1878) 3 App Cas 459; para **4.21**.
4 *Higgons v Burton* (1857) 26 LJ Ex 342.
5 *Moens v Heyworth* (1842) 10 M & W 147 (jury to decide whether invoice stating goods of first shipping quality impliedly represented that shippers were independent); *Blake v Albion Life Assurance Society* (1878) 4 CPD 94 (agent of defendant pretended to have no connection with it).
6 *Marnham v Weaver* (1899) 80 LT 412; *Fawcett v Star Car Sales Ltd* [1960] NZLR 406 CA (agent acting within authority sold car representing she was owner).

3.10 Representations to conceal earlier deception are frequently made by conduct. A solicitor who misappropriated the principal but paid interest to the client represented that a mortgage was effected in accordance with the client's instructions.[1] A custodian, by producing the title deeds of property supposedly mortgaged, represents that moneys have been invested as required.[2]

1 *Blair v Bromley* (1847) 2 Ph 354; *Moore v Knight* [1891] 1 Ch 547; *Thorne v Heard* [1895] AC 495, 506.
2 *Re Murray* (1887) 57 LT 223.

3.11 The practice of employing puffers at auctions[1] and passing off by 'get up'[2] are also representations by conduct.

1 Para **19.12**.
2 Para **20.21**.

3.12 To induce a lady to marry him, a man arranged for his brother to give him a promissory note for a large sum as the pretended balance of accounts between them. Its production was an implied representation that the holder possessed property to that amount.[1] A man who procured another to become the apparent owner of a farm represented him to be a person of substance.[2] A woman who assumed magical powers made a 'pretence', for 'it is not necessary that the false pretence should be made in express words, if the idea is conveyed', and 'her acting as 'a cunning woman' coupled with all that passed', and her 'conduct and conversations' were sufficient.[3] A man sent a bullock, heifer and hermaphrodite to a public market. This was a representation that the third animal was either a bullock or a heifer.[4] The sale of an article by a dealer in antiques was an implied representation that it was a curio of some kind. The article was a 'silent asserter', *res ipsa loquitur*.[5]

1 *Montefiori* (1762) 1 Wm B1 363.
2 *O'Herlihy v Hedges* (1803) 1 Sch & Lef 123.
3 *R v Giles* (1865) 34 LJMC 50, 53.
4 *Gill v M'Dowell* [1903] 2 IR 463.
5 *Patterson v Landsberg & Son* (1905) 7 F (Ct of Sess) 675, 681; *Edgar v Hector* 1912 SC 348.

BRIBERY

3.13 Bribery involves implied representations. A principal who bribes an agent to secure a contract or other advantage from the latter's principal[1] commits the tort of deceit. The corrupting principal and the corrupted agent are jointly liable in restitution for the bribe and in deceit for the victim's loss. These are alternative remedies, and the victim must elect when taking final judgment.[2] There is also a remedy in equity because the agent holds the bribe and its proceeds on a constructive trust for his principal.[3] Liability in deceit was established by decisions of the Court of Appeal in 1891[4] and 1900,[5] and was confirmed by Lord Diplock in *Mahesan* in 1979.[6] These cases did not identify the representations made by the corrupt principal and the corrupted agent but there is no difficulty in treating them as making implied representations of their honesty in the transaction. As A L Smith LJ said: 'In these cases secrecy is a badge of fraud'[7]. This implication is supported by cases where the courts have identified implied representations that a transaction is lawful or honest. In *HIH Casualty*[8] Lord Bingham said:

> 'Parties entering into a commercial contract . . . assume the honesty and good faith of the other; absent such an assumption they would not deal . . . As Lord Justice Bramwell observed[9] . . . 'every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that

that it became true soon afterwards is only relevant on damages.[2]

1 *Briess v Woolley* [1954] AC 333, 344, 353–4 (*Briess*).
2 *McConnel v Wright* [1903] 1 Ch 546 CA (*McConnel*).

CONTINUING REPRESENTATIONS

4.09 A representation that is not withdrawn will normally continue, being repeated minute by minute, until it lapses or is acted on.[1] As Mellish LJ said of a wife who misrepresented her marital status:[2]

> 'Every day when they were living together she must be taken as continuously representing to him that she was his lawful wife.'[3]

Like a continuing offer,[4] a continuing representation may be withdrawn or modified until it expires in accordance with its terms,[5] lapses after a reasonable time, or is acted upon.[6] As Smith J said in an Australian case:[7]

> 'When a man makes a representation with the object of inducing another to enter into a contract with him, that other will ordinarily understand the representor, by his conduct in continuing the negotiations and concluding the contract, to be asserting, throughout, that the facts remain as they were initially represented to be. And the representor will ordinarily be well aware that his representation is still operating in this way, or at least will continue to desire that it shall do so. Commonly, therefore, an inducing representation is a continuing representation in reality and not merely by construction of law.'

A continuing misrepresentation which induced the representee to enter into a contract will then continue until the truth is discovered, and can cause further damage in the meantime.[8] Where marine insurance was obtained by a material misrepresentation, and the policy was renewed without a fresh proposal, the misrepresentation had continuing effect and the insurer could avoid the renewed policy.[9] Any withdrawal or correction of a misrepresentation must be in clear and explicit terms.[10]

1 *Briess* [1954] AC 333, 349 per Lord Reid: ' . . . his fraud continued from minute to minute . . . up to the time when he secured completion of the contract'; *DPP v Ray* [1974] AC 370, 379, 382, 386, 391.
2 *Meluish v Milton* (1876) 3 ChD 27, 35 CA; *With v O'Flanagan* [1936] Ch 575 CA; *Jones v Dumbrell* [1981] VR 199, 203 per Smith J prima facie a representation is taken as continuing until the contract is made:

> ' . . . this . . . merely lays down a presumption of fact, justified by ordinary human experience, leaving the matter . . . for determination as a question of fact on the whole of the evidence.'

3 Fraud inducing bigamous marriages: *Graham v Saville* [1945] 2 DLR 489; *Beaulne v Ricketts* (1979) 96 DLR (3rd) 550; *Shaw v Shaw* [1954] 2 QB 429 CA; *C K v J K* [2004] 1 IR 224 SC [140]; cf paternity fraud: *Magill v Magill* (2006) 226 CLR 551; Handley 'Paternity Fraud' (2007) 123 LQR 337
4 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, 262 CA.
5 As with most prospectuses.
6 *Smith v Kay* (1859) 7 HL Cas 750, 769 where bills procured by misrepresentation were replaced by a bond and in answer to the argument that the plaintiff was not induced to execute the bond by any false statement, Lord Chelmsford LC said: 'It is a continuing representation. The representation does not end for ever when . . . made'; *Holland v Manchester and Liverpool District Banking Co Ltd* (1909) 25 TLR 386 (incorrect balance in pass-book can be corrected but in the meantime is a continuing representation and, if the customer acting in good faith and without negligence, draws a cheque against it which is dishonoured, the bank will be liable for wrongful dishonour); MIA 1906, s 20(6): 'a representation may be withdrawn or corrected before the contract is concluded.'
7 *Jones v Dumbrell* [1981] VR 199, 203; *DPP v Ray* [1974] AC 370, 382–3, 386 (conviction for obtaining a pecuniary advantage by deception sustained against accused who ordered a meal with the intention of paying for it and then changed his mind, falsifying his continuing representation that he intended to pay).
8 *Clef Acquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488 CA (*Clef Acquitaine*).
9 *The Moonacre* [1992] 2 Lloyd's Rep 501, 521; paras **3.15–3.17**.
10 *Arnison v Smith* (1889) 41 ChD 348, 370, 371–2, 373 CA.

SUPERVENING EVENTS

4.10 The relevant facts may change while the representation continues before it is acted on. The representor may discover that what he believed to be true was false[1], and later events may falsify a representation which was true when first made. In the former what was originally false remains false, and discovery turns innocence into fraud. In the latter later events convert truth into falsehood.[2] These principles are not limited to cases where there is an enforceable duty of disclosure[3]. There is a third situation. A representor who originally acted independently may become the agent of another who becomes responsible for any continuing fraudulent misrepresentation by his now agent.[4] A bankrupt's interest was subject to his wife's life interest, and was so described during negotiations with his assignees for its purchase. The purchaser entered into a contract without disclosing that the wife had died, and Lord Eldon LC set aside the sale.[5] Where a proponent for a life policy stated that he was not insured in any other office, but obtained other insurance before the policy issued, there was a misrepresentation.[6] This was also the case when an applicant failed to correct the name of his most recent medical adviser which had become false;[7] and where an insured added a storey to premises correctly described in a proposal before the policy issued.[8] If directors, named in a prospectus, retire before allotment, the representation becomes false[9] but not if they retire afterwards.[10]

A true statement, in negotiations for a compromise between a judgment debtor and a judgment creditor, that the former's father had always refused to assist him, became false on the father's death intestate, and a compromise on the faith of the continuing representation was vitiated.[11] Where a man submitted a horse for auction, describing it as his property, but sold it privately before the auction, the purchaser who relied on the continuing representation could rescind.[12] Where a proponent correctly described his health in the proposal but failed to report a material change before the contract was made, there was a misepresentation.[13]

1 Para **5.14**; *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469, 475.
2 In *With v O'Flanagan* [1936] Ch 575, 584 CA Lord Wright MR referred to 'the duty which rests upon the party who has made the representation not to leave the other party under an error when the representation has been falsified by a change of circumstances'; *Jones v Dumbrell* [1981] VR 199; *Amaroa Holdings Ltd v Commercial Securities and Finance Ltd* [1976] 1 NZLR 19; *L K Oil & Gas Ltd v Canalands Energy Corpn* (1989) 60 DLR (4th) 490, 495 Alberta CA; *Westpac Banking Corporation v Robinson* (1993) 30 NSWLR 668, 686–7 CA; para **5.07**.
3 *Ibid* at 585.
4 *Briess* [1954] AC 333, 353-4.
5 *Turner v Harvey* (1821) Jac 169.

delusion created by the fraud in the injured party's mind in order to profit by the fraud'; *Gross* [1970] Ch 445, 461 CA approving *Pilmore v Hood* (above), cf para **4.23** nn 13–15.

4 (1852) 3 HLC 702, 733–4.

DUTY TO MENTION UNUSUAL FEATURES IN WELL-KNOWN TRANSACTION

4.22 Entry into a transaction of a well-known type, without revealing matters which would be considered unusual in such a transaction, is a representation that there are no such matters and a misrepresentation.[1] This is illustrated by cases of fidelity guarantees given in respect of employees known to the employer to have been dishonest, where the failure to disclose this to the surety involves a misrepresentation because, as Farwell LJ said:[2] 'The surety believes that he is making himself answerable for a presumably honest man, not for a known thief.'

1 *Hamilton v Watson* (1845) 12 Cl & Fin109, 119; para **3.18**; *Evans v Edmonds* (1853) 13 CB 777: fraudulent misrepresentation by trustee of separation deed entitled to receive payment of wife's allowance from the husband, having concealed his seduction of the wife and adoption of the role of trustee to mask their continued association; *Harrower v Hutchinson* (1870) LR 5 QB 584 Ex Ch; *Phillips v Foxall* (1872) LR 7 QB 666, 679; *Cavendish-Bentinck v Fenn* (1887) 12 App Cas 652, 671 where Lord Macnaghten discussed the position of the agent alleged to have concealed his interest, 'and so to have represented that he was not interested in the property, and that it belonged to other persons who were not connected with the scheme'; *Oelkers v Ellis* [1914] 2 KB 139 (the like); cf bribery of agent: para **3.13**.

2 *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, 82 CA; para **3.18** (implied representation to surety).

EXCEPT AS ABOVE, SILENCE IS NOT A REPRESENTATION

4.23 In general, silence is not a representation. Acquiescence in the self-delusion of another, if nothing is said or done to mislead, unless silence makes what is stated false, does not attract legal liability.[1] Mere silence therefore cannot support a cause of action for deceit.[2] Familiar illustrations are cases where a purchaser buys land he knows contains valuable minerals,[3] from an ignorant owner, or buys an 'old master' or rare manuscript from someone who thinks it is rubbish.[4] The same rule applies where a vendor sells a mine which he knows is nearly worked out, a patentee grants a licence to work an invention he knows has no validity or value,[5] a lessor demises premises he knows are unsafe,[6] or a principal does not inform the contractor of the nature of ground to be excavated.[7]

In these situations, silence is not a misrepresentation provided nothing has been said or done which might mislead. It is often a case of one party bringing to bear knowledge, skill or judgment acquired, perhaps at great cost, for the business of life. Such dealings may be repugnant to a man of high honour, but the law's concern is to determine whether a right has accrued. The court however will carefully scrutinise the facts to see if there is anything to prevent this right of silence from operating. Thus Lord Eldon LC, after referring to the general principle, added:[8]

> 'but a very little is sufficient to affect the application of that principle. If a word, if a single word, is dropped which tends to mislead the vendor, the principle will not be allowed to operate.'

Lord Campbell LC added[9] that 'a nod, or a wink, or a shake of the head, or a smile from the purchaser' may make all the difference. The purchaser concealed the fact that the land contained minerals of far greater value than the vendor, to his knowledge, supposed, and because his conduct evidenced an intention to deceive the contract was avoided. Where a purchaser had secretly mined coal from the area offered for sale, which gave the vendor rights of greater value than the coal *in situ*, Lord Hatherley LC held that this imposed on the purchaser a duty of disclosure,[10] and he likened it to the case where:[11]

> 'a picture-dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark which will tell him who is the artist, and then finds a mark showing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist.'

In other words, concealment by a purchaser of facts affecting the value of the property, acquired by his wrongful acts, is a misrepresentation. Where a man, in treaty with another for the purchase of a policy on the life of a third person, learns of an accident to the 'life', he may keep silent if he has never made any representation, but if he insinuates that the health of the 'life' continues as before, the contract will be set aside.[12] An investor lent to a supposed lessee on the security of fictitious leases, and then after discovering the truth, was paid off from the proceeds of a fresh loan by another on the same supposed security. When the new lender discovered the fraud he sued the former in deceit. Romer J acknowledged the general principle that:[13]

> '. . . though a person may be deceived by another with the knowledge of a third person, if that third person is not party to the deceit, and owes no legal duty or obligation to the party deceived, and does nothing but preserve silence, however morally blameworthy . . . he cannot be held liable . . . at the instance of the party deceived.'

It did not apply because the defendant, knowing the truth, produced the leases to the plaintiff's solicitors as if they were genuine, executed reassignments as if the leases existed, and was paid off from the proceeds of the plaintiff's loan. Romer J continued:[14]

> 'It appears to me . . . impossible for the defendant to successfully contend that he took no active part in the transaction so far as the plaintiff is concerned, or that he is to be regarded as a mere passive spectator of the fraud perpetrated on the plaintiff'.

It is one thing to say nothing; it is another to take an active step. Silence, in conjunction with positive conduct, may become a representation when otherwise it would not.[15]

1 *Horsfall v Thomas* (1862) 1 H & C 90, 99–100 (no duty to disclose defect in cannon, and no misrepresentation, the defect not having been concealed from the purchaser who never inspected); *Smith v Hughes* (1871) LR 6 QB 597, 607 per Blackburn J: 'even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit, for . . . there is no legal

ABSENCE OF HONEST BELIEF RENDERS MISREPRESENTATION FRAUDULENT

5.03 The 'something more' is the absence of an honest belief by the representor that his statement was true. It is often said that a misrepresentation is fraudulent when the representor:

(1) knew it to be false;
(2) believed it to be false;
(3) did not know or believe it to be true; or
(4) made it with reckless indifference as to its truth or falsity.

It is obvious, as Lord Herschell said, that (4) is the same as (3) with an added term of opprobrium.[1] It is equally obvious that (2) is an *a fortiori* case of (3), and (1) of (2). Thus all four cases are comprehended in the third category. Lord Herschell concluded 'to prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth'.[2] The expression 'honest belief" imports that the representor may believe that the representation is true but still be fraudulent. This happens when belief is generated or maintained by a conscious decision to avoid enquiry which might reveal the truth; 'diligence in ignorance', the expression of Knight-Bruce V-C[3], or 'wilful ignorance', the expression of Lord Cranworth LC.[4] Lord Herschell said:[5]

> ' . . . if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from enquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.'

A modern expression is 'blind eye knowledge'.[6] Although in this context 'recklessness', 'indifference' and the like refer to the state of mind of the representor,[7] the test is simply whether he had an honest belief in the truth of the representation as he understood it. In *Foley's Creek Extended Co v Cutten*[8] a promoter, 'honestly believing in the truth of the particulars', stated them in a way that would lead readers to come to a certain conclusion, 'not with the intention of conveying that meaning', but 'negligently, without considering the meaning his words would be likely to convey.' Williams J held that he was not fraudulent.

1 (1889) 14 App Cas 337, 374. If the representor does not honestly believe his representation is true, it is immaterial in what spirit – speculative, reckless or deliberately – he propounds it.
2 Ibid at 374; *Angus v Clifford* [1891] 2 Ch 449, 472 CA per Bowen LJ: 'A man ought to have a belief that what he is saying is true.'
3 The previous authors did not provide a reference for this statement and the current author has not been able to find it.
4 *Owen v Homan* (1853) 4 HLC 997, 1034–5; *Jones v Gordon* (1877) 2 App Cas 616, 625; *Whitehorn Bros v Davison* [1911] 1 KB 463, 476 CA; *The Zamora* [1921] AC 801, 803, 812–3.
5 *Derry v Peek* (1889) 14 App Cas 337, 376.
6 *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2003] 1 AC 469, 485 (*Manifest Shipping*) (blind eye knowledge involves suspicion/belief and a deliberate decision to refrain from enquiry); *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 170; *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 per Lord Goff: 'knowledge includes circumstances where the person has deliberately closed his eyes to the obvious'.
7 *Behn v Burness* (1863) 3 B & S 751, 753 Ex Ch ('reckless ignorance whether it may be true or untrue'); *Arkwright v Newbold* (1880) 17 ChD 301, 320 CA ('reckless disregard'); *Angus v Clifford* [1891] 2 Ch 449, 471 CA (where Bowen LJ describes the 'indifference' of the representor as 'the moral obliquity which consists in the wilful disregard of the importance of truth'); *Coats (J and P) Ltd v Crossland* (1904) 20 TLR 800, 803–6 ('reckless non-belief'); *Economides* [1998] QB 587, 598 CA per Simon Brown LJ: 'he could not simply make a blind guess; one cannot believe to be true that which one has not the least idea about.'
8 (1903) 22 NZLR 759, 762–3; *Smith v Chadwick* (1884) 9 App Cas 187, 201 per Lord Blackburn.

STATE OF MIND OF REPRESENTOR

5.04 It is no defence to a charge of falsity that the representor intended the words to convey a different meaning which was true. But where the inquiry is whether the representation was fraudulent we are investigating the state of mind of the representor at the time. In deciding whether the representation was fraudulent, the question is not whether the representor honestly believed it to be true as construed by the court, but whether he honestly believed it to be true as he understood it at the time. There are limits. The meaning professed by the representor may be so unreasonable that the court will find that he did not honestly believe it was true in that sense. But the principle is clear: proof of fraud involves an examination of the representation in the sense in which the representor honestly understood it.[1]

1 *Akerhielm* [1959] AC 789, 805; *Borders* [1941] 2 All ER 205, 228 HL; *Gross* [1970] Ch 445, 459 CA; *John McGrath Motors (Canberra) Pty Ltd v Applebee* (1964) 110 CLR 656; *Krakowski* (1995) 183 CLR 563, 577.

INTENTION AND MOTIVE OF REPRESENTOR

5.05 The representee must prove that he acted on the representation in the manner intended by the representor.[1] In *Peek v Gurney*[2] the plaintiff, who purchased shares on the Stock Exchange, brought an action based on representations in a recent prospectus inviting the public to subscribe for the shares. His action failed because the representors intended to induce subscriptions not purchases. Although actionable fraud involves an intention on the part of the representor to induce the representee to act as he did, there is no need to prove any further intention, and the representor's motive is irrelevant.[3] The fact that he did not intend to damage the representee,[4] or benefit himself,[5] or even intended to benefit the representee[6] or someone else, is immaterial. A false representation made without honest belief in its truth is fraudulent if made with the intention that the representee should act on it, even if there is no apparent motive.[7]

1 Approved *Nautamix BV v Jenkins of Retford Ltd* [1975] FSR 385, 394 (*Nautamix*) by Oliver J (fraudulent misrepresentation of identity of inventor in patent application, not intended to induce compromise of patent litigation some years later), paras **6.08–6.09**.
2 (1873) LR 6 HL 377. The decision may not apply to a modern prospectus: para **6.08** nn 4–6 and has been bypassed by statute: para **19.03**.
3 *Derry v Peek* (1889) 14 App Cas 337, 374 per Lord Herschell: ' . . . if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made'; *Smith v Chadwick* (1884) 9 App Cas 187, 201; *Krakowski* (1995) 183 CLR 563, 580.
4 *Edgington v Fitzmaurice* (1885) 29 ChD 459, 462 CA; *Arnison v Smith* (1889) 41 ChD 348, 368 CA; *United Motor Finance Co v Addison & Co Ltd* [1937] 1 All ER 425 PC (*United Motor Finance*)
5 *Pasley v Freeman* (1789) 3 TR 51, 58.
6 *Smith v Chadwick* (1884) 9 App Cas 187, 201 per Lord Blackburn: 'The defendants might . . . believe that the shares were a capital investment, and that they were doing the

TWO ASPECTS OF INDUCEMENT

6.03 Inducement is established by proof that the representation was made with the object and had the result of causing the representee to alter his position. Neither suffices without the other. As the Singapore Court of Appeal said recently: 'The question of inducement is approached from the perspective of the representor. The question of reliance is approached from the perspective of the representee.'[1] Proof of the necessary intent is facilitated by the ordinary inference that the representor intends the natural and probable result of his acts.[2] Thus materiality and inducement are closely related. Questions of inducement and materiality must be approached by comparing the representation with the truth, not with silence.[3] A misrepresentation is established by proof of a material difference between the representation and the truth. The validity of testing inducement by comparing the representation with the truth is supported by the established principle that causation/inducement continues until the truth is known.[4]

1 *Wee Chiaw Sek Anna v Li Ann Genevieve* [2013] SGCA 36 [22].
2 *Smith v Chadwick* (1884) 9 App Cas 187, 190.
3 *Ross River* [2008] 1 All ER 1004, 1057; cf *Raiffeisen* [2011] 1 Lloyds Rep 123; para **6.20** n 12.
4 There are limits on the damages a claimant can recover for losses that accrue after the truth is known: *Parabola Investments Ltd v Browallia Cal Ltd* [2011] QB 477, 491, 496 (*Parabola*); *Clef Acquitaine* [2001] QB 488 CA, 502 (discovery of the fraud), 510 (loss from deceit), 512 (had the truth been known), 513 (if told the truth); *Doyle v Olby (Ironmongers)* Ltd [1969] 2 QB 158 CA (*Doyle*), 171 (honestly told the facts), 172 (once the facts were fully known).

INTENTION INSUFFICIENT IF ACTUAL INDUCEMENT NOT SHOWN

6.04 The proposition that there is nothing actionable in an intention to induce which fails seems obvious. 'An action cannot be supported for telling a bare naked lie',[1] 'a man may with impunity lie in gross'.[2] Lord Brougham expressed his views on the question with his usual vigour: 'Thirdly and chiefly', he said, after enumerating two elements in any proceeding for misrepresentation, 'it should be this false representation which gave rise to the contracting of the other party.' He continued:[3]

> ' . . . general fraudulent conduct signifies nothing . . . attempts to overreach go for nothing . . . an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected only with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place,[4] and must have given rise to this contract . . . The party must not only have been minded to overreach, but he must actually have overreached . . . the representations so made must have had the effect of deceiving the purchaser; and moreover, the purchaser must have trusted to these representations, and not to his own acumen, not to his own perspicacity, not to inquiries of his own.'[5]

The Earl of Selborne said:[6]

> 'If the vendor was not in fact misled, the contract could not be set aside, because a *dolus* which neither induced nor materially affected the contract is not enough.'

Accordingly, whenever the representee has failed to discharge the burden of establishing that he was in fact induced, he has failed. He may have relied solely[7] on something other than the misrepresentation,[8] his own skill or judgment,[9] his general knowledge of business, faith in the venture, special enquiries,[10] or knowledge of the truth.[11] Inducement and reliance may be excluded where a pre-contractual representation is made the subject of an express warranty.[12] He may not have read the document containing the misrepresentation;[13] it may not have been addressed to, or intended for him, or for a class of which he was a member;[14] he may not have examined the article so that the active concealment of its defects did not influence his decision;[15] or it may appear that he was determined to take the risk, whatever it was.[16]

1 *Pasley v Freeman* (1789) 3 TR 51, 56; *Langridge v Levy* (1837) 2 M & G 519, 531: 'mere naked falsehood'.
2 *Archer v Stone* (1898) 78 LT 34, 35; *Nautamix* [1975] FSR 385, 392 per Oliver J.
3 *Attwood v Small* (1838) 6 Cl & Fin 232, 447–8; *CRF Holdings Ltd v Comor Supplies Ltd* [1982] 2 WWR 385, 391 BCCA: 'A misrepresentation to be material, must be one necessarily influencing and inducing the transaction and affecting and going to its very essence and substance.'
4 The view that the representation must be made 'the very ground' upon which the transaction took place has been rejected: para **6.09**; *Australian Steel & Mining Pty Ltd v Corben* [1974] 2 NSWLR 202, 207 CA (*Corben*); *County NatWest Bank Ltd v Barton* [2002] 4 All ER 494 (*Barton*); *Nautamix* [1975] FSR 385, 394.
5 *Nautamix* ibid.
6 *Cooke v Boswell* (1886) 11 App Cas 232, 236.
7 Reliance on something in addition to the misrepresentation does not negative inducement: para **6.09**.
8 *Flinn v Headlam* (1829) 9 B & C 693 (jury found that plaintiff relied solely on certificate of seaworthiness and not on the misstatement of the cargo); *Re Northumberland and Durham District Banking Co* (1858) 28 LJ Ch 50 (shareholder had not relied on reports and accounts, which he had not seen, but on statements of a director); *Baty v Keswick* (1901) 85 LT 18 (plaintiff relied on names of the directors and not on prospectus).
9 *Hill v Balls* (1857) 2 H & N 299; *A-G of NSW v Peters* (1924) 34 CLR 146, 152 (civil servants who made recommendations were misled, but Ministers who made the decision acted on other grounds): 'The fact or the amount of the contractors' loss was considered immaterial, and the government entered into the contract for public reasons'; total self-reliance negatives liability for misrepresentation: *Raiffeisen Zentral Bank Osterereich AG v Archer Daniels Midland Co* [2007] 1 SLR 196, 213.
10 *Attwood v Small* (1838) 6 Cl & F 232; *Bellairs v Tucker* (1884) 13 QBD 562, 582 where the representee relied on personal knowledge of business and faith in the product.
11 Paras **11.06–11.08**.
12 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 350.
13 *Re Northumberland etc Co* (1858) 28 LJ Ch 50.
14 *Salaman v Warner* (1891) 65 LT 132 CA; *Sleigh v Glasgow and Transvaal Options Ltd* (1904) 6 F (Ct of Sess) 420 (prospectus had not been issued to the public), paras **6.06**, **9.06–9.07**.
15 *Horsfall v Thomas* (1862) H & C 90, 99.
16 *Attwood v Small* (1838) 6 Cl & F 232; *Shrewsbury v Blount* (1841) 2 Man & G 475; *Vigers v Pike* (1842) 8 Cl & Fin 562; *Way v Hearn* (1862) 13 CBNS 292, 302, 305, 307; *Kisch* (1867) LR 2 HL 99, 125; *Mathias v Yetts* (1882) 46 LT 497, 502, 504 CA; *Wasteneys* [1900] AC 446, 451: 'impossible to believe that the respondent was induced to execute the deed by representations as to his wife's chastity'; *Stevens v Hoare* (1904) 20 TLR 407; *A W Gamage Ltd v Charlesworth* 1910 SC 257 (manager not called to prove inducement).

INTENTION TO INDUCE ALSO NECESSARY

6.05 An intention to induce is also essential, for as Lord Denman CJ pointed out[1]: ' . . . if every untrue statement which produces damage to another

would found an action at law, a man might sue his neighbour for . . . having a conspicuous clock too slow'. The point was made by Coleridge J when he said[2] that if 'a person coming from abroad publishes a false account of a mining district . . . a party going out in consequence, and suffering loss', would otherwise 'be entitled to sue.' An incorrect entry in Lloyd's Register did not give a cause of action to a person to whom it was not expressly or impliedly directed as an inducement, Denman J saying:[3]

> 'It would be . . . almost as great a stretch to say that if, in a public directory, there were the statement of an address of a firm which was inaccurate . . . any one of the public who had to pay a large sum for a journey to go to that place to do business with that firm would have a cause of action against the proprietors of that directory for that statement.'

The representor must intend to induce the particular representee, or a class to which he belongs, to act on the representation in the way he did. Where the representation is made without such an intention, as in the case of the clock, or a register or directory, and nothing more is shown, the representor is not responsible even if someone did rely upon the representation and suffer loss. No intent can be inferred from such representations, and the intention to induce must be specially proved[4]. In *Magill*, Heydon J said[5]: '[a] statement of fact made . . . in jest, or on some purely social occasion' will not support an action in deceit because there was no intention to induce.

1 *Barley v Walford* (1846) 9 QB 197, 208; a 'mere naked falsehood' is not enough: *Langridge v Levy* (1837) 2 M & W 519, 531.

2 *Gerhard v Bates* (1853) 2 E & B 476. Counsel for the defendant (at 486) said 'a lecturer might just as well be liable to every one who heard him, if he stated an untruth', to which Lord Campbell CJ replied that he would only be liable if the statement were 'fraudulently made and with the intent to produce the evil.'

3 *Thiodon v Tindall* (1891) 65 LT 343, 348; cf *Rich (Marc) & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211 (*Marc Rich*) (classification society owed no duty of care to cargo interest).

4 *Attwood v Small* (1838) 6 Cl & Fin 232; *Way v Hearn* (1862) 13 CBNS 292, 302–3, 305, 307 where the plaintiff only intended to conceal a debt from his wife; *Conybeare* (1862) 9 HLC 711 where the communication was not made 'with . . . reference to any statement of the respondent that he wished to buy shares'; *Baty v Keswick* (1901) 85 LT 18 (intention to induce investors not underwriters); *Andrews v Mockford* [1896] 1 QB 372 CA (prospectus and then telegram published in the financial press intended to induce purchases on stock exchange). Cf *Salaman v Warner* (1891) 65 LT 132 CA (statement of claim which failed to allege such matters struck out); *Gordon v Street* [1899] 2 QB 641 CA; *Tackey v McLean* [1912] AC 186, para 6.08 n 2.

5 (2006) 226 CLR 551, 617.

REPRESENTATION MAY BE SPENT

6.06 A representation may be made to induce a representee to act in one way, but he may act on it in another way. The representation is then regarded as spent, and a representee who suffers loss in that way has no cause of action. The reasons for this were explained by Lord Cairns in *Peek v Gurney*, where directors who issued a fraudulent prospectus were not liable to persons induced to purchase shares on the Stock Exchange. He said:[1]

> 'I ask the question, how can the directors . . . be liable, after the full original allotment of shares, for all the subsequent dealings which may take place with regard to these shares upon the Stock Exchange? If the argument of the appellant is right, they must be liable *ad infinitum* for I know no means of pointing out any time at which the liability would in point of fact cease.'[2]

The continuing validity of this principle is illustrated by *Collins*[3] where an undisclosed principal whose agents took up shares and transferred them to him was denied standing to enforce rescission. The principal had relied on the prospectus but the company was entitled to treat his agents as principals, and its prospectus was only intended to induce subscriptions. *Peek v Gurney* did not decide that a prospectus could never be intended to induce purchases in the market. In *Possfund*[4] Lightman J refused to strike out claims by purchasers against directors, auditors and financial advisers responsible for the listing particulars[5], because expert evidence disclosed a triable case that:

> '. . . by 1989 company and commercial practice . . . had changed, and . . . the established purpose of a prospectus and its contents were no longer confined to inducing investors to become placees, but extended to inducing the public to make aftermarket purchases.'[6]

In *Gross*[7] A contracted to purchase land relying on representations by the vendor. He passed these on to the plaintiff who agreed to take a conveyance by direction and pay him a commission. The plaintiff could not rescind because the representations were spent when A entered into the original contract. Harman J said, echoing Lord Cairns, 'after that where do you stop?'[8] Cross LJ said that the case was to be distinguished from one where the purchaser's expert is misled by the vendor's fraudulent misrepresentations and recommends the purchase to his client without passing on the misrepresentations. He thought that in such a case the purchaser could rely on the misrepresentations to his agent to establish a cause of action or defence.[9]

In *Nautamix*[10] a research scientist employed by the plaintiff went to work for the defendant. The defendant later applied for a patent allegedly derived from the plaintiff's confidential information which the scientist should not have used. The plaintiff claimed that the defendant misrepresented the identity of the inventor in the patent application to conceal its misuse of the confidential information. Some years later, and before it discovered the falsity of the representation, the plaintiff compromised a suit for infringement of the patent. Having discovered the misrepresentation, the plaintiff sought to set aside the compromise for fraud, but Oliver J dismissed its action because any misrepresentation made to the Patent Office in the application for grant, or indirectly to the plaintiff, had not been made to induce the compromise. The case was one, like *Peek v Gurney*, where the representation was intended to induce the plaintiff to act one way, but it acted in another way.

1 (1873) LR 6 HL 377, 411.

2 The directors' liability would cease once the falsity of the prospectus became general knowledge. For the position under current legislation: Ch 19. Lord Cairns gave the example of a vendor who fraudulently attempts to induce the representee to purchase his house. If the representee later acted on the representation by advancing money to the purchaser on mortgage he could not recover his loss from the vendor.

3 *Collins v Associated Greyhound Racecourses Ltd* [1930] 1 Ch 1, 34, 36 CA.

4 *Possfund Custodian Ltd v Diamond* [1996] 1 WLR 1351.

5 These have replaced the prospectus: para 19.01 ff.

6 Ibid at 1363, 1365–6.

7 [1970] Ch 445 CA.

8 Ibid at 463.

9 Ibid at 461. A company can only rely on the inducement of its servants or agents: *Corben* [1974] 2 NSWLR 202, 210 CA per Hutley JA: ' . . . where a party to whom the relevant

fair inference of fact that he was induced to do so by the representation . . . one can readily understand why it is in cases of deceit that a tribunal whose duty it is to find the facts may require a defendant to make some answer to the case that is put against him . . . In the general experience of mankind the facts speak for themselves . . . it is entirely accurate to speak of an onus resting on a defendant to draw attention to the presence of circumstances . . . to show that the inference of the fact of inducement which would ordinarily be drawn . . . should not be drawn. But it is no more than an evidentiary onus.'

In *Pan Atlantic*[8] the House of Lords confirmed the understanding of materiality in insurance law accepted in *Oceanus*,[9] but held that an underwriter cannot avoid for non-disclosure or innocent misrepresentation unless this induced him to enter into the contract, and overruled *Oceanus* on this point. The decision emphasised the separate elements of materiality and inducement in cases of innocent misrepresentation. As Lord Mustill said:[10]

'. . . an innocent misrepresentation inducing the contract would give the underwriter a right to avoid only if it was material. Proof of actual effect was not necessarily proof of materiality.'

He referred to the inference of inducement that arises on proof of materiality, saying:[11]

'In the general law it is beyond doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid, although the task of proof may be made more easy by a presumption of inducement . . . even where the underwriter is shown to have been careless in other respects the assured will have an uphill task in persuading the Court that the withholding or misstatement of circumstances satisfying the test of materiality has made no difference. There is ample material both in the general law and in the specialist works on insurance to suggest that there is a presumption in favour of a causative effect.'

1 (1884) 9 App Cas 187, 196–7; *Mathias v Yetts* (1882) 46 LT 497, 507 CA per Lindley LJ: 'if the defendant makes a representation to the plaintiff . . . with a view to induce him to enter into a contract, is it necessary for the plaintiff to prove by any other affirmative means than that he completed the contract, that he relied on the statements made to him? I apprehend not and anybody would infer that he did'; *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, 428 CA per Scrutton LJ: 'The mercantile importance of clean bills of lading is so obvious and important that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it'; *Batty* (1986) 160 CLR 251, 258 (fair inference that bank was induced to collect the proceeds of cheques by implied representation that customer was the owner or had the authority of the owner, although it called no evidence on that question); *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, 282 CA.

2 *Commercial Union Assurance Co Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, 418–9 CA.

3 (1881) 20 ChD 1, 21 CA.

4 *Smith v Chadwick* (1882) 20 ChD 27, 44 CA.

5 Ibid (1884) 9 App Cas 187, 197 per Lord Blackburn: 'I think it is not possible to maintain that it is an inference of law . . . I quite agree that, being a fair inference of fact, it forms evidence proper to be left to a jury that he was so induced'; *Arnison v Smith* (1889) 41 ChD 348, 369 CA per Lord Halsbury LC; *Pan Atlantic* [1995] 1 AC 501, 570 per Lord Lloyd; *Holmes v Jones* (1907) 4 CLR 1692, 1707, 1711; *Gould* (1984) 157 CLR 215, 236, 238–9, 250; *LK Oil & Gas Ltd v Canalands Energy Corpn* (1989) 60 DLR (4th) 490, 496–501 CA Alberta.

6 In *Moss & Co Ltd v Swansea Corpn* (1910) 74 JP 351, Channell J inferred inducement though the plaintiff, when in the box, had said nothing about it. In *R v Lambie* [1982] AC 449, 460–1 the House of Lords held that an inference of inducement resulting from the fraudulent use of a credit card was irresistible, although the shop assistant was not asked a direct question on the point.

7 (1985) 157 CLR 215, 236, 238.

8 [1995] 1 AC 501.

9 [1984] 1 Lloyd's Rep 476 CA.

10 [1995] AC 501, 533; para 6.21.

11 Ibid at 542, 551.

6.16 If a representation could not be material, the fact that the representee thought at the time, or says at the trial, that it was cannot make it so. The fact that the representee considered a representation to be immaterial does not deny its materiality, but it negatives inducement. The self-serving opinion of the representor has even less relevance. If a statement which induced another to alter his position was likely to have that result in the ordinary course, its tendency cannot be affected by the honest belief of the representor that this would not happen.[1]

1 If a party has a duty of disclosure, his belief that undisclosed matters were not material is no excuse: *Lindenau v Desborough* (1828) 8 B & C 586, 592, 593; *Dalglish v Jarvie* (1850) 2 Mac & G 231, 243; *London Assurance v Mansel* (1879) 11 ChD 363, 368. Still less would such a belief be an answer to a claim for misrepresentation. The principle is well established in insurance law.

6.17 Someone who misrepresents with intent to mislead creates evidence against himself on the issues of materiality and inducement.

'When a dishonest trader fashions an implement or weapon for the purpose of misleading potential customers he . . . provides a reliable and expert opinion on the question whether what he has done is in fact likely to deceive.'[1]

Lord Simonds made the same point.[2] The principle was established in passing-off and trade mark cases, but is of general application. '[T]he Court is entitled to assume that the representor knows his victim, and the misrepresentation designed to produce a result does so.'[3] However, an intention to deceive is only evidence from which inducement may be inferred. 'When once you establish the intent to deceive, it is only a short step to proving that the intent has been successful, but it is still a step, even though it be a short step.'[4]

1 *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641, 657 per Dixon and McTiernan JJ, derived from the speech of Lord Blackburn in *Johnston & Co v Orr Ewing & Co* (1882) 7 App Cas 219, 230–1: 'as against these defendants . . . their own conduct is such as to prove against them that the resemblance was calculated to deceive . . . Why . . . did they come so near the plaintiff's ticket? . . . Their counsel complained that to use this as evidence of an intention to mislead, and . . . as evidence of what the effect of the similarity was likely to be, was to rely on topics of prejudice . . . as against these defendants this is very strong evidence . . . I do not think it is a proposition of law'; applied *Ross River* [2008] 1 All ER 1008, 1057.

2 *Office Cleaning Services Ltd v Westminster Office Cleaning Association* (1946) 63 RPC 39, 42 HL: 'If the intention to deceive is found, it will be readily inferred that deception will result. Who knows better than the trader the mysteries of his trade?'; *Parker-Knoll Ltd v Knoll International Ltd* [1962] RPC 265, 273 HL.

3 *Gipps* [1978] 1 NSWLR 454, 460 CA per Hutley JA.

4 *Ash (Claudius) Sons & Co v Invicta Manufacturing Co Ltd* (1912) 29 RPC 465, 475 HL per Earl Loreburn LC; *Cadbury-Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 WLR 193, 203 PC; *Radio Taxicabs (London) Ltd v Owner Driver Radio Taxi Services Ltd* [2004] RPC 351, 368–9.

Materiality is not established where the representee would have entered into the contract on the same terms with anyone else, where the identity of the purchaser or vendor is not of the essence of the contract,[4] or where the representor has kept silence.[5] Under ordinary circumstances, if a man is willing to borrow money on certain terms, the identity of the lender is not material, but if the representor knows that the representee has such a dislike of one lender that he would never incur any liability to him, a misrepresentation of the identity of that lender becomes material.[6] A woman, convicted of permitting disorderly conduct in a tearoom, applied for a lease of other premises using a name adopted by deed poll, and this was a material misrepresentation.[7]

Statements that a person is acting for himself or for another,[8] and statements as to the ownership of certain kinds of property, such as horses, pictures and the like,[9] may be material. In such cases it is idle to urge that the representation was immaterial to the contract, because this presupposes that the contract has been entered into and begs the question. The point is whether the statement was material, not to the contract but to the inducement.[10] Representations that an infant is of full age are obviously material.[11]

1 *Feret v Hill* (1854) 15 CB 207 (statement of intended use for a perfumery business: material); *Canham v Barry* (1855) 15 CB 597 (misrepresentation that intended assignee a responsible person to induce the defendant to sell his leasehold: material); *Cundy v Lindsay* (1878) 3 App Cas 459 (misrepresentation of intended contractor as honest and solvent firm of Blenkiron and Co, whereas it was the dishonest and impecunious Blenkarn: obviously material); *Morrison v Robertson* 1908 SC 332 (representor, whom purchaser would not have trusted, stated he was son and agent of someone the purchaser did trust: material); paras **3.08–3.09**.

2 *Re Life Association of England Ltd, Blake's Case* (1865) 34 Beav 639, 642; *Re Scottish Petroleum Co* (1881) 17 ChD 373; (1883) 23 ChD 413 CA; *Smith v Chadwick* (1882) 20 ChD 27, 50–1 CA, per Jessel MR; *Karberg* [1892] 3 Ch 1 CA; *Re Discoverers' Finance Corpn Ltd* [1910] 1 Ch 312 (misrepresentation of status of proposed transferee material inducement to directors to approve transfer).

3 *Phillips v Duke of Buckingham* (1683) 1 Vern 227; *Archer v Stone* (1898) 78 LT 34; *Said v Butt* [1920] 3 KB 497; *Dyster v Randall & Sons* [1926] Ch 932; *Lake v Simmons* [1927] AC 487, 501.

4 *Fellowes v Lord Gwydyr* (1829) 1 Russ & M 83, where the misrepresentation was that the principal was Lord Gwydyr who was *persona grata* to the representee; whereas the representor had bought the Coronation fittings and decorations from Lord Gwydyr, and was reselling them at a profit. Lord Lyndhurst LC said that if the representee would not have treated with any one but Lord Gwydyr, he would have been entitled to relief; *Smith v Wheatcroft* (1878) 9 ChD 223, 230 per Fry J: 'I ask myself . . . whether the defendant has shewn that any personal consideration entered into the contract. Has he shewn that he would have been unwilling to enter into a contract on the same terms with any one else?'; *Corben* [1974] 2 NSWLR 202 CA (vendor of farm land asked about intending purchaser, told it was a doctor who wanted a hobby farm, whereas it was an industrial consortium: material).

5 *Nash v Dix* (1898) 78 LT 445, decided like *Archer v Stone* (1898) 78 LT 34, 6.18 n 1, by North J: the claim (specific performance by the purchaser) and the defence (misrepresentation that the plaintiff was buying for himself) was the same but in *Nash v Dix* the plaintiff had not told any falsehood. He was not buying as agent, and there was no duty to reveal the agreed resale; *Dyster v Randall & Sons* [1926] Ch 932, 939 per Lawrence J: 'The real question . . . is whether C's silence . . . amounted to a misrepresentation which renders the agreement unenforceable in this court. In my judgment mere nondisclosure as to the person entitled to the benefit of a contract for the sale of real estate does not amount to misrepresentation, even though the contracting party knows that, if the disclosure were made, the other party would not enter into the contract; *secus*, if the contract were one in which some personal consideration formed a material ingredient.'

6 *Gordon v Street* [1899] 2 QB 641 CA (moneylender, by fraudulently misrepresenting his identity, induced a necessitous person to borrow on extortionate terms which, to his knowledge, the borrower would never have accepted had he known the truth: material); *Smith v Kay* (1859) 7 HLC 750, 758–9, 769–70; *Said v Butt* [1920] 3 KB 497, 501; *Dyster v Randall & Sons* [1926] Ch 932, 939.

7 *Sowler v Potter* [1940] 1 KB 271.

8 *Fellowes v Lord Gwydyr* (1829) 1 Russ & M 83 (para **6.22** n 4); *Moens v Heyworth* (1842) 10 M & W 147 (representation that goods 'invoiced to sellers as of first shipping quality' by independent shippers who were a branch of the representors); *Smith v Wheatcroft* (1878) 9 ChD 223 (para **6.22** n 4) and *Archer v Stone* (1898) 78 LT 34 (para **6.18** n 1) (cases where the representor stated he was acting for himself when he was an agent). In *Angus v Clifford* [1891] 2 Ch 449 CA, one question was whether the statement in a prospectus that a report had been prepared 'for' the directors was material when it had been prepared for vendors, there being no other misrepresentation. Romer J held (at 456–8) that this meant that the report had been prepared on the instructions of the directors, which might be material, and he instanced a valuation where a representee might want to know whether it had been prepared for the owner or independently. The Court of Appeal held that the representation meant that the report had been prepared for submission to the directors, which was true. It was not necessary to decide whether the representation as construed by Romer J was material, but Lindley and Kay LJJ expressed doubts. It is submitted that the decision of Romer J on this point was correct since the report dealt with matters of opinion.

9 Such statements were considered material in *Bexwell v Christie* (1776) 1 Cowp 395 ('Sale of goods and effects of a gentleman deceased, at his house in the country, by order of the executors' which was untrue, described by Lord Mansfield CJ as a fraud on the public, and he mentioned a well-known case of the sale of 'a gentleman's wines' where large quantities had been sent in and sold at a very high price); *Hill v Gray* (1816) 1 Stark 434 (representation that pictures were being sold for Sir Felix Agar); *Whurr v Devenish* (1904) 20 TLR 385, para **6.18** n 1 (representation as to ownership of horse) and *R v Kenrick* (1843) 5 QB 49 (similar).

10 *Sibbald v Hill* (1814) 2 Dow 263, 267 HL per Lord Eldon LC, who decided against the representor, 'not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence without which the party would not have acted'; *Gordon v Street* [1899] 2 QB 641, 645–6 CA.

11 Such representations by the infant are not actionable: para **12.24**.

BURDEN OF PROOF

6.23 In some cases (eg where the representation is implied from the external appearance of an object) it may be necessary to produce evidence of the tendency of the representation to deceive.[1] It is a question of law whether the representation is capable of inducing[2]:

> 'it may be that the misstatement is . . . so trivial that the court will be of opinion that it could not have affected the plaintiff's mind at all, or induced him to enter into the contract'.

Similarly, the question whether there is any evidence of inducement is a question of law.

1 In *London General Omnibus Co Ltd v Lavell* [1901] 1 Ch 135 CA it was held that the judge was not entitled to infer a tendency to deceive from the appearance of rival buses, and evidence was necessary. In the 'hermaphrodite' and 'antique' cases (para **3.12**) the animal and the curio 'told its own lie'.

2 *Smith v Chadwick* (1882) 20 ChD 27, 45–6 CA.

ALL THE CIRCUMSTANCES TO BE CONSIDERED

6.24 In determining whether a representation had a tendency to induce, and did induce the representee to alter his position, 'all the circumstances must be considered.'[1] Amongst these are: the character of any document containing the

acts which would not have attracted civil[6] or criminal liability[7] if the representation had been true. A representee who changes his position by innocently passing on a fraudulent misrepresentation which attracts an estoppel against himself can maintain an action for deceit against the original representor.[8]

1 *Skidmore v Bradford* (1869) LR 8 Eq 134; misrepresentation of authority cases: para **10.05**; *Barry v Croskey* (1861) 2 John & H 1.
2 *Haygarth v Wearing* (1871) LR 12 Eq 320, 329 per Wickens V-C setting aside a sale induced by fraud: 'the same conclusion would . . . have resulted . . . if . . . the . . . transaction was . . . a gift'; *Re Glubb* [1900] 1 Ch 354 CA (gift recovered from donee who innocently misrepresented the facts).
3 Consent to judgment: para **20.02** n 8; para **20.13**.
4 *Firbank's Executors v Humphreys* (1886) 18 QBD 54, 61 CA (representee induced to continue performing contract without pressing for cash).
5 *M'Carthy v Decaix* (1831) 2 Russ & M 614; *Stewart v Great Western Rly Co* (1865) 2 De GJ & Sm 319; *Lee v Lancashire and Yorkshire Rly Co* (1871) 6 Ch App 527; *Hirschfield v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1; *Gilbert v Endean* (1878) 9 ChD 259 CA; paras **11.22**, **16.11** n 1.
6 *Adamson v Jarvis* (1827) 4 Bing 66 (auctioneer induced to sell goods held liable in conversion to true owner); *Eyre v Smith* (1877) 2 CPD 435 CA (resolution for arrangement under bankruptcy law); para **6.22** n 2 (registration of share transfers induced by misrepresentation); *Batty* (1986) 160 CLR 246 (bank induced to collect cheques by implied representation of authority).
7 *Burrows v Rhodes* [1899] 1 QB 816 (Jameson raid) where objection that the plaintiff was suing in respect of a criminal act was overruled because if the representation had been true it would not have been criminal.
8 *Cleary v Jeans* (2006) 65 NSWLR 355 CA.

ACTIONABLE DAMAGE

7.03 Where the representee elects to affirm a contract induced by misrepresentation or is no longer able to rescind, or where his change of position involved some other act or result, his only remedy will be an action for damages.[1] He must prove that he acted on, or suffered in consequence of, his belief in the truth of the representation, and that this caused him damage. Deceit is an action on the case and damage is the gist of the action. The only relevant damage is temporal damage – some loss of money or money's worth, physical injury, some liability present or contingent, or some other form of economic loss which can be quantified and assessed. Such damage does not include the loss of social advantages to which no monetary value can be attached.[2] There is no such thing in this tort as presumptive or nominal damages. Proof of damage is essential.[3]

1 In some circumstances, eg fraud inducing payment to a third party, restitution may be available.
2 *Chamberlain v Boyd* (1883) 11 QBD 407 CA.
3 *Potts v Miller* (1940) 64 CLR 282, 287 per Starke J: 'In an action for deceit, the proof of real damage is essential. It is not a question of nominal damages, the foundation or gist of the action is real damage . . . if the real damage proved be small the verdict will be also be small.'

7.04 Damage of the nature indicated may arise from entry into or performance of a contract or transaction, from the creation of an estoppel[1], from payments,[2] loss of profits, appointments or earnings,[3] trouble and expense, or detriment of any kind to which a monetary value can be attached.[4] If a fraudulent misrepresentation causes the representee physical injury including

nervous shock,[5] though he may only suffer and not act, the injury will support this cause of action. Mere distress of mind will not do,[6] but is recoverable if the fraud caused physical or financial loss[7].

1 *Cleary v Jeans* (2006) 65 NSWLR 355 CA.
2 Moneys paid to the representor may be recovered in an action for restitution: *Kettlewell v Refuge Assurance Co Ltd* [1908] 1 KB 545, 550 CA.
3 *Barley v Walford* (1846) 9 QB 197 (loss of profits on textile design); *Denton v Great Northern Rly Co* (1856) 5 E & B 860 (missed appointment); *Burrows v Rhodes* [1899] 1 QB 816 (loss of pay and earnings).
4 Paras **12.04**, **12.20**.
5 *Levy v Langridge* (1838) 4 M & W 337 Ex Ch; *Burtsal v Bianchi* (1891) 65 LT 678 (illness caused by taking house with defective drains represented to be in good order); *Burrows v Rhodes* [1899] 1 QB 816 (injuries received during Jameson raid); *Nicholls v Taylor* [1939] VLR 119 (purchaser of secondhand car recovered damages for injury when tyre fraudulently represented as new blew out). Nervous shock is a form of physical injury: *Page v Smith* [1996] AC 155, 181–2, 187–8; *Wainwright v Home Office* [2004] 2 AC 406, 425; *Wilkinson v Downton* [1897] 2 QB 57 (defendant as a practical joke told the plaintiff that her husband had been seriously injured and was in hospital and she was to go at once to bring him home. She suffered nervous shock with physical consequences); followed in *Janvier v Sweeney* [1919] 2 KB 316, CA, where a man frightened a woman with threats in the assumed character of a detective from Scotland Yard.
6 *Lynch v Knight* (1861) 9 HLC 577, 598, per Lord Wensleydale: 'Mental pain or anxiety the law cannot value, and does not pretend to redress, when the wrongful act complained of causes that alone, though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.'
7 *Majo v Adams* [1970] 1 QB 548 CA (inconvenience); *Archer v Brown* [1985] QB 401 (mental distress and injured feelings); *Saunders v Edwards* [1987] 1 WLR 1116 CA (same); para **7.04** n 4.

7.05 There must be a causal relationship between the inducement intended, the claimant's reliance and change of position, and the damage to make the misrepresentation actionable. It is not enough that damage followed caused by the misrepresentation unless it was also a result of intended, induced reliance on it.[1] If this is not made out the representee will fail though he sustained damage by reason of his belief in the truth of the representation.[2] When the representee can prove that the representor intended the change of position which resulted, the question of whether the consequent damage was the probable result becomes immaterial.[3] Statements that the damage must be 'proximate', 'immediate' or 'direct'[4] add nothing. The test, despite the use of such terms, remains: was the change of position (a) actually intended? or (b) was it the natural and probable result of the representee being induced by the misrepresentation? The principles were summarised by Page-Wood V-C in *Barry v Croskey*:[5]

> 'First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting is injured or damnified. Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting is injured or damnified – provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss . . . Thirdly. But, to bring it within the principle, the injury . . . must be the immediate, and not the remote, consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified, it must appear that such

transaction', but from other causes. This would accord with the general principle that a loss is not recoverable if it was due to an extraneous and supervening cause.[9] The same result flows from the principle of *volenti non fit injuria* because a person entering into a transaction assumes the general risks associated with transactions of that type.

There appears to be no UK decision other than *Downs v Chappell* in point, but the question arose in *Copping v ANZ McCaughan Ltd.*[10] The plaintiff, who carried on a farming business, owed $725,000 to a bank and was having difficulty meeting his commitments because of high domestic interest rates. He did not want to sell land to reduce the debt and his only alternative was to borrow Swiss francs at a substantially lower interest rate, but with an exchange risk. The court found[11] that 'what was induced by the representation was not . . . a borrowing in [Swiss francs] but the entry into a particular transaction for [that] purpose.' The plaintiff incurred substantial losses when the Australian dollar fell sharply against the Swiss franc. Although these were the result of a transaction induced by fraud, the court held they were not recoverable in deceit because they had not been caused by the fraudulent inducement. Doyle CJ[12] cited this statement from *Gates:*[13]

> 'Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for . . . the tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation.'

He held that this principle applied, not only as in *Gates* to a claim for a lost profit or chance, but also to a claim that another course of action would have involved less expense. After reference to *Smith New Court* Doyle CJ concluded:[14]

> 'It is sufficient if the relevant loss can be said to be caused by the representation, and it is not necessary . . . that the loss is attributable to that which made the representation wrongful . . . the test is a relatively generous one, in that the misrepresenting party may have thrown upon it risks unrelated to the representation. But there is still the requirement that the loss flow from the representation and it seems to me impossible to conclude that it does . . . if . . . quite apart from the representation the appellant would have entered into a transaction bringing with it the very risk which eventuated . . . '.

The decision is consistent with the decision in *Smith New Court*, and it is thought that the case would be decided the same way in England. The court, having characterised the transaction narrowly, held that the subsequent fall in the value of the Australian dollar against the Swiss franc did not flow directly from the inducement, but from extraneous causes. A court which treated the Atkin principle as dominant, and the transaction principle as subordinate, would reach the same result. Lord Hoffmann in *Banque Bruxelles*[15] supported this analysis:

> ' . . . even if the maker of the fraudulent representation is liable for all the consequences of the plaintiff having entered into the transaction, the identification of those consequences may involve difficult questions of causation. The defendant is clearly not liable for losses which the plaintiff would have suffered even if he had not entered into the transaction or for losses attributable to causes which negative the causal effect of the misrepresentation.'

1 [1997] AC 254, 266, 281–3; however Lord Steyn said at 280: 'as between the fraudster and the innocent party moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his *fraud*' and at 284: 'the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the *inducement* of the fraudulent misrepresentation' (emphasis supplied), para 12.02 n 2.

2 Para 12.10 n 2; *Doyle* [1969] 2 QB 158, 167; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 215 (*Bank Bruxelles*); *Gould* (1984) 157 CLR 215, 221, 223; *Poseiden Ltd v Adelaide Petroleum NL* (1994) 179 CLR 332, 348.

3 [1969] 2 QB at 167, 168, 171 approved in *Smith New Court* by Lord Browne-Wilkinson at 263 and by Lord Steyn at 281.

4 Para 12.06 nn 1, 3; *Northern Bank Finance Corp Ltd v Charlton* [1979] IR 149, 187, 199 SC.

5 'One effect of the tort [was] to expose the loser to a risk which he should not be required to bear': per Hobhouse LJ in *Downs v Chappell* [1997] 1 WLR 426, 444 CA.

6 Ibid at 444.

7 [1997] AC at 267.

8 Ibid at 283.

9 Para 12.14.

10 (1997) 67 SASR 525 (Full Court of Supreme Court of South Australia). The facts have been slightly simplified.

11 Ibid at 539.

12 Ibid at 533.

13 (1986) 160 CLR 1, 13.

14 (1997) 67 SASR 525, 539.

15 [1997] AC 191, 216; cf *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 809, 909, 918-9 CA. In *B G Preco International Ltd v British Colombia Hydro and Power Authority* (1993) 99 DLR (4th) 577, 593 SC a case of negligent misrepresentation, La Forest and McLachlin JJ said that where the plaintiff would have entered into the contract in any event, albeit at a higher price, the court should not award damages 'for any losses not related to the misrepresentation, but resulting from such factors as the plaintiff's poor performance, or market or other factors.' In *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 428 (*Kenny & Good*) Gaudron J held, in a no-transaction case, that the negligent valuer was liable for the whole of the loss suffered by the client, except that part, if any, which would have been suffered if the valuation had been correct.

REDUCTION DUE TO SUPERVENING CAUSE

12.16 In *McConnel*[1] the representation that the company owned a valuable parcel of shares was false at the date of allotment but became true ten days later. This was no answer but was relevant on damages. Collins MR said:[2]

> ' . . . anybody assessing the damages will have to consider . . . what is the difference between the value of the property as it was represented and the property without this large asset in it, having regard to the possibility, certainty, or uncertainty of that asset ever being in fact acquired.'

The problems that can arise in such a situation were considered by the High Court of Australia in *Kizbeau.*[3] A motel business was purchased on a misrepresentation that use for seminars and conferences was lawful. The purchaser conducted the business for two and a half years in breach of the planning approval. The local authority then amended it to allow those uses, with restrictions, which reduced the takings. The trial judge assessed damages assuming that the approval would not be altered, but the court held that this was an error.[4] Value and damages had to be assessed on the basis that 'where facts are available they are to be preferred to prophecies.'[5] The damages had to reflect the plaintiff's use of the premises for two and a half years despite the prohibitions, and the reduced takings thereafter.[6]

1 [1903] 1 Ch 546 CA.

2 Ibid at 553.

EXEMPLARY DAMAGES

12.21 In *Mafo v Adams*[1] where a landlord obtained possession from a protected tenant by fraud, there were conflicting dicta from Sachs LJ and Widgery LJ as to whether *Rookes v Barnard*[2] allowed an award of exemplary damages in deceit. In *Cassell & Co v Broome*[3] dicta from Lords Hailsham and Diplock denied such a possibility.[4] An award was refused in *Archer v Brown* where the defendant had already been punished by the criminal courts, but Peter Pain J said that the door was open for such claims.[5] In *Danison v Fawcett*[6] the Ontario Court of Appeal upheld an award of exemplary damages for conspiracy to defraud, and in *Musca v Astle Corpn Pty Ltd*[7] French J, then of the Federal Court of Australia, made such an award. Awards have been made in Canada[8] and Malaysia[9].

1 [1970] 1 QB 548 CA.
2 [1964] AC 1129.
3 [1972] AC 1027.
4 Ibid at 1076, 1131.
5 [1985] QB 401, 423; *AB v South West Water Services Ltd* [1993] 1 All ER 609 CA. Awards were refused in *Gray v Motor Accident Commission* (1998) 196 CLR 1 where the defendant had been punished by the criminal courts and in *Daniels v Thompson* [1998] 3 NZLR 22 CA; affirmed *W v W* [1999] 2 NZLR 1 PC where the defendant had been acquitted. In Canada the position is different eg *Glendale v Drozdick* (1993) 77 BCLR (2d) 106 BCCA.
6 (1958) 12 DLR (2d) 537.
7 (1988) 80 ALR 251. Exemplary damages are probably available in deceit in Australia, Canada and New Zealand: *Gray v Motor Accident Commission* (1998) 196 CLR 1; *Vorvis v Insurance Corpn of British Columbia* [1989] 1 SCR 1085; and *Daniels v Thompson* [1998] 3 NZLR 22. In *Bottrill v A* [2003] 2 NZLR 72, not a fraud case, the Privy Council held that exemplary damages are available where the defendant's conduct was intentional or deliberately reckless.
8 *Sturrock v Ancona Petroleums Ltd* (1990) 75 Alta LR (2d) 216, Alta.
9 *Lembaga* [2009] 4 MLJ 610, 635–6 CA.

SOME MISCELLANEOUS PRINCIPLES

12.22 In actions of deceit, as in others, difficulties in the assessment due to the actions of the defendant operate to his disadvantage on the principle of *omnia praesumuntur contra spoliatorem*. If he has deliberately destroyed or carelessly complicated the means of arriving at an accurate result, he must suffer. The law will presume the most and the worst;[1] but the claimant must adduce such evidence as is reasonably available to him.

1 *Armory v Delamirie* (1722) 1 Stra 505 (detinue); *Docker v Somes* (1834) 2 My&K 656, 674 (breach of trust); *Leeds (Duke) v Earl of Amherst (No 2)* (1850) 20 Beav 239 (equitable waste); *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 59 CA (failure of party committing fraud on minority to keep accounts, and trespass to airspace during construction), applied *Libertarian Investments Ltd v Hall* [2013] HKCFAR 93 [138]–[139]; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 416; *Wilson v Northampton & Banbury Junction Rly Co* (1874) LR 9 Ch App 279, 286–7 (breach of contract); *Mahesan* [1979] AC 374, 382–3 (briber presumed to have profited to the extent of bribe); *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 257 CA (solicitor losing case because of delay has evidentiary onus of proving action would have failed). This principle also applies to issues of liability: *The Ophelia* [1916] 2 AC 206, 229–30; *Allen v Tobias* (1958) 98 CLR 367, 375.

12.23 A claimant may fail to adduce evidence of value as at the relevant date where this is essential and if the defendant offers no evidence on damage the action must be dismissed. The courts lean against such a result and if there is

any relevant evidence will endeavour to estimate the loss.[1] However, 'the absence of proper evidence of actual loss is a reason why the jury's verdict cannot be allowed to stand.'[2] The assessment cannot be left entirely to conjecture.

1 *Mallett v Jones* [1959] VR 122, 129; *Chaplin v Hicks* [1911] 2 KB 786 CA (breach of contract); *Ungar v Sugg* (1892) 9 RPC 114, 117 CA (action for threats); *De Vries v Wightman* [1961] Qd R 196 HCA.
2 *Potts v Miller* (1940) 64 CLR 282, 301 per Dixon J; *Canavan v Wright* [1957] NZLR 790 CA; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 HC of A. A new trial should not be ordered in such a case: ibid; *Newark Engineering (NZ) Ltd v Jenkin* [1980] 1 NZLR 504 CA.

MINORS

12.24 A minor lacks contractual capacity, but is responsible for torts which are not a breach of contract and are not 'connected . . . with a contract.'[1] Where deceit is appurtenant to a contract[2] or its subject matter, the minor is not liable in tort or contract.[3] There is no record of a successful action for fraud against a minor but it has been said that should such a case arise, the minor will be liable.[4] In the earliest authority, the Court of King's Bench held that a minor's fraudulent assertion of majority could not be the subject of an action;[5] and a plea of infancy is not defeated by an estoppel.[6] It has been suggested that equitable relief may be obtained against a minor whose fraud induced, or was connected with, a contract. However, the authorities only establish that a minor who has obtained property or a fund by fraud can be compelled to restore it.[7] A decision in bankruptcy went further,[8] but is anomalous[9] and is not to be extended.[10]

1 *Stikeman v Dawson* (1847) 1 De G & Sm 90, 109; *Burnard v Haggis* (1863) 32 LJCP 189, 191 per Willes J: 'The act of riding this horse at the place where it met its death is just as much a trespass as if the defendant without any hiring, and without the plaintiff's leave, had mounted the plaintiff's horse and gone with it into the field and used it as this horse was in fact used'; *Walley v Holt* (1876) 35 LT 631 (defendant attempted a jump contrary to express prohibition).
2 *Archer v Stone* (1898) 78 LT 34.
3 *Jennings v Rundall* (1799) 8 TR 335 (infant not liable for reckless riding of mare delivered to be moderately ridden because action in substance for breach of contract).
4 *Stikeman v Dawson* (1847) 1 De G & Sm 90, 109; *Cowern v Nield* [1912] 2 KB 419, 424 (infant sold goods, received price, and refused to deliver. The court held that plaintiff could not recover in contract or restitution but ordered a new trial of claim in deceit); *Walsh v Commercial Travellers Association* [1940] VLR 259: para 11.05 n 2.
5 *Johnson v Pye* (1665) 1 Keb 905, 913.
6 *Bartlett v Wells* (1862) 1 B & S 836; *De Roo v Foster* (1862) 12 CBNS 272; *Miller v Blankley* (1878) 38 LT 527; *Levene v Brougham* (1909) 25 TLR 265 CA; *Walsh v Commercial Travellers Association* [1940] VR 259.
7 *Cory v Gertcken* (1816) 2 Madd 40, 49–51; *Overton v Banister* (1844) 3 Hare 503, 506; *Stikeman v Dawson* (1847) 1 De G & Sm 90, 111; *Wright v Snowe* (1848) 2 De G & Sm 321; *Nelson v Stocker* (1859) 4 De G & J 458; *Mohori Bibee v Ghose* (1903) LR 30 Ind App 114, 122; *R Leslie Ltd v Sheill* [1914] 3 KB 607, 618 CA (*Sheill*). The Minors' Contracts Act 1987, s 3(1) gives the court a discretionary power to order the return of property acquired by a minor under the contract or any property representing it. Other remedies are not affected: s 3(2).
8 *Re King* (1858) 3 De G & J 63 (proof upheld for money lent on security of life policy issued on fraudulent assertion of majority).
9 *Miller v Blankley* (1878) 38 LT 527, 529, 530; *Re Jones* (1881) 18 ChD 109, 120 CA; *Sheill* [1914] 3 KB 607 CA.

purchase money, interest and rates. Herring CJ said[7] that the purchaser had not exercised rights under the contract adverse to the representor and the 'right' of election had not been lost. A minor variation in a shipbuilding contract was not an affirmation.[8] The references to unequivocal acts do not indicate an estoppel because there is no mention of change of position or detriment.[9] They mean that unequivocal acts speak as loudly as unequivocal words.[10] In *The Kanchenjunga*[11] Lord Goff said:

> ' . . . where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him . . . he is held to have made his election accordingly . . . [T]he owners were asserting a right inconsistent with their right to reject charterers' orders . . . in these circumstances . . . the owners must be taken in law to have thereby elected not to reject the charterers' nomination.'

Lord Goff describes the result as an election, as did Lord Diplock in *Kammins*.[12] Although he reserved for future consideration cases in which it had been held that election requires knowledge of the 'right',[13] the passage quoted shows that this was a formality. The better view is that there is only one doctrine of election between inconsistent rights.[14] This is supported by the principle that ignorance of the law does not excuse. Sir Owen Dixon J said:[15]

> ' . . . generally, when the facts are known from which a right arises the right is presumed to be known . . . He knew as much as was required in order to form a decision as to what he should do.'

This should come as no surprise because knowledge of the facts is sufficient for criminal responsibility.

1 Equivocal acts include *Wontner v Shairp* (1847) 4 CB 404 (attending shareholders' meeting and moving that all deposits on shares be refunded); *Morrison v Universal Marine Insurance Co* (1873) LR 8 Ex197, 203–7 Ex Ch (issue of stamped policy); *Re Metropolitan Coal Consumers' Association* (1891) 64 LT 561 (attending meeting of shareholders for a few minutes and inquiring of the secretary about the price of the shares); *Brown v Smitt* (1924) 34 CLR 160, 167–8 (letter to representor stating intention to resell the property); *Elder's Trustee* (1941) 65 CLR 603 (retention of share certificates, payment of promissory note for balance of allotment moneys, and joining association of shareholders); *Haas* (1954) 94 CLR 593, 602 (delay during negotiations). Unequivocal acts of affirmation include *Campbell v Fleming* (1834) 1 Ad & El 40 (selling shares); *Pulsford v Richards* (1853) 17 Beav 87 (purchasing further shares); *Re Royal British Bank* (1859) 4 De G & J 575 (receipt of dividends); *Re Hop and Malt Exchange and Warehouse Co* (1866) LR 1 Eq 483, 487 (instructing broker to sell shares); *Re Cachar Co* (1867) 2 Ch App 412 (payment of call without protest); *Re Russian (Vyksounsky) Iron Works Co* (1867) 2 Ch App 412; *Scholey v Central Rly Co of Venezuela* (1868) LR 9 Eq 266n (payment of call and receipt of dividend); *Sharpley v Louth and East Coast Rly Co* (1876) 2 ChD 663 CA (plaintiff active in meetings urging company to continue enterprise); *Re Dunlop-Truffault Cycle and Tube Manufacturing Co* (1896) 66 LJ Ch 25 (applicant, after repudiation, paid allotment moneys and instalments in respect of her shares in the mistaken belief that this would strengthen her position); cf *Melevende* [1965] VR 433, 445; *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 (plaintiff carried on business at a profit); *Gray v Thomson* [1922] NZLR 465 (purchaser remaining in possession under contract and demanding compensation for deficiency); *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60, 74-5 (application for loan under life policy).

2 *Abram Steamship* [1923] AC 773, 779.

3 *Elder's Trustee* (1941) 65 CLR 603, 615; *Jurong* [2005] 3 SLR 283 CA (election can be implied where representee acted in a way which was consistent only with a decision to affirm and exercised rights which would only exist if he had affirmed).

4 *Immer* (1993) 182 CLR 26, 42–3 (submission of draft deed recognised contract, but no election because it was not adverse to vendor and purchaser not bound to choose).

5 [1985] Ch 457, 489. The representee went into possession under a separate agreement which, under the contract of sale, was not an acceptance of the vendor's title and he did not exercise rights under the sale contract. Entry into possession would ordinarily be adverse and only 'justifiable' if a contract supporting or conferring that right existed. In *Bosaid v Andry* [1963] VR 465, 466, 477–8 entry into and retention of possession affirmed the contract.

6 [1965] VR 433.

7 Ibid at 436–7, 443, 453, 454; *Sargent* (1974) 131 CLR 634, 646, 656, 658.

8 *Abram Steamship* [1923] AC 773, 779 per Lord Dunedin: 'It is not conclusive that the act in itself was trivial, but the triviality of the act may easily affect the inferences to be drawn from it.'

9 Para **14.20**.

10 *Scarf v Jardine* (1882) 7 App Cas 345, 361 per Lord Blackburn: 'communicated it . . . in such a way as to lead the opposite party to believe . . . '; para **14.14** n 3.

11 [1990] 1 Lloyd's Rep 391, 398, 400 HL; *London & Country Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, 782 CA per Russell LJ: act which can have no 'impact' on the other party not an election; *Aquis Estates Ltd v Minton* [1975] 1 WLR 1452, 1457 CA per Russell LJ: 'treated the contract as something of which it was entitled to take advantage'; *Turner* (1974) 131 CLR 660 (demand by purchaser's solicitor for particulars of title under contractual right an unequivocal act which affirmed the contract and precluded rescission later that day).

12 [1971] AC 850, 853.

13 [1990] 1 Lloyd's Rep 391, 398.

14 In *Clough* the court said that the principle in cases of fraud was 'precisely the same' as that which applies where a landlord has a right to forfeit the lease for breach of covenant: (1871) LR 7 Ex 26, 34 Ex Ch. The suggestion that different principles apply for fraud and where there is a contractual right of rescission emerged in *Melevende* [1965] VR 433 and *Peyman v Lanjani* [1985] Ch 457, CA. In *Sargent* (1974) 131 CLR 634, 658 Mason J said that there was one doctrine of election of general application. There is no decision or dictum in the House of Lords, Privy Council or Supreme Court which supports the other view; *Elder's Trustee* (1941) 65 CLR 603, 618.

15 *Hourigan v Trustees Executors Co Ltd* (1934) 51 CLR 619, 651 citing Stafford (1857) 1 De G &J 193, 202 per Knight Bruce LJ.

IMPUTED ELECTION NOT BASED ON ESTOPPEL

14.20 An imputed election is not based on estoppel because it takes effect when communicated[1] without proof of reliance, change of position or detriment. This is clear if the election is communicated by express words,[2] or by unequivocal conduct such as the withdrawal of a ship,[3] or re-entry or ejectment by a landlord.[4] There is no reason why an imputed election to affirm should alone depend on estoppel. The High Court of Australia has held that detriment is not required for election.[5] 'An election, unlike estoppel, is concerned with what a party does not with what he causes the other party to do.'[6] Mance J has said[7]:

> 'Whether conduct amounts to an unequivocal communication of a choice to affirm requires . . . an objective assessment of the impact of the relevant conduct on a reasonable person in the position of the other party to the contract . . . [T]he actual state of mind of the other party is not the test. Affirmation depends on the objective manifestation of a choice.'

1 *R v Paulson* [1921] 1 AC 271, 284; *Oliver Ashworth Ltd v Ballard Ltd* [2000] Ch 12, 27 CA: ' . . . reliance by B on A's unequivocal words or conduct as opposed to B's knowledge of what he has said or done, is not a necessary ingredient.'

2 *Scarf v Jardine* (1882) 7 App Cas 345, 361; *Khoury* (1984) 165 CLR 622, 633; *Peyman v Lanjani* [1985] Ch 457, 500 CA.

3 *China Trade* [1979] 1 WLR 1018, 1024 HL.

4 *Clough* (1871) LR 7 Ex 26, 34 Ex Ch; *Scarf v Jardine* (1882) 7 App Cas 345, 361; *Matthews v Smallwood* [1910] 1 Ch 777.

defend.[3]

[1] The general rule is that the rights of parties are determined as at the commencement of the poceedings: *In re Keystone Knitting Mills' Trade Mark* [1929] 1 Ch 92 CA; *Esber v Commonwealth* (1992) 174 CLR 430, 449–50 and in this context: *Reese River* (1869) LR 4 HL 64 and *Karberg* [1892] 3 Ch 1, 10 CA. If a representee sued in respect of one misrepresentation, he will not be allowed to amend after the winding up to rely upon another but an amendment to express the original claim with greater precision will be allowed: *Cocksedge v Metropolitan Coal Consumers' Association Ltd* (1891) 65 LT 432 CA.
[2] *Re Warren's Blacking Co* (1869) 4 Ch App 178.
[3] *Re General Railway Syndicate* [1900] 1 Ch 365 CA.

17.15 A contract, before the winding-up, binding the company to remove the representee's name from the register is sufficient because his name is no longer properly on the register.[1] Rectification was refused where the agent contracting with the company did not have the representee's authority,[2] and where an agreement to allow the representee to transfer his shares to a director was not completed before the winding-up.[3] Rectification can also be ordered after the winding-up where the parties had agreed to be bound by the result in a test case.[4] When the representee does not come within any of these exceptions his claim for rectification has failed,[5] unless his shares had been forfeited, or there never was a concluded contract.

[1] *Re Etna Insurance Co* (1873) IR 7 Eq 264; *Re Scottish Petroleum Co* (1882) 51 LJ Ch 841.
[2] *Re London and County General Agency Association* (1869) 4 Ch App 503.
[3] *Re Anglo-Danubian Steam Navigation & Colliery Co* (1868) LR 6 Eq 30.
[4] Cf *Re Estates Investment Co* (1869) 4 Ch App 497; *Re Estates Investment Co* (1870) LR 9 Eq 263; *Re Scottish Petroleum Co* (1883) 23 ChD 413 CA (no agreement about the test case).
[5] *Re Lennox Publishing Co* (1890) 62 LT 791; *Re Central Klondyke Gold Mining and Trading Co* (1898) 5 Mans 282.

DELAY

17.16 Delay alone is not a defence to proceedings to enforce rescission, but may be evidence that the representee was never deceived, or affirmed the contract, and it may allow the rights of a third party to intervene or changes to occur which make restitution impossible.[1]

[1] *Allen v Robles* [1969] 1 WLR 1193, 1196 CA; *Brown v Smitt* (1924) 34 CLR 160, 167–8, *Haas* (1954) 94 CLR 593.

17.17 Time does not begin to run for this purpose until the representee knows the facts giving him the right to rescind or would have discovered them by the exercise of due diligence.[1] 'We think', said the Exchequer Chamber, 'the party defrauded may keep the question open so long as he does nothing to affirm the contract . . . [but] lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence that he has so determined.'[2] In *Lindsay Petroleum* Lord Selborne LC said:[3]

> '. . . the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in the situation in which it would not

> be reasonable to place him, if the remedy was afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which would otherwise be just, is founded upon mere delay, that delay of course, not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable.'[4]

[1] *Rawlins v Wickham* (1858) 3 De G & J 304, 314, 318–21; *Lindsay Petroleum* (1874) LR 5 PC 221, 241 per Lord Selborne LC: 'in order that the remedy should be lost by laches or delay . . . it is necessary that there should be sufficient knowledge of the facts constituting the title to relief'; *Redgrave v Hurd* (1881) 20 ChD 1, 13 CA per Jessel MR: 'Under the statute [of limitations] delay deprives a man of his right to rescind on the ground of fraud and the only question . . . is from what time the delay is to be reckoned. . . . delay counts from the time when by due diligence the fraud might have been discovered.'
[2] *Clough* (1871) LR 7 Ex 26, 34–5 Ex Ch; *Torrance v Bolton* (1872) 8 Ch App 118, 124; *Aaron's Reefs* [1896] AC 273, 294 per Lord Davey: 'lapse of time without rescinding may furnish evidence of an intention to affirm the contract. But the cogency of this evidence depends upon the particular circumstances of the case, and the nature of the contract in question.' For delay not amounting to affirmation or election: *Mutual Reserve Life Insurance Co v Foster* (1904) 20 TLR 715 HL. In *Re Christineville Rubber Estates Ltd* (1911) 81 LJ Ch 63 unexplained delay was fatal.
[3] (1874) LR 5 PC 221, 239–40 and errata.
[4] *Erlanger* (1878) 3 App Cas 1218, 1231. For intervening rights of third parties: *Re Murray* (1887) 57 LT 233; paras **17.09–17.13**.

17.18 Acquiescence may be a synonym for delay but its true meaning was explained by Lord Cottenham LC[1]:

> '. . . if a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. This is the proper sense of the word acquiescence.'

Acquiescence may establish an estoppel by representation, or an estoppel by standing by, but delay alone is not a bar[2]. Acquiescence will only defeat rescission for misrepresentation if it establishes affirmation.[3] Lord Campbell LC said[4]:

> 'It has beautifully been remarked, with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one hand he cuts down the evidence which protects innocence, with the other he metes out the period when innocence can no longer be assailed.'

There is a natural tendency to support, if possible, the defence of one who after many years is charged with misrepresentation on plausible grounds and evidence with which he might have successfully defended the proceedings has been lost or destroyed.[5] The effect of delay which does not establish a defence cannot be put higher than this, but where the representation was fraudulent, and the representor has enjoyed an unmerited benefit, this attitude is out of place. 'No time,' said Lord Campbell LC, 'will assure [such persons] in the enjoyment of their plunder, but their children's children will be compelled in this Court to restore it.'[6]

[1] *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117, 123; *De Bussche v Alt* (1878) 8 ChD 286, 312–14 CA; *Life Association of Scotland v Siddal* (1861) 3 De GF & J 58, 74, 77.
[2] *Murray v Palmer* (1805) 1 Sch & Lef 474, 486–7 per Lord Redesdale LC (Ir).
[3] The representee may rely on acquiescence, in its proper sense, to defeat a defence that he so altered the property as to make restitution impossible: para **17.08** n 2; paras **16.19–16.22**.
[4] *Bright v Legerton* (1861) 2 De GF & J 606, 617; *Lawrance v Lord Norreys* (1890) 15 App Cas 210, 213, 219, 221.