

Common Law Misrepresentation.

A false statement about existing or past fact that induces entry into a contract.

Different from broken promise (statement of intention that is broken. c.f. [CRA](#))

Statements IN contract = terms of the contract. *Did the speaker intend statement to be contractually binding?*

If term, could get relief – irrespective of fraud

- recession (condition only)
- damages (condition + warranty)

condition (sufficiently serious term) or **warranty**

Statements not incorporated into K (ABOUT K) = mere representations.

traditionally (before CL / equity fusion) – innocent representations about statements not incorporated into the K had no remedy. equity held that innocent misrepresentation - as caused P to enter into a K not fully consented to, even if innocent – was a species of equitable fraud as unconscionable to enforce such a contract. thus, if mere representation:

- rescission (innocent + negligent + fraudulent misrepresentation)
- damages (negligent + fraudulent only)

innocent or fraudulent?

Fraudulent = knowledge of making a false statement or recklessness of making false statement. Hard to satisfy

Resulted in a strange paradox: mere representations that were also innocent could give rise to a more drastic remedy than an breach of warranty (thus, breach of a term, albeit not sufficiently serious).

→ least 'serious' misrep could get most 'serious' remedy.

once established statement intended to be contractually binding (= term), cause of action made out. however, historically there have been limits:

- Parol Evidence Rule: term that has been made orally (and not included in the written K) inadmissible.
- [s 24 Property Law Act](#): all contracts for sale of land must be in writing

Parol Evidence Rule – oral evidence inadmissible to add, vary or contradict the terms of the written K. **therefore if misrepresentation was based off oral evidence only, could not claim misrepresentation to term i.e. mere misrep only.**

Court began to get around it –

- **equitable remedy of rectification**: allowed K to be altered in accordance with their common intention so that K expressed / articulated correctly the shared intention. (limited)
- **concept of collateral contracts**: an extra contract the consideration of which is the making of another K. Therefore, not breaching rule as separate K. Traditionally could not have a collateral K that contradicted main K term, but Courts increasingly relaxed of this.
- K that are partly written; partly oral: required court to accept 2 rules

- PER does not apply to every piece of writing that evidences a K. There must be a fully written K in order for PER to apply
 - no principled reason why parties cannot agree to have partly written & partly oral contracts
- PER applies ONLY parties have agreed entire contract will be in writing. If it is established a term not contained in the document was intended to be binding, K was intended to be fully written & PER cannot apply.
- Paradoxical

For most practical purposes there is a rebuttal of the presumption that the K was intended to be fully written.

- CCLA rejects entire agreement clauses when it is fair & reasonable to treat them as such.

When sale of land, a promisee aggrieved by a statement that was a breach of promise but not a misrepresentation (because statement was oral & not written) = collateral K.

How was PER affected by CRA reform? c.f. LRC: 'nothing in this Act will affect PER' under s 6 CRA, requirements are inducement only. no longer have to show:

- misrepresentation was a term of the K (statement was intended to be binding)
- misrepresentation was written in the K

Innominate term? Diplock invention: either warranty or condition. dependent on how serious breach was & what was involved in fixing the breach.

- did not require much time & energy to fix: warranty
- did require time & energy to fix: condition

Availability of tort damages -

- tort of deceit = promisor was lying and never intended to carry out the promise
- negligent misstatement = **Hedly Byrne 1963**
 - made without reasonable grounds for believing it to be true;
 - in breach of a duty (duty of care between K parties)

