



Roger Vickery • MaryAnne Flood

# AUSTRALIAN BUSINESS LAW

# 7

COMPLIANCE & PRACTICE

TH EDITION

ALWAYS LEARNING

PEARSON

[http://www.austlii.edu.au/au/other/auflivewdoc/au/legis/vlc/consol\\_act/wa1958111/s48.html](http://www.austlii.edu.au/au/other/auflivewdoc/au/legis/vlc/consol_act/wa1958111/s48.html)

Face-to-face mistaken identity cases—are they fair or logical?

There is some moral justification for the distinction between mistaken identity ‘at a distance’ (where the contract is void) and mistaken identity ‘face to face’ (where the contract is probably voidable). The innocent third parties who bought goods from the swindler had not been careless. They had not accepted poor identification and they had no reason to suspect fraud. Why should they bear the loss?

4. Mistake about the nature of the contract document

People sometimes sign documents that are fundamentally different from the ones they thought they were signing. In such cases, they may refuse to perform their promises under the contract by claiming the agreement was void as it was *non est factum*, meaning ‘not my doing’ or ‘not my deed’.

The person claiming this defence must prove all of the following:

- ‘The document was fundamentally different from the one I thought I was signing.’
- ‘I was not careless or negligent. I took reasonable steps to check out the nature of the document.’
- ‘I have a severe disability, such as blindness or illiteracy, which forces me to rely on others for advice about what I am signing.’ For example, Petelin, who spoke little English and could not read it, signed what he reasonably believed to be a receipt. In fact, it was a document that gave Cullen an option to purchase Petelin’s property. Cullen was denied the right to enforce the purchase. See *Petelin v Cullen* (1975) 132 CLR 355. For information on other cases in this area, visit the Digital Library <[www.pearson.com.au/vet/vickery](http://www.pearson.com.au/vet/vickery)>. Also see Review Question 5 at the end of this chapter.

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*Non est factum*—  
‘not my deed’

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*Petelin v Cullen* (1975)



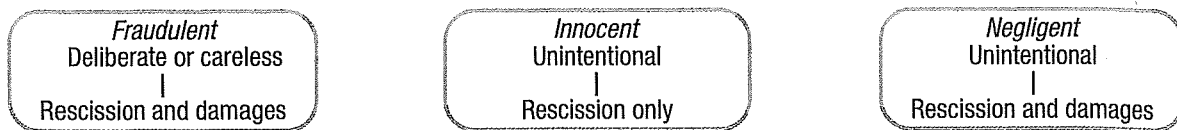
Misrepresentation

A misrepresentation is:

- a false statement about a past or present fact—it cannot be about the ‘future’ (as in a prediction), an opinion or a statement of intention;
- made with the intention of inducing (persuading) someone to enter into a contract; and
- one that induces that person to enter into a contract. The false statement must be the reason, or one of the reasons, why the other person enters into the contract.

Misrepresentation can be fraudulent, innocent or negligent. See Figure 13.4.

FIGURE 13.4 Three types of misrepresentations and their remedies



What remedies are available?

Any misrepresentation makes a contract voidable and gives the injured party the equitable right to rescind (terminate) the contract and seek restitution—recovery of property or money given as consideration to the other party. The right to rescission may be lost for several reasons, the main ones being:

- the parties cannot be reasonably restored to their pre-contract position; or
- a third party has, in good faith and for valuable consideration, acquired rights under the contract that would be lost if the contract was terminated.

Damages are also available for fraudulent and negligent misrepresentation, but not for innocent misrepresentation. Special legislation in South Australia (*Misrepresentation Act 1972*) and the

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Right to rescind may be  
lost for several reasons

Australian Capital Territory (*Law Reform (Misrepresentation) Act 1977*) allows damages and/or rescission for any misrepresentation of fact, whether fraudulent or innocent.

### Fraudulent misrepresentation

A person who makes a **fraudulent misrepresentation** (usually referred to as **fraud**) also commits the tort of deceit if they:

- *knew the misrepresentation was false, or was 'recklessly indifferent'* (did not care) about its truthfulness; and
- *the misrepresentation caused loss to the person who relied on the statement.* If there is no loss, there is no basis for an action for damages under tort law.

If fraudulent misrepresentation is proven, the contract is voidable. The injured party has the right under equity to rescind and seek restitution. In addition, they may sue for damages because the tort of deceit has been committed.

### Innocent misrepresentation

The essential features of **innocent misrepresentation** are identical to fraudulent misrepresentation except that the representor did *not* know the statement was false and was not 'recklessly indifferent' about its truthfulness, and damages are not available. The only remedy is that the contract is voidable.

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No damages; the contract is voidable only

#### **EXAMPLE**

### Innocent misrepresentation

A person who privately sold a 2009 Daihatsu car as a 2011 model would be liable for an innocent misrepresentation if they honestly believed their claim and the buyer had reasonably relied upon it. The buyer has the right to recover their money, but cannot keep the car and seek damages for the difference in value. The seller has the right to recover possession of the car.

### Negligent misrepresentation or negligent misstatement

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Innocent parties may receive damages

**Negligent misrepresentation** occurs when one party innocently makes a false statement which the receiver reasonably relies on and consequently suffers a loss. The statement maker must have expected the receiver to rely on it. This conduct also creates the tort of **negligent misstatement**, which is explained in Ch 3, p. 88. The great advantage of a negligent misstatement action over one for innocent misstatement is that the latter gives the plaintiff the right to sue for damages. The following case is a key precedent on this point.

### Esso v Mardon [1976]

**An innocent party was awarded damages because the other party to the contract breached its duty to take reasonable care about projected sales figures.**

Mardon leased a service station from Esso Ltd after its representatives stated he would sell about 900 000 litres per year. The station sold only about 350 000 litres per year partly because it did not face the main road. Mardon suffered heavy losses and could not pay his rent. When Esso sued to reclaim possession from Mardon, he claimed damages on the then new ground of negligent misrepresentation.

*The English Court of Appeal held:* Mardon was entitled to damages for breach of contract and negligent misrepresentation. Lord Denning found that Mardon had reasonably relied on Esso's special knowledge and expertise. Esso's duty of care existed before and after the signing of the lease contract. See *Esso Petroleum Co Ltd v Mardon* [1976] 1 QB 801.

*Comment:* Statements about the future do not qualify as representations. Esso's sales projection figures were representations because they were based on present facts.

**SELF QUIZ**

Match each of the following definitions with the correct term.

- |   |   |
|---|---|
| 1 Set aside   | (a) common mistake                                    |
| 2 It is not my deed   | (b) mutual mistake                                    |
| 3 Fraud or deceit   | (c) unilateral mistake                                |
| 4 An inducement that leads a person to make a contract                            | (d) <i>non est factum</i>                             |
| 5 One party is misled about the identity of the other                             | (e) order making a contract invalid and unenforceable |
| 6 A false statement that unintentionally induces someone to enter into a contract | (f) representation                                    |
| 7 Both parties make the same mistake about an essential fact                      | (g) fraudulent misrepresentation                      |
| 8 Each party misunderstands the other about an essential fact                     | (h) innocent misrepresentation                        |

**Duress**

Duress is the use of violence or illegal threats to induce a person to enter into a contract.

If duress is proven, the usual remedy is that the contract is voidable and non-enforceable against the party who suffered from it. There are three categories: duress to a person, duress to goods or economic duress.

1. *Duress to a person.* This is the most common category of duress. It occurs when a person enters into a contract because they (or their family) were pressured by actual violence or **false imprisonment** (Ch 4), or threats that either would take place. Plaintiffs bear the onus of proof. They must show, on the balance of probabilities, that they were pressured in this way. The onus then shifts to the defendant who must show the duress did not take place. As the following case indicates, if duress was used the contract will be voidable even if it was not the main reason the plaintiff entered into the contract.

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Duress to a person—  
actual or threatened  
violence

—  
Duress to a person  
involves pressure  
through violence or false  
imprisonment

**Barton v Armstrong [1976]**

**A contract may be voidable for duress although it was not the only reason the threatened party entered into the contract.**

Barton agreed to buy shares from Armstrong and others after Armstrong had threatened to murder him and his family. The threats were not the only reason Barton had entered into the contract.

*The majority of the Privy Council held:* The contract could be rescinded (set aside). Duress is proven even if it was only a contributing factor to entering into a contract. See *Barton v Armstrong* [1976] AC 104.

2. *Duress to goods.* Where persons have been pressured into entering into a contract because of wrongful threats to seize or damage or destroy their goods, the contract is voidable on the ground of duress to goods.
3. *Economic duress.* If excessive illegitimate pressure is brought to bear on parties to enter into a contract, the agreement may be voidable. See also economic torts, Ch 4, p. 106. As it is difficult to differentiate between commercial pressure and economic duress, plaintiffs are far more likely to sue for conduct that causes economic loss through undue influence or 'unconscionable conduct', which are outlined below.

## Undue influence

Stronger person persuades weaker person to enter into a contract of benefit to the stronger person

Undue influence occurs where one party uses their strong influence over another to persuade them to enter into a contract that provides the stronger person with a direct or indirect benefit. Consequently, genuine consent is missing—there is no ‘true meeting of minds’. Usually, there must be a **fiduciary relationship** between the parties. This means that the stronger party occupies a position of trust in regard to another and is obliged to act in that person’s best interests.

Most undue influence cases concern contracts where the plaintiff agreed to transfer property to the defendant for no consideration or for below market value. This type of contract may be voidable and damages may be available if the defendant’s conduct constituted a tort, such as fraudulent misrepresentation.

The common law recognises two types of undue influence actions:

Presumption of undue influence if plaintiff occupies a recognised position of influence

1. *Special relationships*—where the defendant’s relationship with the plaintiff was a special one that the common law ‘automatically’ recognises as a fiduciary relationship. There is a presumption that undue influence has occurred. The defendant has the **onus of proof**. They must disprove the presumption by showing, on the balance of probabilities, that they did not pressure the plaintiff to enter into the contract. It would help their case, for example, if they could show they encouraged the plaintiff to seek independent legal or financial advice.

Relationships that the courts have traditionally regarded as ‘special’ are:

- *Parent and child*
- *Trustee and beneficiary*
- *Doctor and patient*
- *Solicitor and client*
- *Guardian and ward*
- *Religious adviser and devotee* (follower). See *Allcard v Skinner* (1887) below.

2. *Other relationships*—in relationships other than the special ones recognised by common law, the plaintiff must prove that the defendant’s influence over them was so strong that it made them incapable of deciding whether the contract was in their best interests. If the plaintiff produces sufficient evidence, the onus of proof shifts to the defendant who must show that the plaintiff was not pressured to enter into the contract.

The flow chart in Figure 13.5 outlines the main stages in undue influence actions.

### EXAMPLE

#### Undue influence in a ‘non-special’ relationship

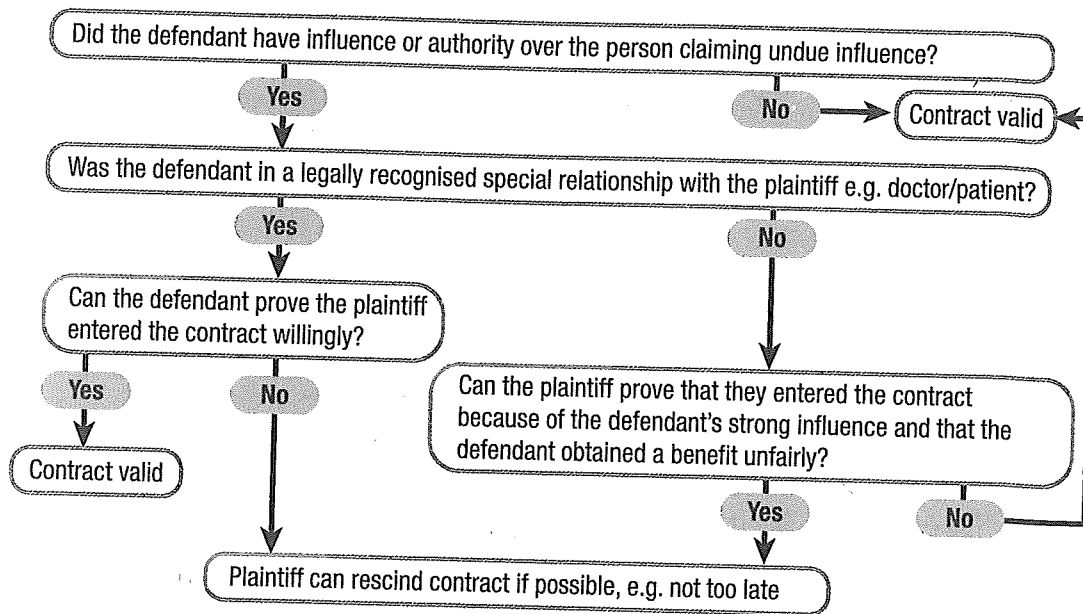
Erin, a social worker, makes home visits to Mary Ellen, an 80-year-old widow who is very dependent on Erin. After Mary Ellen sold some valuable jewellery to Erin for a small sum, she regretted the decision. If Erin refuses to return the jewellery and Mary Ellen sues on the basis of undue influence, she must prove that her reliance on Erin was so great that she was incapable of resisting Erin’s pressure to sell the jewellery. If Mary Ellen provides this proof, Erin must show that Mary Ellen acted voluntarily.

#### Did the action commence in time?

Right to rescind lost if not brought within a reasonable time

As the following case shows, a plaintiff’s right to rescind may be lost if the undue influence action is not brought within a reasonable time.

FIGURE 13.5 Flow chart of the main stages in undue influence actions



### Allcard v Skinner (1887)

The plaintiff proved undue influence but had no remedy as she did not take legal action within a reasonable time.

Miss Allcard belonged to a Church of England sisterhood for seven years, during which time she gave many gifts of property by deed to the head of the sisterhood. Several years after leaving the sisterhood, Miss Allcard claimed she had been subject to undue influence and sought the return of her property.

The English Court of Chancery held: Allcard could not reclaim her property. She had been subject to undue influence but she failed to act within a reasonable time. See *Allcard v Skinner* (1887) 36 Ch D 145.

### Unconscionable (unjust) conduct

Under common law, a contract may be voidable on the ground of unconscionable conduct. In plain terms, plaintiffs who enter into a contract must prove all of the following:

- they suffered from a 'disability' that made them the 'weaker party' in the contract;
- the stronger party took unfair advantage of this disability; and
- this prevented the plaintiff from making independent decisions about the contract.

The courts have interpreted 'disability' as a strong disadvantage and have recognised many categories including illiteracy, limited education, illness, poverty, age and lack of legal advice. The main common law precedent is the following case.

Plaintiff must prove stronger party exploited their 'disability'

### **Commercial Bank v Amadio (1983)**

#### **A bank that took unfair advantage of guarantors lost its right to sell up their security.**

Mr and Mrs Amadio put up their house as security for their son's business loan with the Commercial Bank. They wrongly believed their liability was limited to \$50 000 and the guarantee period was for only six months. The Amadios were elderly (both were over 70 years), had poor English skills and virtually no business experience. The bank did not advise them to seek independent legal advice or admit their son's finances were very unstable. When the son's business failed, the bank demanded they repay the loan.

*The High Court held:* The bank had engaged in unconscionable conduct. It knew of the 'disabilities' of the Amadios but did not advise them to seek independent legal advice. The contract of guarantee was not enforceable. See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

*Comment:* This precedent has meant that banks and other lenders now usually require guarantors to provide a solicitor's certificate that their obligations under the proposed contract have been fully explained to them. The cost of this advice falls on the guarantor.

The courts have continued to extend the limits on whether a contract is unconscionable, even to the extent of finding that 'love sickness' could create a special disability.

### **The 'Lovesick Lawyer' Case (1992)**

#### **Taking advantage of a person's extreme emotional dependence is a form of unconscionable conduct.**

Diprose, a middle-aged, twice-divorced male solicitor, became infatuated with Ms Louth. When she threatened to commit suicide because she and her children were about to lose their rented accommodation, Diprose gave her the money to buy a small cottage. After the relationship ended, Diprose claimed the house on the ground of either a constructive trust or undue influence.

*A majority of the High Court held:* The house had to be returned to Diprose because of Louth's unconscionable conduct. Where one party to an agreement suffers a special disadvantage, the party who benefits has a heavy onus to prove it was fair, just and reasonable. Louth was unable to satisfy this test because she had taken advantage of Diprose's extreme emotional dependence on her. See *Louth v Diprose* (1992) 110 ALR 1.

*Comment:* This decision has been strongly criticised by many legal commentators, for obvious reasons.

### **Unconscionable conduct under statute law**

Unconscionable conduct is also prohibited under Commonwealth and State legislation.

#### **Consumer protection legislation**

Unconscionable conduct is also prohibited under the *Australian Consumer Law*. See Ch 24.

#### **Additional statutory protection against unfair terms in consumer contracts**

Since 1 July 2010, consumers across Australia have enjoyed additional statutory protection against unfair terms in consumer contracts, especially those in standard form contracts. This means that unfair terms in an agreement could be void or voidable and subject to other remedies. See Ch 24.

#### **Contracts Review Act 1980 (NSW)**

In New South Wales, this Act gives the courts a unique power to review unjust (harsh, oppressive or unconscionable) contracts. The courts determine whether a contract has breached the Act by considering the public interest. The main questions they ask are:

- *Was there inequality of bargaining power?*
- *Was there a real opportunity to negotiate?*