

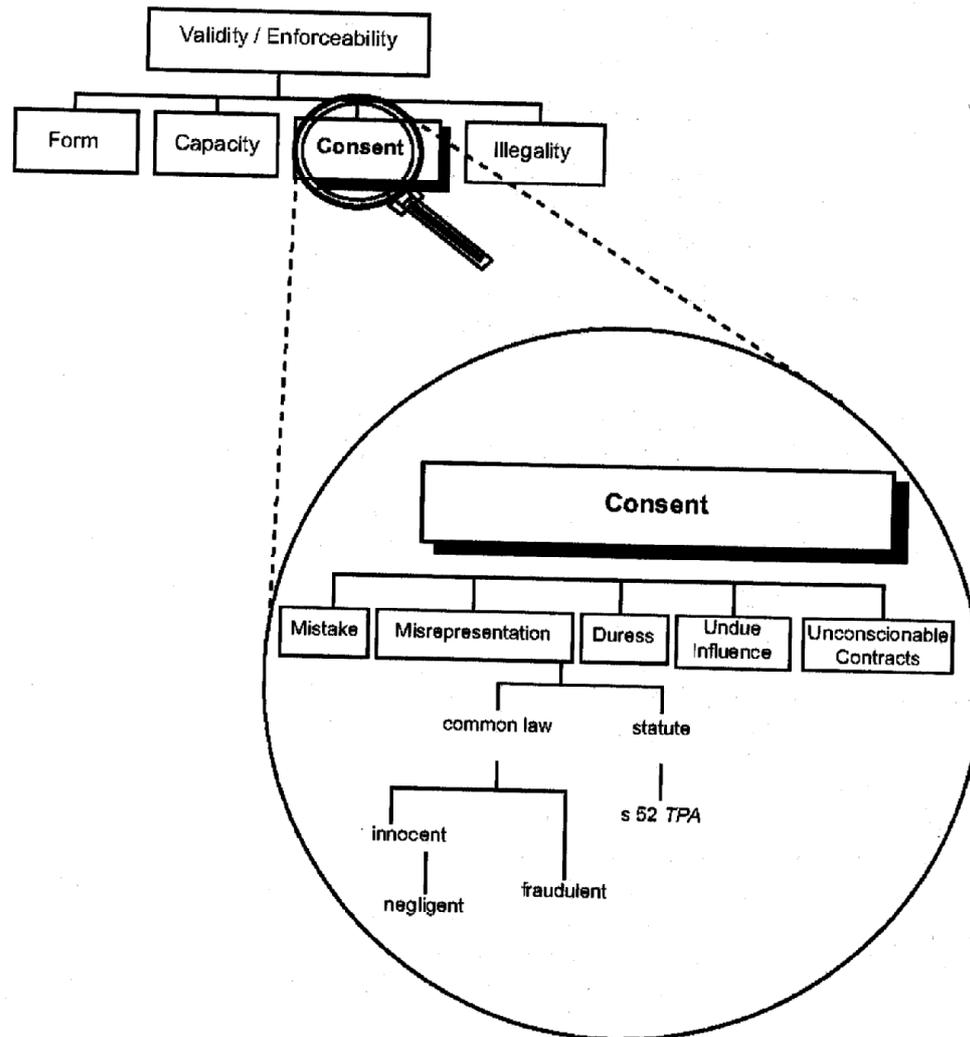


**NATIONAL OPEN UNIVERSITY OF
NGERIA**

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW



SELF ASSESSMENT EXERCISE 1

- 1(a) What are the three classes of minor's contract?
- (b) What two tests are used to determine whether something is a "necessary"?
- (c) Yuguda, a sixteen year old, has a job working at the cattle farm. He rides a bicycle covering kilometers to get to work. Yuguda bought a new bicycle from a "Releigh Company" which took his old bicycle as a trade in. Yuguda failed to pay Releigh Co. the balance owed on his new bicycle. Releigh Co. wants its bicycle back or the balance owed.

Advise parties about their respective rights. Give reasons for your answer.

3.3 Consent

This topic covers matters which may affect whether the parties have in fact given real consent to the contract. For example one of them may not have genuinely agreed to that contract.

3.3.1 Misrepresentation

When parties are negotiating a contract, statements are often made by one to the other which later becomes significant as they are found to be incorrect. Courts are often then called upon to decide later what legal significance to attach to these statements.

You will recall from Module 8 that statements made to encourage the other party to enter the contract but not forming part of the contract, are called **representations** and, if later proven to be incorrect, **misrepresentations**.

If instead the statements were **promissory** by nature, they form terms of the contract. If later they are found to be incorrect, the wronged party can then sue for a breach of these terms.

In every case it is a question of degree and often it can be quite a difficult decision for a court to make as to the significance attached to the statements by the parties at the time they were made.

a. Fraudulent Misrepresentation

This involves a false representation of past or existing fact made with a knowledge of its falsehood, or recklessly careless of whether it be true or false, with the intention that it should be acted upon by another party who is, thereby, induced to act upon it to his or her loss.

This statement of law can now be broken up into its six essential **elements**. All these six must be present to establish fraudulent misrepresentation.

- (i) The misrepresentation is of fact, not of opinion or intention. A statement of opinion may however amount to a misrepresentation when the maker did not hold the opinion or a reasonable person could not have held the opinion. Also, if an opinion is expressed in such circumstances as to suggest that the maker is aware of the facts which formed the basis of the opinion then misrepresentation can occur.

In *Smith v Land and House Property Corporation* (1882) 28 ChD 7 the vendor of an hotel advertised it as ‘now held by a very desirable tenant’, ‘Mr. Fredrick Fleck, for an un-expired term of 28 years at a rent of \$400 per annum’. In fact the tenant had been behind in rent payments and had only paid under pressure. The Court of Appeal held that the statement was not merely an opinion as to the suitability and creditworthiness of the tenant, but an implied statement as to relevant facts.

- (ii) The representation must be a false statement.
- (iii) The representation must be made:
 - with knowledge of its falsehood, or
 - without belief in its truth, or
 - recklessly careless of whether it is true or false.
- (iv) The representation must be made with the intention that it should be acted upon by the injured party ie it is one of the contributing causes to his/her entering the contract.
- (v) The representation must actually deceive – ie it is in fact acted upon by the plaintiff to his/her detriment.
- (vi) Resulting in damage to the innocent party.

Remedies

The contractual consequence of fraudulent misrepresentation is that it renders a contract violable. The innocent party may elect to rescind the contract from the beginning or to affirm it and keep it on foot. Although the contract is valid and binding until this right is exercised, once rescission occurs, it has the effect of restoring the parties to the position that they were in prior to the contract. As you would expect then, this right could easily be lost, for example if *restitution in integrum* is not possible i.e. if the parties cannot substantially be restored to their pre-contractual position. Another ground for disallowing rescission exists where an innocent third party has acquired rights to the subject matter while the contract was valid, e.g. a bonafide purchaser for value.

Rescission may be by clear words or conduct of the representee which indicates to the other party that the contract is cancelled. Once the election to rescind has been notified to the other party, the act of rescission is complete. If the parties subsequently go to court, it is the court's role merely to ratify the act (or decide that rescission was not justified, as the case may be). Where it is impossible to communicate with the other party, it is sufficient that the representee takes all necessary and reasonable steps to make it known that the contract is cancelled.

Although not a 'remedy' as such, an innocent party may successfully rely on a fraudulent misrepresentation as a good defence against an action for specific performance. This means that if the fraudulent party seeks an order of the court to make the innocent party complete

obligations under the contract, the innocent party may raise the fraudulent misrepresentation as a defence.

Fraudulent misrepresentation also gives rise to a remedy in torts. Although the innocent party cannot seek damages in contract because of the false statement (it not being a term of the contract), the innocent party would have an action for the tort of deceit. The elements of this tort are the same as those for fraudulent misrepresentation. The representee therefore can sue for damages in tort, in addition to exercising the option to rescind in contract. The measure of damages is the 'out of pocket' loss ie how much is the representee out of pocket because of acting on the fraudulent misrepresentation. The plaintiff is to be restored to the position he/she would have been in but for the deceit.

(b) Innocent Misrepresentation

Basically the same elements need to be established to satisfy innocent misrepresentation, except of course that the misrepresentation has been made innocently or honestly. The remedies also differ in that although the contractual consequences of rescission and defence in an action for specific performance still apply, damages are not available as deceit is not involved. *See Redgrave v Hurd* (1881) 20 Ch D 1.

(c) Negligent Misrepresentation

In module 6 reference was made to the cause of action based on negligent mis-statement as a sub-category of negligence. There the focus was upon the circumstances where the court would allow the plaintiff to recover even though there was no contract between the parties. In the context of parties entering into a contract, negligence can be relevant in two circumstances:

1. A person may enter a contract because of the negligence advice of a third person. An illustration of this is *Rentokil Pty Ltd v Channon*
2. More relevant to the present discussion is the situation where parties are negotiating the terms of a contract and one gives information or advice to the other which is relied on by that person but later turns out to be incorrect. There may be no suggestion of fraud by the person giving the information or advice. The courts have been prepared to allow the 'innocent' party to recover for negligent misrepresentation as shown in the case of *Esso Petroleum Co Ltd v Mardon*

It should be remembered that **negligence misrepresentation**, although alleged in the context of a contractual relationship, **is still a tort**. Accordingly, the elements of the tort have to be established. For the duty of care element it is still necessary to make out the ‘special relationship’ between the parties involved (*see Shaddock’s* case module 6). Central to this relationship and the resulting duty of care is the aspect of **reliance** by the plaintiff on the information or advice supplied by the defendant. Much depends on the positions of the parties and the relative knowledge of each in the contract negotiations. In *Esso Petroleum Co. Ltd v Mardon* it was the special knowledge of the manager of Esso on the throughout of the petrol station that gave rise to the duty of care in that case.

Negligence mis-representation is often called a sub-category of innocent misrepresentation because in both cases there is no knowledge by the defendant that the representation is false. However, from the point of view of the remedies available, there is an important difference. For negligent misrepresentation rescission is available (as it is with innocent misrepresentation) but in addition, the plaintiff can recover damages for the loss suffered.

You will notice in Turner, a reference to a number of cases on negligent misrepresentation. You only need to know *Shaddock and Esso Petroleum Co.*

Very frequently, negligent misrepresentation overlaps with innocent misrepresentation and since it is now established that damages may be recovered for negligent misrepresentation it has made the differences between fraudulent and innocent misrepresentation less significant.

The previous discussion on misrepresentation reveals a number of difficult areas of law. Some of these are:

1. The difference between a **representation** and a **term** of a contract.
2. The need to identify the six essential elements before fraudulent misrepresentation can be made out;
3. The different remedies that apply if the misrepresentation is fraudulent or innocent; and
4. To establish negligent misrepresentation it is necessary to show that the elements of negligent mis-representation are made out.

Operating Rules

1. It is necessary to identify the relevant section or sections of the public who was or may have been misled. This is important for cases concerning false advertising and the like but is not so critical in a contract situation such as we are concerned with. Here the deception is easily proved. In any event, once the section of the public is identified, you include within it the normal range of people who make up society, i.e. the intelligent and the not so intelligent, the astute and the gentle, the well educated and the poorly educated. By including such a wide cross section, it is easier to prove misleading or deceptive conduct.
2. It is necessary to prove an intention to mislead or deceive, or commit fraud.
3. The rule covers contractual and non-contractual statements, representation and the like. Accordingly, it is not necessary to define what falls within the terms of the contract and the does not, or to consider whether a representation forms part of collateral contract or not or whether the parole evidence rule applies. All these distinctions are irrelevant.
4. Misleading or deceptive conduct can occur through silence where given the circumstances of the particular case, a duty to disclose can be said to arise. An example of this would be where the parties are negotiating the sale of a business which depends upon the availability of a license from the local council to operate a tannery. Assume that the council has notified the seller that it intends to revoke the license because of pollution caused to water courses. A failure to mention this by the seller would probably constitute misleading or deceptive conduct.

At common law silence is not generally regarded a misrepresentation, however the circumstances may require disclosure. In this area the courts are more easily persuaded that the silence has misled.

5. One of the elements of actionable misrepresentation at common law is that there must be a misrepresentation of fact, not opinion. Thus forecasts, prediction or other situations where an opinion given are caught unless it can be shown that the statement or misrepresentations was made on reasonable grounds.
6. As a general rule a person who has been misled will not lose their remedy by reason of their failure to check the accuracy of the representation.

7. The final point to note is the wide range of remedies. The three most important of these remedies are damages, rescission and injunctions. One essential point to note here is that if damages are being claimed then it must be shown that the misleading conduct caused the loss., this will, frequently be established by showing that the injured party relied upon the misleading or deceptive representation but reliance is not the only means by which the causal link between the conduct and the loss can be established.

SELF ASSESSMENT EXERCISE 2

- 1a. What are the elements of an actionable misrepresentation?
- b. In what circumstance may the following constitute an actionable misrepresentation:
 - i. a statement of opinion
 - ii. silence
- c. What remedies are available for each category of misrepresentation?

3.3.2 Duress

Duress occurs where a person has been pressured into entering a contract because of actual or threatened violence to or unlawful imprisonment of the person or near a relative.

The duress need not only be the only reason why the plaintiff entered the contract as demonstrated by:

Barton v Armstrong(1973) 3 ALR 355:

There B claimed that certain commercial contracts had been entered into by him because of A's duress and sought an order setting them aside. The trial judge found, after a trial lasting 56 days, that B had been justified in treating serious death threats made against him by A. But the judge also found that A's threats had not coerced B and that the reason why B had executed the documents in question was his belief in the commercial necessity of doing so. B was also unsuccessful in the Court of Appeal, where a majority of the court held that B could not succeed unless he could show that but for A's threats he would not have signed the agreement. The Privy Council found for B, by a majority. Their view of the facts was that 'though it may be that B would have executed the documents even if A had made no threats...the threats and

unlawful pressure in fact contributed to his decision to sign': at 367. Their view of the law was that, by analogy to developments in respect of fraud, the court should not allow an examination into the relative importance of contributory causes and that if A's threats were 'a reason' for B's entering into the contracts then he was entitled to succeed.

(Source: Vermeesch & Linggren 1992, p 242)

Duress is quite a narrow remedy and in recent times it has been recognized by the courts that equally real in the world of commerce, is economic pressure which may be exerted by a dominant party in a contractual or pre-contractual situation. Also the old remedy of duress required violence or the threat of it, which is not particularly relevant where the party suffering the duress is a company since companies are artificial structures. This is not to say that the violence could not be directed to an officer or manager but in any event the courts have increasingly been prepared to grant a remedy for **economic duress** which is available to both companies and natural persons.

The requirements for economic duress are posed by Turner in the form of two questions and an example of a case where those requirements were met is provided in the case of *North Ocean Shipping Co Ltd v Hyundai*.

3.3.3 Undue Influence

Undue influence may also force a person to enter a contract. Where a relevant relationship of influence exists between two persons, with one person being in a position of ascendancy or dominance over the other, equity will void a contract or other legal arrangement between them pursuant to which the dominant person obtains an advantage. The dominant person will have a good defence if it can be established that the weaker party was not subject to undue influence at the time of entering into the arrangement.

There have been a number of recent decisions on undue influence concerning the relationship between a banker and its customer. See *Lloyds Bank v Bundy* [1975] QB 326.

3.3.4 Unconscionable Contracts

Unconscionable Conduct

This remedy is best demonstrated by *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

In that case, the respondents were elderly migrants with poor business and English language skills. They were induced to execute a mortgage and guarantee in favour of the appellant bank to secure an overdraft facility that had been granted to their son's building company. At the time of execution, they believed that the company was in a solid financial position and that their liability was limited to both \$50 000 and a period of only six months. To the knowledge of the bank, all of these beliefs were incorrect. The Amadios applied to have the mortgage and guarantee set aside.

Held: *The contract was set aside. The majority to the court found that guarantee had been entered into as a result of the bank's unconscionable conduct and, as a result, could not be enforced.*

The reasoning adopted can be found in the judgment of Deane J. (at 475 et seq). He listed three requirements necessary to make our plea.

- (a) *the weaker party must have been under a special disability vis-à-vis the stronger;*
- (b) *the stronger must have been aware of that special disability; and*
- (c) *it must have been unfair or 'unconscientious' of the stronger to procure agreement in the circumstances in which it was procured.*

In Amadio's case all three were present. The Amadios were under a special disadvantage because of their age, lack of business background, limited knowledge of English and total reliance on their son. The bank was aware of those 'disabilities' and yet had then execute the mortgage and guarantee without any independent advice or the opportunity to obtain it. The fact that there was no 'dishonesty or moral obliquity' on the part of the bank's officer was immaterial – the guarantee was unenforceable.

To satisfy a court that there has been unconscionable conduct all three elements, as set out above, need to be satisfied. After *Amadio's case*, one element in particular, namely the need to show a 'special disability', was the subject of considerable debate within the legal community. If a very onerous test was applied by the courts then clearly the scope for

litigants to argue unconscionable conduct would be considerably reduced.

The response from the High Court indicates that the ‘special disability’ requirement will not be especially onerous at all. In *Louth v Diprose* (1992) 110 ALR 1 it was held that emotional dependence can be a significant factor in proving the disability. There a solicitor successfully set aside a gift of a house that he made to a woman with whom he was infatuated. In a more recent decision of the High Court a failure by the defendant’s nephew to obtain separate and objective legal advice for his uncle from whom the nephew was obtaining a benefit was relevant to the disadvantage of the uncle. Other factors were the advancing years of the uncle (he was 84 years old) and the emotional attachment for, and dependency on the nephew. In that case the uncle sold one property to the nephew at a considerable discount and gave the nephew an option to purchase another again at a much reduced value. In a general sense the uncle was a willing participant in the transaction and the case shows how difficult it is to assess unconscionable conduct. In that instance the trial judge and Court of Appeal by a majority (2-1) found for the nephew whereas the High Court, again by a majority (3-2) found against him.

Allied to unconscionable conduct are the doctrines of duress and undue influence.

SELF ASSESSMENT EXERCISE 3

Chukwu has been nominated for a ministerial appointment. In his youth, Chukwu committed several indiscretions which would embarrass him in the committee before the senate committee if they became known during the screening exercise. Okafor, by chance, became aware of Chukwu’s past and threatened to expose him unless Chukwu sold him Chukwu Plaza, at Wuze Abuja at a substantial undervaluation. Chukwu reluctantly agreed and signed a contract. He later reconsidered that matter and now wishes to get out of the contract. Advise Chukwu. Would your answer be different if Okafor had threatened instead to send his associates to Chukwu’s house to “persuade” him?

3.5 Discharge of a Contract

Thankfully the vast majority of contracts are properly performed by both parties and no cause arises to go to litigation. Depending upon the mode of discharge of the contract however there may be continuing obligations of one or other party following discharge.

3.5.1 By Performance

A party's obligations under a contract may be discharged by performance. However its effect on the party's right and obligations will depend on the degree of performance. The party will be discharged by performance only if his or her performance is precise and exact. That is, it must comply strictly with the terms of the contract. A purported performance which falls short of that required by the contract does not discharge the performing party who is bound to perform precisely or be liable for breach of contract.

3.5.2 By Agreement between the Parties

The parties are at liberty at any time to put an end to their contract by mutual agreement (eg accord and satisfaction), or parties may agree to discharge a contract without reaching a new contract (eg through waiver or abandonment). The parties may themselves provide in their agreement that the contract shall be terminated at the will of either party or that it shall terminate on the occurrence of a particular event (a condition subsequent).

3.5.3 Operation of Law

We are not concerned with this mode of discharge but one common example is what is known as merger. Merger occurs where there is a substitution of a higher grade of obligation for a lower. A common example is where one party to a contract sues another and receives a judgment by the court. Here the cause of action merges in the judgment which is a higher grade of obligation which can be used against the defendant. Another example is the *Statute of Limitations* which provides that debts are automatically extinguished within six years from the date they were contracted.

3.5.4 By Frustration

Where a contract originally valid, subsequently becomes impossible, performance of it is said to be discharged by frustration. The question of whether or not performance has become impossible is primarily one of construction of the contract in question.

Frustration occurs whenever the law recognizes that without default of either party, a contractual obligation has become incapable of being performance because the circumstances in which the performance is called for