The Harris Society Annual Lecture

Keble College, Oxford 29 April 2025

"Careless Whispers and (Sweet) Little Lies"

Establishing the Boundaries of Misstatement Claims

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1. It is a great pleasure to have been invited to deliver this lecture, organised by a society named in honour of Professor Jim Harris, a Fellow of this College from 1973 until his death in 2004.[1] It will be apparent both from the songs references in the title of this lecture, and the wreck of a man who stands before you, that I was an undergraduate in the 1980s. As a law student at Magdalen, I would often see Professor Harris navigating the crossing outside the King's Arms, or in the vicinity of the St Cross Building, and marvelled at the mastery which someone without the benefits of sight had of a subject which seemed so astonishingly wordy. However, as so often, real insight comes from the ability to look beyond the forest of words of a subject and identify its more fundamental truths and contradictions. And the best teachers are those able to simplify their subject for the benefit of their students, without losing too many of its nuances in the process. In that connection, Professor Harris' *Legal Philosophies*[2] was an essential companion for anyone of my generation navigating the Final Honours School Jurisprudence paper. For many, it was the only the book they had read on the subject.

2. My subject today is not jurisprudence, however, nor even the law of property – another of Professor Harris' particular interests[3] – but various features of the legal rules which determine when false statements which cause loss are, and are not, actionable. For a subject which has long been such a prevalent feature of litigation, and of law examination papers, there remain a surprising number of aspects of the law which are still open to argument.

3. It is always dangerous in the law to devote too much time to paradigms. Nonetheless, this is a context in which one paradigm instance comes relatively easily to mind: A makes a false statement to B, either dishonestly or on a basis which involves fault in some other legally relevant sense; B believes the statement to be true and acts to their detriment in reliance upon it; and B suffers loss as a result. Perhaps its most paradigmatic instance – certainly for a commercial lawyer like me – is where the action B takes is entering into a contract with A. That particular paradigm has received a statutory encapsulation in s.2(1) of the Misrepresentation Act 1967.

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[1] For an excellent short biography for those in need of one, see Professor Bernard Rudden, "James William Harris: 1940-2004" (2006) 138 Proceedings of the British Academy 125-143.

[2] *Legal Philosophies* (London, 1980). The second edition, in 1987, came too late for me.

[3] See Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (OUP, 2023).

4. There are four features of this paradigm which I want to highlight and explore:

   a. First, the statement is made *by the defendant*, or by someone whose act in making the statement is legally attributable to the defendant.

   b. Second, the statement is made *to the claimant* or someone acting on the claimant's behalf.

   c. Third, what causes loss – or as it is sometimes put, the instrumentality of B's loss – is B's reliance (or the reliance of someone on B's behalf) on the statement.

   d. Finally, what more specifically causes B loss is B's belief in, and acting on, the truth of the misstatement.

5. But this is a paradigm, and not a rule. In the course of this lecture, I want to explore the scope of each of these elements, and engage with some of the legal controversies they have generated.

A statement made by the defendant

6. Turning to the first of those features, liability for the making of false statements does not begin and end with statements made by the defendant itself or a duly authorised agent. For example, some flexibility is seen in the approach of the law to statements made by legal persons. Thus, a director with a dishonest state of mind who directed, procured or authorised the making of a false statement by the company can be personally liable in deceit, just as the company may be liable in deceit on the basis of attribution of the director's knowledge.[4] Technical arguments about legal personality do not generally fare well in this context. It has been noted by Irwin J in *Contex Drouzhba v Wiseman*[5] that: "the clear policy of the law must be – and must always have been – in favour of a remedy for fraud. It is in my view inconceivable, where fraud is proved, that the status of director could act as an effective shield from personal liability by a director." When we are told that fraud unravels all, it not only unravels transactions, but legal paradigms and sometimes statements of general legal principle as well.

7. It has long been established that a defendant who adopts the statement of a third party knowing it to be untrue can be liable in deceit.[6] A particularly interesting scenario is where the defendant passes information to an innocent third party knowing and intending that the information will be passed onto the claimant who will rely upon it. In *Libyan Investment Authority v King*[7] it was held to be "realistically arguable, with no small degree of conviction" that the defendants had put themselves in the shoes of representors by consciously taking steps to select and instruct a valuer and rewording its report with a view to the final report being transmitted by the valuer to the

[4] *C Evans & Son Ltd v Spritebrand Ltd* [1985] 1 WLR 317, 425-30; *MCA Records Inc v Charly Records Ltd* [2000] EMLR 743, [15]; *4VVV Ltd v Spence* [2024] EWHC 2434 (Comm), [31].
[5] *Contex Drouzhba v Wiseman* [2006] EWHC 2708 (QB), [96].
[6] *Bradford Third Equitable Building Society v Borders* [1941] 2 All ER 205.
[7] *Libyan Investment Authority v King* [2020] EWHC 440 (Ch) 123.

claimant. In *4VVV Ltd v Spence*,[8] I found that defendants who had controlled the contents of marketing material put out by a third party, making untruthful statements to promote contracts with the defendants and their companies, were liable in deceit. In both *LIA* and *4VVV*, the party held liable in deceit had controlled the content of material put out by an innocent third party for the purposes of promoting transactions between the defendants' corporate vehicles and the representee. In such cases, when we find the defendant at the start and end of the sequence of events, it may be easier for a court to treat the representations as, effectively, made by or on behalf of the defendants, even though the immediate source of the representation is the third party.

8. We see here, therefore, some elasticity when considering whether the representation received and acted on by the claimant is made by the defendant, with liability extending beyond traditional doctrines of vicarious liability or agency. The length of that particular piece of elastic is a matter which features prominently in the *Skatteforvaltningen v Solo Capital Partners LLP* litigation. That case was the subject of a trial which lasted a year and a day – once the gestation period for murder until the Law Reform (Year and a Day Rule) Act 1996 –in the Commercial Court. The trial ended, thankfully with no dead bodies to date, in early April. Mr Justice Andrew Baker is currently working his way through several thousand pages of closing submissions.

A statement made to the claimant

9. A degree of flexibility is also apparent when considering whether the statement in issue has been made to the claimant. Once again, a representation made to a third party with the intent that it be passed onto the claimant to be acted on by them has long been held to suffice for liability in deceit. In *Barry v Croskey*[9] the general principle enunciated by the court was that "every man must be responsible for the consequences of a false representation made by him to another, upon which a third person acts .. provided that it appear that such false representation was made with the intention that it should be acted upon by such third person in the manner that occasions the loss or injury". Here, the original representor's *intention* that the third party should receive and act upon the representation so passed on overcomes many of the concerns which courts articulate about the prospect of indeterminate liability, rather in the manner that intended consequences are never too remote.

10. But what where the representor merely foresees, rather than intends, such second order reliance? Many of the cases, including *Barry v Croskey* itself, elide the concepts of intention and contemplation, and in some cases, the facts are more redolent of the latter than the former.[10] Where the result of the repetition of the representation by the immediate representee is a contract between the third party and the defendant, knowledge of its repetition would appear to enough – once again the defendant is conveniently there at the beginning and the end of the story.[11] Where the claim is for negligence rather than deceit, the much-derided duty of care concept provides a useful mechanism for distinguishing between second order representees who can claim

[8] *4VVV Ltd v Spence* [2024] EWHC 2434.
[9] E.g. *Barry v Croskey* (1861) 2 Johnson and Hemming 1, 20, 70 ER 945,
[10] *Langridge v Levy* (1837) 2 Meeson & Welby 519, 150 ER 863; *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm), [139], [142] ("intended or expected").
[11] *Pilmore v Hood* (1838) 5 Bing NC 97, 132 ER 1042. *Clef Acquitaine SARL v Laporte Materials (Barrow) Ltd* [2001] QB 488 also involved the second order representee contracting with the defendant.

against the original representor, and those who cannot. That was the position in *Playboy Club London Ltd. v Banca Nazionale del Lavoro SpA*,[12] in which a bank was held not liable in negligence for a reference as to a customer's creditworthiness passed onto another company in the recipient's group who then relied upon it in approving a cheque-cashing facility. The Supreme Court said that, ordinarily, there would only be liability for a representation passed on in this way if the representor both knew that it was likely to be passed on, and it was part of the statements known purpose that it should be communicated and relied upon by the ultimate representee.

11. The tort of deceit, however, does not require a duty of care,[13] and for this tort, the tools to control the extent of any downstream liability for an original misstatement passed on to another party must be found elsewhere. A long-standing limitation is the need for the claimant to be a member of the class of persons at which the representation was originally directed. This can involve fine distinctions between representations in a company prospectus aimed at those being invited to subscribe to the original allotment of shares, and those buying shares from existing shareholders in the market, as in *Peek v Gurney*.[14] Where the representation originally made to induce transaction A is passed on by the original representee to induce transaction B, the same outcome is sometimes rationalised on the basis that the original representation is "exhausted" or "spent" once the first transaction is concluded.[15] The limits of this requirement are not entirely clear to me – for example it has been suggested that mere knowledge that the original representation is being repeated by the buyer to the on-buyer may be sufficient to found the original representor's liability.[16] There must be some limit on the continuing life of a representation, but formulating what it should be is not straightforward.

12. In all of these cases, the instrumentality of the claimant's loss has been reliance on a representation put into circulation by the original representor, but of which the claimant was not the original representee. To that extent, the defendant's liability falls within the penumbra of our misstatement paradigm, even if not within its core. Can there be liability where this feature is not present? There are legal contexts in which misstatements made to third parties are actionable by a claimant who did not rely on a repetition of the misstatement. They generally involve either special facts patterns or carefully delineated and specialist torts. I am going to confine myself to three examples.

13. One which was still causing great excitement when I studied tort law as an undergraduate was *Ministry of Housing and Local Government v Sharp*[17] in which a local authority employee carelessly issued a statement declaring a property to be free of a charge in respect of a statutory entitlement to compensation to the intended purchaser of the land. The purchaser relied on the certificate in acquiring the land, but

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[12] *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [11]. See T Foxton, "Second Degree *Byrne*" (2019) CLJ 18.
[13] In *Playboy*, the claimant subsequently pursued a claim in deceit: see e.g. [2020] EWHC 748 (Comm). Proceeding settled at trial.
[14] *Peek v Gurney* (1873) LR 6 HL 377.
[15] In addition to *Peek v Gurney*, *Gross v Lewis Hillman* [1970] Ch 445, 461.
[16] *Gross v Lewis Hillmann*, 461, by reference to *Pilmore v Hood* where there was no on-sale, but the second order representee took over the ongoing transaction between the defendant and the original representee.
[17] *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.

did not suffer loss in doing so because they were protected by a statutory provision deeming the certificate to be accurate. The loss was suffered by the Ministry, which found itself having to pay the compensation to the seller who had been refused permission to develop without being able to recover it from the purchaser who had been granted such permission. However, it was the purchaser's, rather than the Ministry's, reliance on the certificate which had caused the loss. Liability was imposed in characteristically wide terms by Lord Denning – the duty of care in producing the certificate was owed not just to the person to whom it was issued but "any person whom he knows or ought to know will be injuriously affected by a mistake".[18] Salmon LJ noted "the case does not precisely fit into any category of negligence yet considered by the courts", because the claimant had not been misled.[19] However, he was "not troubled by the fact that the present case is, in many respects, unique", on the basis that "the categories of negligence are never closed. "Cross LJ was unpersuaded, but not to the point of dissension.

14. There is also the tort of causing loss by unlawful means, which requires an intention to cause loss to the claimant; use of "unlawful means" against a third party; and interference with that third party's freedom to deal with the claimant.[20] That could include a misstatement to the third party which would be actionable but for the absence of loss to that third party.[21] The tort of deceit can provide the requisite unlawful act,[22] although the circumstances in which deceit will limit the third party's ability to deal with the claimant may be limited.[23]

15. Finally, there is a legal principle of indeterminate scope that where a fraudulent statement made by a defendant to a third party enables it to acquire property which would otherwise have remained the claimant's, the property will be held on trust for the claimant. This is one of the many quirky delights of the common law's shop of curiosities. This principle was applied in *Homeward Bound Gold Mining Co v McPherson*[24] where it was summarised in the following terms: "equity will not permit any person… to hold a benefit [derived by fraud] as against the person who, but for the fraud, would be entitled ." The principle was also applied in *Walker v. Webb*[25] in respect of a fraudulent application to the Commissioners of the Court of Claims by which the defendant obtained the grant of a freehold. In *Lonrho Plc v Al-Fayed (No 2),*[26] Millett J suggested that the cases concerned "a fraud which was practised on the plaintiff even though it consisted of falsehoods told to a third party" with plaintiff recovering property which, "but for the fraud, would have belonged to him."

16. I am going to deal with the decision of the Supreme Court in *Zurich Insurance Co plc v Hayward*[27] in more detail a little later. It has caused many of us to have to re-visit

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[18] Ibid, 268-69.
[19] Ibid.278.
[20] *Clerk & Lindsell on Torts* (24th Ed.) at [23-80].
[21] *OBG v Allen* [2007] UKHL 21, [49, [302] and [319]-[320].
[22] *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 as explained in *OBG Ltd v Allan* [2007] UKHL 21, [49]; *Costa v Dissociadid Ltd* [2022] EWHC 1934 (IPEC).
[23] A claim relying on deceit of a third party failed because of the inability to satisfy this requirement in *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24; [2022] A.C. 959,
[24] *Homeward Bound Gold Mining Co v McPherson* (1896) 17 NSWLR 281, 319.
[25] *Walker v. Webb* (1845) Res. & Eq. 19.
[26] *Lonrho v Al Fayed (No 2)* [1992] 1 WLR 1, 10-12.
[27] *Zurich Insurance Co plc v Hayward* [2017] AC 142.

our paradigms of misstatement based liability. As you will know, a defendant gave the claimant's insurer a dishonest account of the circumstances of an accident with a view to securing a favourable settlement. The insurer did not believe the account, but was concerned that a court might believe it if a claim was pursued, and agreed to settle. The insurer was later held to be entitled to rescind the settlement for fraudulent misrepresentation and recover the amount paid. Certain of the misstatement claim paradigms are present in *Zurich* – the false statement had been made by the defendant to the claimant for the purpose of inducing the claimant to act in a certain way. But the insurer was induced to act not because it believed the misstatement was true, but because of concern that a third party might.

17. That more attenuated notion of reliance led to an argument before me in *Commercial Bank of Dubai PSC v Al Sari*[28] that a claim could be brought in deceit to recover legal costs where the claimant had been sued by the defendant in foreign court proceedings on the basis of what the claimant knew were forged documents purporting to record the existence of a fake debt. I was unpersuaded, because there had been no dishonest statement to the claimant for the purpose of inducing the claimant to act in a certain way (and certainly not for the purpose of inducing the claimant to incur legal costs).

18. All of this may sound a little theoretical, but the been for direct reliance by the claimant on the defendant's misstatement is one of the principle bulwarks standing in the way of a major liberalisation of securities litigation in this jurisdiction. One of the major challenges of mass securities litigation is that individual purchasers of shares may simply buy them at the prevailing market price, without reading any particular quarterly investor report, directorial statement or annual report. They will simply rely on the prevailing market price as an informed evaluation of the company's worth. Even for those who have read one of those reports, the economics of group litigation where it has to be proved that each investor discerned and was influenced in the relevant sense by a particular misstatement are very challenging.[29] In the US, this difficulty is largely overcome by the "fraud on the market" doctrine, which accepts the economic theory that the misstatements are "priced in" to the market value of the securities, and cause loss to those purchasing securities at the inflated market price, such that a rebuttable presumption of reliance arises.[30] A principle of law which allowed a claimant to sue because the defendant's misrepresentation to a third party, who has in turn relied upon it, had led to an overvaluation of quoted shares on the market price on which the claimant has then relied, would overcome most of these issues.[31] It is possible to characterise an inducement of this kind as reliance on the reliance of others on the defendant's fraudulent statement.

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[28] *Commercial Bank of Dubai PSC v Al Sari* [2024] EWHC 3304 (Comm), [135]-[142].
[29] See *Wirral Council v Indivior Plc* [2025] EWCA Civ 40.
[30] *Basic Inc v Levinson* 485 US 224 (1988).
[31] See *Persons Identified in Schedule 1 v Standard Chartered Plc* [2025]EWHC 698 (Ch), [19].

19. It is possible to find older English authority with vague echoes of an argument of this kind,[32] but the consistent direction of recent authority has been less supportive.[33] The common law requirement of direct reliance has been identified as a key controlling feature of liability under s.90A of FSMA 2000,[34] which itself reflects the narrow securities fraud remedy which that section was intended to bring into being.[35] For that reason, liability in private law for misstatements appears to be largely be limited to those which make their way to, and are discerned by, the claimant, who then takes action upon them.

The claimant's reliance on the statement

20. That brings me to the third element in my paradigm. What do we mean when we say the claimant must rely upon the misstatement? This area of the law relating to the liability for misstatements is much more complicated than it needs to be with issues as to:

    (1) what the test is;

    (2) whether there should be a different test depending on whether the misstatement was made innocently (in the sense of non-fraudulently) or fraudulently;

    (3) whether there should be different tests for claims for rescission and damages; and

    (4) the incorporation within the substantive law of various rules about proof.

21. So far as the test itself is concerned, the principal issue is whether the claimant must (with the benefit of whatever evidential presumptions are engaged) show that "but for" the misstatement, they would not have taken the action[36] which caused loss? Or is it enough to show that the misstatement was "actively present" in the claimant's mind when taking that action?[37] As recently as 2015, the Honourable Kenneth Handley suggested that "the orthodox causation rule for inducement in deliberate misrepresentation cases, fraudulent or innocent … is that any contribution, even if it is

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[32] *Twycross v Grant* (1877) 2 C.P.D 469, 489-490; *Bedford v Bagshaw* (1859) 4 H&N 538, 548-9.
[33] For a summary see *Allianz Funds Multi-Strategy Trust v Barclays Plc* [2024] EWHC 2710 (Ch), [66]-[78]; *Leeds City Council v Barclays Bank plc* [2021] EWHC 363 (Comm); *Loreley Financing (Jersey) No 30 Ltd v Credit Susse Securities (Europe) Ltd* [2023] EWHC 2759 (Comm) and *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) and compare *Crossley v Volkswagen AG* [2021] EWHC 3444 (QB). For a recent decision refusing to follow Leech J in striking out claims on this basis see *Persons Identified in Schedule 1 v Standard Chartered Plc* [2025] EWHC 698 (Ch).
[34] *Wirral Council v Indivior Plc* [2025] EWCA Civ 40, [83]: "reliance was important in controlling the extent of claims which can be brought under that section".
[35] See the Discussion Paper of March 2007 and the Final Report of June 2007 Professor Paul Davies KC (especially the Discussion Paper at [116] and the Final Report at [17].
[36] Frequently, but not invariably, entering into a transaction with the defendant or someone else.
[37] A formulation from Bowen LJ's judgment in *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 48.

not material is sufficient."[38] Handley justifies this approach on the basis that "the representor's intention to induce the plaintiff to change position is relevantly an intention to injure that person".[39] I do not find this reasoning entirely persuasive. The intention the representee should act on the representation is frequently imputed rather than actual, and while some innocent misrepresentation cases involve a deliberate decision to make a statement which proves to be wrong, others may involve a negligent failure to realise what the objective meaning of their statement is, or that they have made a statement at all. A "but for" test has also been opposed on the basis of the alleged difficulty in working out what effect a particular statement has among the many factors influencing human decision-making,[40] or the "unseemliness", particularly in fraud cases, of allowing a party who has made a dishonest statement with the intention it be acted upon to argue that this might not be the case.[41]

22. Ten years on, I think it is reasonably clear that in negligent or statutory misrepresentation cases in which damages are sought, a "but for" test applies.[42] There is much more scope for argument where the misstatement is made fraudulently, with support for the view that the iniquitous nature of the defendant's conduct merits a more claimant-friendly causation test.[43] However, putting issues going to the issue of proof aside, I would suggest that the better view is that a claim for damages for deceit imposes a "but for" requirement as much as a claim based on breach of a duty of care.[44] While it is easy to see why fraudulent behaviour should influence the extent of a defendant's liability,[45] it is not immediately clear why it should moderate the test for one of the most fundamental questions of the law of tort: has the defendant's wrongful act left the claimant worse off?

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[38] KR Handley, "Causation in Misrepresentation" (2015) 131 LQR 275, 275. Cases supporting the absence of a "but for" case are collected in this article.
[39] Ibid.
[40] Elise Bant, "Causation and Scope of Liability" [2009] RLR 60.
[41] E.g. Lord Chelmsford LC in *Smith v Kay* (1859) 7 HLC 750, 759: "Can it be permitted to a party who has practised a deception with a view to a particular end which has been attained by it, to speculation on what might have been the result if there had been a full communication of the facts?"
[42] *Assicurazioni General Spa v Arab Insurance Group* [2002] EWCA Civ 1642 [79], [187]; *Raiffeisen Zentralbank Osterreich AG v Ryal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) [171], [173], [195] (a particularly influential judgment). Niranjan Venkatesan "Causation in misrepresentation: Historical or counterfactual? And 'but for' what?" (2021) 137 LQR 503.
[43] Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 482; Andrew Burrows QC in *Century Finance Holdings Ltd v Jamtoff Trading Ltd* [2018] EWHC 3135 (Comm), [26]; *Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 (Ch), [202]. It is possible to read Longmore LJ in *BV Nederlandse Industrie van Eiprodukten v Rembrandt Entreprises Inc* [2019] EWCA Civ 596, [32], [36] as adopting a similar approach. If there is a separate fraud test, the issue arises as to whether the "fiction of fraud" in s.2(1) of the Misrepresentation Act 1967 on which see *Raiffeisen Zentralbank Osterreich AG v Ryal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) [182], [198]-[199].
[44] *Barings Plc v Coopers & Lybrand* [2002] EWHC 461 (Ch(, [127]-[130]; *Dadourian Group International v Simms* [2006] EWHC 2973 (Ch), [99]-[101]; *Standard Chartered Bank v Pakistan National Shipping Corpo (Nos 2 and 4)* [2002] UKHL 43, [15]; *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [117]; [2022] EWCA Civ 231, [61]; *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone)* [2016] UKSC 45, [29]. For support for this view see Niranjan Venkatesan "Causation in misrepresentation: Historical or counterfactual? And 'but for' what?" (2021) 137 LQR 503.
[45] E.g. *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158.

23. I am going to deal with the second question – does a different test apply when rescission is sought for fraudulent misrepresentation – briefly. The answer is that there is a respectable body of authority which suggests it does,[46] and when the issue last arose before me, I concluded that was the current position of the law.[47] On one view, that involves not just different tests for rescission and damages, but different tests for rescission for fraudulent and innocent misrepresentations, and, perhaps, for damages under s.2(1) and s.2(2) of the Misrepresentation Act 1967.[48] I do not find that altogether satisfactory, if so, and have struggled to find any adequate justification for the distinction.[49]

24. Identifying the relevant counterfactual raises the question of whether the "but for" analysis involves asking would have happened if no statement on the relevant subject had been made at all, or if an accurate statement had been made (and, if the latter, the extent of any "adjustments" to achieve accuracy). There are in theory three approaches which might be adopted.

    (1) First something akin to the doctrine of minimum performance in contract[50] could be adopted, with damages being calculated on the basis that the defendant would have adopted that means of complying with the obligations imposed upon them by the law of tort which was most favourable to them.[51] However, that rule of contract law would appear to reflect the fact that the extent of the claimant's legally protected interest is set by the terms of the contract (absent which there would be no relevant legally protected interest at all). This approach appears inapposite when dealing with general legal duties imposed by the law of tort.

    (2) Second, for fraud claims at least, it would be possible to formulate a rule which assumed that the defendant would have performed its legal duty not to make misstatements in the manner most favourable to the claimant. That would involve another "special rule" for fraud, and possibly for s.2(1) of the Misrepresentation Act 1967 by extension. You may feel we have enough of those already.

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[46] See Dominic O'Sullivan KC, Steven Eliott KC and Rafal Zakrzewski, *The Law of Rescission* 3rd (OUP, 2023), [4.104]-[4.113]. *Hayward v Zurich Insurance Co Plc* [2018] UKSC 48, [37]-[38].
[47] *SK Shipping Europe Plc v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm), [117]; [2022] EWCA Civ 231, [61].
[48] See fn 40 above and cf KR Handley, "Causation in Misrepresentation" (2015) 131 LQR 275, 288.
[49] In *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG (The DC Merwestone)* [2016] UKSC 45, [29]. Lord Sumption suggested that the same test applied to a claim in deceit and for rescission for misrepresentation, "fraudulent or otherwise".
[50] See Adam Kramer KC, *The Law of Contract Damages* (3rd) (Hart, 2022) [13-39]-[13-81].
[51] There are faint echoes of this in Niranjan Venkatesan "Causation in misrepresentation: Historical or counterfactual? And 'but for' what?" (2021) 137 LQR 503, 516.

(3) Third, the court can decide what would have happened on the facts in the counterfactual world – are circumstances such that the putative representor would have said something on a particular subject, or would they have remained silent?

25. That last approach seems intuitively right, although there are arguments as quite how it falls to be applied. It appears reasonably clear on the authorities that the starting point is to consider what would have happened had the misstatement not been made – that is after all, the wrongful act in this scenario.[52] However, it will frequently be the case that the enquiry does not end there, either because the defendant is under a positive duty to communicate information – for example as an advisor[53] – or because if information is not volunteered on a particular subject, it will be asked for.[54]

26. It has been suggested that the right question to ask is "would the defendant have chosen to comply with the obligation not to lie by remaining silent or by telling the truth?"[55] It is not clear to me if this involves a different approach, but the idea of the defendant making a choice as to how to perform an antecedent legal obligation seems more appropriate for a contractual rather than a tortious context. In the latter, a starting point of asking what would have happened had the relevant wrongful act said to have caused the loss (and thereby constituted the tort) not taken place seems more appropriate, and to focus the enquiry at the relevant point in time. And in law, one has to start somewhere.

27. That leaves the operation of presumptions and burdens of proof. Some of these – such as the presumption of inducement – make obvious sense. As Wilson J noted in *Gould v Vaggelas*,[56] "if a misrepresentation is made which is calculated to induce the representor to enter into a contract and that person enters into that contract, there arises a fair inference of fact that he was induced to do so by the representation". One which I find more troubling is the strengthening of that evidential presumption where the misrepresentation is made fraudulently, it being suggested that in such cases the inference of inducement will be "very difficult to rebut".[57] An argument that the more obviously material a misstatement is, the harder it will be to rebut the inference of inducement, makes perfect sense. But the fact that a marginally material misstatement

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[52] *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc [*2010] EWHC 1392 (Comm), [174]-[180]; *Leni Gas & Oil Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm), [17]; *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844 (Comm), [189]; *Marme Inversiones 2007 SL v Natwest Markets plc* [2019] EWHC 366 (Comm), [294]; *Cassa di Risparmio della Republica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm); [2011] 1 CLC 701; *SK Shipping Europe plc v Capital VLCC 3 Corp and another* [2020] EWHC 3448 (Comm) [185]-[188]; [2022] EWCA Civ 552, [61].
[53] *Petromec Inc v Petroleo Brasiliero SA Petrobras* [2006] EWHC 1443 (Comm), [95].
[54] *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31.
[55] Niranjan Venkatesan "Causation in misrepresentation: Historical or counterfactual? And 'but for' what?" (2021) 137 LQR 503, 516 (or at footnote 85, "How would the defendant have in fact chosen to avoid committing the tort or breach of contract in question?").
[56] *Gould v Vaggelas (*1985) 157 CLR 215, 236-238.
[57] *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48, [37].

is made fraudulently ought not to make the inference of inducement harder to be rebut than for a more centrally material misstatement made negligently. It is also not entirely clear to me what evidential process the words "very difficult to rebut" contemplate: for example, does it mean an enhanced burden of proof beyond the balance of probabilities? This is one of a number of occasions in which the principles of English private law hint at a higher probative challenge as a means of reflecting important values of private law, but quite what they involve in practice is never easy to say.[58] If these are nothing more than empirical observations about how frequently the requirement will be made out, they are not rules of law at all, nor are they helpful. We do not generally allow one party to pray-in-aid the fact that the argument raised by the other side is rarely made out on the evidence in other cases.

The claimant's reliance on the truth of the statement

28. That brings me to the last element in my paradigm case of private law liability for misstatements. It might be thought that it is of the essence of the tort of deceit that not only has the defendant been *deceitful*, but the claimant has been *deceived*. Cotton LJ in *Arkwright v Newbold*[59] once noted that "in an action of deceit the Plaintiff cannot establish a title to relief simply by shewing that the Defendants have made a fraudulent statement: he must also shew that he was deceived by the statement, and acted upon it to his prejudice".

29. That analysis of the tort cannot survive *Zurich v Hayward*.[60] As just discussed, the defendant gave the claimant insurer a dishonest account of the extent of injuries suffered in an injury at work. The insurers suspected that the claim was deliberately exaggerated but entered into a settlement agreement, nonetheless. When they acquired evidence of the suspected dishonesty, they brought a claim for rescission of the settlement agreement. The claim was rejected by the Court of Appeal on the basis that the insurers had not relied upon the dishonest statements, in the sense of acting on their truth, in settling the claim. The Supreme Court held that rescission was not dependent on proving the representee's belief in the truth of the misstatement.[61] While the insurers had accepted that knowledge, rather than suspicion, of the falsity of the account would have prevented relief, Lord Clarke left that issue open, stating "it seems to me that there may be circumstances in which a representee may know that the representation is false but nevertheless may be held to rely upon the misrepresentation as a matter of fact."[62]

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[58] For other examples see *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm), [90]-[104] (the particularly onerous burden of showing no export licence could have been obtained by a defendant who was obliged to take reasonable steps to obtain one, and did nothing); and *Joscelyne v Nissen* [1970] 2 QB 86, for "irrefragable" evidence for a rectification case.
[59] *Arkwright v Newbold* (1881) 17 Ch D 301, 324-5.
[60] *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48. See Paul S Davies and William Day, "A Mistaken Turn in the Law of Misrepresentation"
[61] Lord Clarke, [18]; Lord Toulson, [67].
[62] At [44].

30. Much of the academic disquiet caused by *Zurich* came from its application to a claim for rescission, and the undermining of the concept of misrepresentation inducing a contract as a form of induced mistake.[63] The extent to which the laws of unjust enrichment dominate private law scholarship is remarkable. Paul S Davies and William Day, for example, suggest that the Justices impermissibly applied authorities dealing with the tort of deceit – where it would seem they are quite happy for there to be no need for the representee to be induced to believe the misstatement – to rescission for misrepresentation.[64] For my part, I view the post-*Zurich* position where damages are claimed for disbelieved deceit which has induced a transaction with less equanimity, and similarly the idea that separate reliance / inducement tests apply depending on whether the remedy sought for a misrepresentation is damages or rescission of a transaction. There are a number of pre-*Zurich* cases which suggest that a requirement of induced belief is a requirement of the tort of deceit, as well as a claim for rescission,[65] and *Zurich* is a significant case in the tort of deceit, as well as on the subject of rescission for misrepresentation.

31. I referred earlier in this talk to three legal rules which involve liability for false statements made to third parties, but not to the claimant, which cause loss to the claimant. To those might be added the torts of injurious falsehood and defamation. These torts or rules have their own particular features and limitations. In this jurisdiction we have a law of tort*s* rather than a law of tort, for reasons of legal history which may or may not coincide with reasons of legal principle, the ambits of those torts frequently reflecting the different interests protected. I was struck by a case I was involved in recently in which the claimants appeared to be engaging in the game of *Clerk & Lindsell* bingo, trying to tick off as many different torts as possible.[66] We had unlawful means conspiracy, deceit, defamation, malicious prosecution, malicious falsehood and so on. But the case had a foreign law element, and whenever we went to the claimants' expert report on UAE law to identify the basis on which the conduct complained of was alleged to be actionable under that law, we returned time and again to the same generally expressed provision of the UAE Civil Code. Who would want to be a Scholar of Tort Law in the UAE?

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[63] See in particular Kelry CF Loi, "Pre-Contractual Misrepresentations: Mistaken Belief Induced by Mis-statements" (2017) JBL 598 ; Elise Bant, "Unravelling Fraud in the Wake of *Hayward v Zurich Insurance*" [2019] LMCLQW 91 and Paul S Davies and William Day, "A Mistaken Turn in the Law of Misrepresentation" [2019] LMCLQ 390 and William Day, "Recent Travails of Fraudulent Misrepresentation" [2021] LMCLQ 636. For concern at the implications of *Zurich* for deceit claims, see Margaret Hemsworth, "English Insurance Law" [2017] IMCLY 45, 52-56. For a more supportive view, Rosa Lee, "Proof of Inducement in the Law of Misrepresentation" [2017] LMCLQ 150.

[64] Paul S Davies and William Day, "A Mistaken Turn. in the Law of Misrepresentation" [2019] LMCLQ 390, 396 noting that both Lord Clarke and Lord Toulson cited more deceit than rescission cases.

[65] A number of cases are collected in Margaret Hemsworth, "English Insurance Law" [2017] IMCLY 45, footnote 25, to which can be added *Strover v Harrington* [1988] Ch 390, 407 (s.2(1) of the Misrepresentation Act 1967) *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [40] (s.2(1) Misrepresentation Act 1967 and discussing *Pattinson v Flack* [2002] EWCA Civ 1820, a deceit case) and *Sprecher Grier Halberstam LLP v Walsh* [2008] EWCA Civ 1324, [17].

[66] *Commercial Bank of Dubai v Al Sari* [2024] EWHC 3304 (Comm).

32. One difficulty with *Zurich*, even in deceit cases, is that it is apt to undermine the boundaries between different torts recognised by English law, which have their own distinct rules, as to what is required for an actionable tort, what loss can be recovered and the applicable periods of limitation.[67] In substantive terms, *Zurich* was a case in which the insurer was exposed to loss by the fact that a dishonest legal case was to be advanced in court proceedings, the insurer's concern being that the court would or might accept that case. Bringing a complaint of this kind within the tort of deceit might open the door to the extension of that tort to any claims premised on loss caused by dishonest statements, to whomever they are made, and whatever the instrumentality of the claimant's loss. If the insurer had been incentivised to settle by the claimant saying it would otherwise make false statements to third parties about how dreadfully the insurer had behaved, would that ground a rescission claim or a damages for deceit claim? I doubt it.

33. Two first instance decisions have suggested that, for a claim in deceit or some species of misstatement tort to succeed, it is still necessary to show that the representee acted as they did because of a perception that a third party might believe that the statement was true.[68] A control mechanism of that kind does not go particularly far in avoiding the difficulties I have mentioned. However, it was sufficient to address the issue which faced me in *School Facility Management Ltd v Governing Body of Christ the King College*.[69] In that case, the claimant – who specialised in leasing modular buildings to public authorities – insisted as a pre-condition of contracting that the school provide a letter confirming its entitlement to enter into the contract. I found that the claimant was fully alive to the legal hazards raised by public bodies entering into contracts of this kind, and was not in any way influenced in its assessment of those risks by the school's statement, but nonetheless that the contract would not have gone ahead without that box being ticked. The school's statement was, therefore, a "but for" cause of the contract. I held that this was not enough for liability in negligent misstatement:[70]

> "Where the only significance of a representor's assertion of the truth of a state of affairs is the fact that it is made, not that the making of the statement would cause someone to accept the truth of the matters represented, that is not, in my view, capable of supporting a cause of action in misrepresentation or misstatement. It would involve a fundamental, and to my mind unjustified, expansion of the traditional scope of representation-based torts if a contracting party could protect itself against a known risk of an intended transaction by requiring someone to make a representation as to the absence of that risk as a

[67] E.g. Section 4A Limitation Act 1980 for malicious falsehood claims
[68] *Holyoake v Candy* [2017] EWHC 3397 (Ch), [391]-[392] and *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), [401] .
[69] *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm).
[70] Ibid, [401].

condition of proceeding, in circumstances in which the statement did not cause or influence the contracting party's evaluation of the risk. A party who wishes to allocate a risk of contracting of this kind must do so by contract, or not at all. When, as in the present context, it is not possible to allocate the risk to the contractual counterparty by a binding promise because the counterparty lacks the capacity to give such a promise, it would be particularly surprising if the risk of lack of capacity could nonetheless be transferred to that party by requiring it to make a statement on the truth of which the claimant did not rely."

34. What of the argument that there should be different causation tests for claims for damages and for rescission resulting from misstatements? It is certainly possible to apply different rules to the setting aside of bargains from those which apply to claims for damages – for example, for purely innocent misrepresentations which induced contracts, there was, until s.2(2) of the Misrepresentation Act 1967, no basis for awarding damages at all. But in terms of the necessary connection between the misrepresentation and the claimant's conduct, and in particular whether it is an answer that the claimant knew that the misstatement was untrue, I do not find the distinction particularly satisfactory. For non-fraudulent misrepresentations, the law appears to be that the same test applies.[71] Were this not to be the case, the issue would arise as to what test applied to a claim for damages in lieu of rescission under s.2(2) of the Misrepresentation Act 1967. If that is right, it would suggest the nature of relief does not of itself justify a different approach, and this should equally be the case where the misrepresentation was made fraudulently. I acknowledge, however, that the authorities do currently distinguish between the inducement tests in deceit and rescission for fraudulent misrepresentation, in adopting a less onerous test for the latter. But that hardly supports having a *more* onerous test for rescission than for damages claims in some other respect.

Conclusion

35. In his 2001 Maccabean Lecture in Jurisprudence to the British Academy,[72] Professor Harris suggested that "from a non-lawyer's point of view reasoning in common law cases and the commentary built upon them appears as nowhere more arcane than when it is dealing with property", describing the law as "sprinkled with technicalities and in-bred conceptualisations". Without suggesting the law relating to actionable misstatements has reached such a parlous state, it is remarkable how many uncertainties and obscurities still characterise such a basic function of private law as the extent of liability for false statements. This is not, after all, a new problem – lying was not, as the comedian Ricky Gervais's 2009 film once postulated, a recent invention, but is as old as the power of speech – indeed almost certainly older, once misrepresentations by conduct are brought into the picture. And to bring us vaguely

[71] *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [15].
[72] JW Harris, "Reason or Mumbo Jumbo: The Common Law's Approach to Property" (2002) 117 Proceedings of the British Academy 445, 445.

back to where we began, I am going finish this lecture with a quotation from Marx. Not Karl Marx, about whom almost all I know comes from Professor Harris' *Legal Philosophies*. But from a rather older film comedian than Mr Gervais, who left us with this enduring piece of wisdom:

"The secret of life is honesty and fair dealing. If you can fake that, you've got it made."

Thank you.