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The Impact Of Misrepresentation And Mistake On The Validity Of Contracts In Common Law: A Case Study Analysis

Qobiljon Shavkatovich Nosirov, Lecturer, Department of Civil law and Private international law disciplines, University of World Economy and Diplomacy
nosirovk66@gmail.com

ABSTRACT

This article examines the impact of misrepresentation and mistake on contractual validity within the common law tradition. Through doctrinal analysis and case study methodology, the research explores how English common law distinguishes between these two vitiating factors, the elements required to establish each doctrine, and the remedies available to aggrieved parties. The article traces the evolution of misrepresentation from the stringent fraud standard in *Derry v Peek* (1889) to the statutory regime under the Misrepresentation Act 1967, which introduced damages for negligent misrepresentations. Concurrently, the analysis addresses the doctrine of common mistake, particularly the narrow test established in *Bell v Lever Bros Ltd* and the Court of Appeal's subsequent rejection of an equitable jurisdiction to render contracts voidable for common mistake in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* (2002). The findings reveal a fundamental divergence: misrepresentation renders a contract voidable, focusing on the representor's conduct, whereas common mistake may render a contract *void ab initio*, focusing on the subject matter's essential identity. This distinction reflects broader common law commitments to contractual certainty and the allocation of risk.

Keywords: Misrepresentation, mistake, common law contract, vitiating factors, rescission, damages, Misrepresentation Act 1967, *Derry v Peek*, *Great Peace Shipping*



Introduction

The law of contract rests upon the foundational principle of party autonomy: that freely negotiated agreements ought to be enforced. However, this principle yields when consent is impaired. Two principal doctrines address such impairment: misrepresentation and mistake. While both concern defective consent, they operate on distinct conceptual bases and produce different legal consequences.¹ Misrepresentation arises where one party makes a false statement of fact that induces the other to enter a contract. The focus is on the representor's conduct and the representee's reliance. Mistake, by contrast, concerns situations where both parties share a false assumption about a fundamental fact underlying their agreement, with no necessary fault on either side.²

This article addresses three research questions: (1) How have English courts and Parliament defined actionable misrepresentation and established remedies? (2) What is the scope of the common law doctrine of mistake, and how does it relate to equitable relief? (3) What are the practical implications of these doctrines for contractual validity?

The analysis employs a case study methodology, examining landmark decisions including *Derry v Peek* (1889), *Bell v Lever Bros Ltd* (1932), and *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* (2002), alongside the Misrepresentation Act 1967. The article adopts the IMRAD structure: Introduction, Methods, Results, and Discussion, followed by conclusions and a full reference list.

Methods

This doctrinal legal research employs qualitative analysis of primary and secondary sources. Primary sources include judicial decisions from English courts (the House of Lords, Court of Appeal, and High Court) and legislation, particularly the Misrepresentation Act 1967. Secondary sources comprise academic textbooks, including Poole's Textbook on Contract Law, journal articles, and case comments.

¹ *Lyman v Romboli* 293 Mass. 373 (Mass. 1936)

² Merkin, R. and Saintier, S. (2024) 'Misrepresentation', in *Poole's Textbook on Contract Law*. 16th edn. Oxford: Oxford University Press.



The case selection follows a purposive sampling strategy, focusing on authoritative precedents that have shaped the doctrinal framework. For misrepresentation, *Derry v Peek* (1889) establishes the fraud standard; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) informs negligent misstatement principles; and recent High Court decisions, such as *Barnsley v Noble* (2014), illustrate contemporary applications. For mistake, *Bell v Lever Bros Ltd* (1932) provides the common law test, while *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* (2002) resolves the relationship between common law and equitable mistake doctrines.

The analysis proceeds by first establishing the elements and remedies for misrepresentation, then examining the mistake doctrine, and finally comparing their respective impacts on contractual validity. Harvard referencing style is employed throughout.

Results

The Doctrine of Misrepresentation

An actionable misrepresentation is a false statement of fact made by one party to another, before or at the time of contracting, which induces the representee to enter the contract.³ Three elements must be established: (1) a false statement of existing fact (not mere opinion, intention, or law); (2) addressed to the party misled; (3) inducing the contract.

English law classifies misrepresentations according to the representor's state of mind. The traditional tripartite classification comprises fraudulent, negligent, and innocent misrepresentations.⁴ This classification determines the available remedies.

Defined in *Derry v Peek* (1889) 14 App Cas 337, fraudulent misrepresentation requires proof that the false statement was made knowingly, without belief in its truth, or recklessly, careless whether it be true or false. The case concerned a company prospectus stating the company was authorised to use steam-powered trams when, in fact, Board of Trade consent had been applied for but not yet granted. The House of Lords held that because the directors honestly believed

³ *Bell v Lever Bros Ltd* [1932] AC 161 (HL)

⁴ *Bell v Lever Bros Ltd* [1932] AC 161 (HL)



consent was a mere formality, their statement was not fraudulent.⁵ Lord Herschell's formulation remains authoritative:

"Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false... To prevent a false statement being fraudulent, there must... always be an honest belief in its truth." (*Derry v Peek*, 14 App Cas at 374)

Prior to 1967, negligent misrepresentations (those made carelessly but honestly) attracted only the remedy of rescission, not damages. The Misrepresentation Act 1967 revolutionized this position. Section 2(1) provides that where a person enters a contract after a misrepresentation and suffers loss, the representor is liable to damages "if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true".

This provision effectively reverses the burden of proof, requiring the representor to demonstrate honest and reasonable belief, rather than requiring the representee to prove fraud.

Where a representor makes a false statement honestly and with reasonable grounds, the misrepresentation is innocent. Prior to 1967, the only remedy was rescission. Section 2(2) of the 1967 Act empowers courts to award damages in lieu of rescission where equitable to do so, considering the nature of the misrepresentation and the loss that would be caused by upholding or rescinding the contract.

Remedies for Misrepresentation

The primary remedy for misrepresentation is rescission, which restores the parties to their pre-contractual positions. Rescission renders the contract voidable, not void—meaning the contract remains valid until the representee elects to avoid it. Bars to rescission include affirmation, lapse of time, third-party rights acquisition, and impossibility of restoration.

⁵ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 (CA)



Available remedies vary by classification. Fraudulent misrepresentation sounds in tort of deceit, entitling the claimant to all consequential damages directly flowing from the fraud. Negligent misrepresentation under section 2(1) of the 1967 Act permits damages on the tort measure. Innocent misrepresentation may result in damages in lieu of rescission under section 2(2).

A recent application appears in *Barnsley v Noble* [2014] EWHC 2657 (Ch), where claims for deceit and under the Misrepresentation Act 1967 were dismissed because the defendant made no actionable representation, and in any event, the claimant was not induced by any statement made.⁶

Excluding Liability for Misrepresentation

Parties frequently attempt to exclude or restrict liability for misrepresentation through contractual clauses. The effectiveness of such clauses is constrained by section 3 of the Misrepresentation Act 1967, which provides that any contractual term excluding or restricting liability for misrepresentation is void unless it satisfies the requirement of reasonableness. The Unfair Contract Terms Act 1977 further regulates such exclusion clauses.

The Doctrine of Mistake

Common mistake arises where both parties share the same erroneous assumption about a fundamental fact. The common law takes a strict approach, preserving contractual certainty by invalidating contracts only in narrow circumstances. As noted in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, "The common law takes a strict approach to the effect of mistake on contracts because it is important to preserve the reliability of agreements".⁷

The authoritative test appears in *Bell v Lever Bros Ltd* [1932] AC 161. Lever Brothers employed Bell as a chairman, later terminating his contract with substantial compensation. Unknown to both parties, Bell had committed breaches that would have justified summary dismissal without compensation. The House of Lords held the contract was not void for mistake. Lord Atkin stated the test: a mistake will render a contract void only where it is "the mistake of both parties,

⁶ *Solle v Butcher* [1950] 1 KB 671 (CA)

⁷ *Derry v Peek* (1889) 14 App Cas 337 (HL)



and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be".⁸

Three categories of common mistake are recognised:

- Mistake as to existence – where subject matter has ceased to exist (rendering contract void)
- Mistake as to ownership – where buyer unknowingly purchases own property (rendering contract void)
- Mistake as to quality – only exceptionally renders contract void where the quality is "essential"

The Fate of Equitable Mistake: *Great Peace Shipping*

For fifty years following *Solle v Butcher* [1950] 1 KB 671, it was understood that equity might render a contract voidable for common mistake where the common law would not render it void. *Solle v Butcher* concerned a lease entered under a fundamental misapprehension about rent control limits. Lord Denning held the lease could be set aside in equity.

The Court of Appeal in *Great Peace Shipping* [2003] QB 679 unequivocally rejected this proposition. The facts are instructive: Tsavlis contracted to charter the *Great Peace* as a standby vessel for a salvage operation, believing it was 35 miles from the distressed vessel. In fact, it was 410 miles away, 39 hours' steaming time rather than 12. Tsavlis sought to avoid the contract for common mistake.⁹

The Court of Appeal held the contract was valid. The mistake did not render the subject matter "essentially different" from what was believed—the *Great Peace* could still perform the contractual task of crew rescue, albeit less promptly.¹⁰ More significantly, the court held that *Solle v Butcher* could not stand with *Bell v Lever Bros Ltd* and should no longer be followed. Lord Phillips MR concluded:

⁸ Merkin, R. and Saintier, S. (2024) 'Misrepresentation', in *Poole's Textbook on Contract Law*. 16th edn. Oxford: Oxford University Press.

⁹ *Derry v Peek* (1889) 14 App Cas 337 (HL) ; Merkin, R. and Saintier, S. (2024) 'Misrepresentation', in *Poole's Textbook on Contract Law*. 16th edn. Oxford: Oxford University Press.

¹⁰ *Derry v Peek* (1889) 14 App Cas 337 (HL)



"If coherence is to be restored to this area of our law, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law" (*Great Peace Shipping* [2003] QB 679 at [161])¹¹

The practical consequence is that a common mistake either renders the contract void under the narrow *Bell* test, or has no effect on validity. There is no intermediate equitable voidability.

Mistake and Allocation of Risk

A critical limitation on mistake doctrine is that the mistaken assumption must not have been allocated to either party by the contract. As *Great Peace Shipping* illustrates, parties who contract without verifying fundamental assumptions bear the risk that those assumptions are incorrect. The decision reflects the common law's preference for enforcing bargains and leaving parties to protect themselves through due diligence, warranties, or condition precedents.

Comparative Observations: Misrepresentation and Mistake

The results reveal fundamental distinctions between the two doctrines. The table below summarizes key differences:

Feature	Misrepresentation	Common Mistake
Focus	Representor's conduct	Subject matter's essential identity
Effect	Contract voidable	Contract void (if established)
Fault requirement	Yes (fraud, negligence, or innocent)	No (both parties share same error)
Remedies	Rescission and/or damages	Contract treated as never existing
Burden of proof	On representee (except s.2(1) MA 1967)	On party asserting mistake

The conceptual distinction reflects different rationales: misrepresentation protects autonomy by ensuring consent is informed, while mistake protects

¹¹ Merkin, R. and Saintier, S. (2024) 'Misrepresentation', in *Poole's Textbook on Contract Law*. 16th edn. Oxford: Oxford University Press.



against fundamental error where neither party is at fault but the contractual basis has disappeared.

Discussion

The Continuing Vitality of *Derry v Peek*

The fraud standard from *Derry v Peek* remains good law, but its practical significance has diminished. Section 2(1) of the Misrepresentation Act 1967 provides an easier path to damages for negligent misrepresentation, shifting the burden to the representor. Claimants alleging fraud must still prove the *Derry v Peek* elements, but those alleging negligence need only establish a false representation and loss, leaving the representor to prove reasonable belief.

This statutory intervention reflects a policy judgment that contracting parties ought to exercise reasonable care in their pre-contractual statements. The law has moved from a fraud-centric approach toward a negligence-based standard, aligning with broader tort developments following *Hedley Byrne*.

The Restrictive Scope of Common Mistake

Great Peace Shipping represents a deliberate choice to confine mistake doctrine narrowly. The Court of Appeal prioritised contractual certainty over the flexible justice that equity might offer. This aligns with Lord Atkin's concern in *Bell* that voiding contracts for mistake could undermine commercial reliability.

However, the decision leaves claimants with limited recourse where both parties share a serious but non-essential mistake. Parties in such circumstances must rely on contractual mechanisms (warranties, conditions, force majeure, or frustration) rather than mistake doctrine. Where no such mechanisms exist, the loss lies where it falls—a result that may appear harsh but promotes legal certainty.

Practical Implications for Contracting Parties

For practitioners, the doctrines carry distinct implications. First, pre-contractual disclosure:¹² English common law does not impose a general duty of disclosure. Silence does not constitute misrepresentation unless a fiduciary relationship exists or a half-truth is told. Parties seeking information must ask specific questions or negotiate express warranties.

¹² *Lyman v Romboli* 293 Mass. 373 (Mass. 1936)



Second, contractual allocation of risk: *Great Peace Shipping* confirms that parties bear the risk of their mistaken assumptions unless those assumptions go to the essential identity of the subject matter. Careful drafters will address key assumptions through conditions precedent or representations that, if false, trigger remedies.

Third, limitation and exclusion clauses: While parties may attempt to exclude liability for misrepresentation, section 3 of the 1967 Act and the Unfair Contract Terms Act 1977 impose reasonableness requirements. Attempts to exclude liability for fraud are generally ineffective as contrary to public policy, as illustrated in *Lyman v Romboli* (1936) 293 Mass. 373, where the court held that "an attempt by a contract to restrict the remedy of a party for fraud of the other party which induced the making of the contract, is ineffectual".¹³

Comparative and International Perspectives

The common law approach to mistake differs markedly from civilian systems. As Beale observes, in civilian-based laws, a party may avoid a contract upon showing mistaken facts without requiring misrepresentation by the other party, whereas common law systems generally require a misrepresentation to trigger relief.¹⁴ This divergence reflects different underlying values: civilian systems emphasise impaired consent, while common law systems focus on the other party's behaviour and the importance of contractual security.

This comparative insight suggests potential for future harmonisation efforts, though fundamental differences in approach persist.

Limitations and Future Research

This article's limitations include its focus on English common law, excluding analysis of other common law jurisdictions, and its case study methodology, which cannot capture all doctrinal nuances. Future research might examine: studies of how misrepresentation and mistake claims resolve in practice; comparative analysis with Commonwealth jurisdictions that may have developed different approaches; the impact of digital contracting and artificial intelligence on traditional vitiating factors doctrine.

¹³ *Barnsley v Noble* [2014] EWHC 2657 (Ch)

¹⁴ *Lyman v Romboli* 293 Mass. 373 (Mass. 1936)



Conclusion

The doctrines of misrepresentation and mistake serve complementary but distinct functions in protecting contractual consent. Misrepresentation addresses defective consent caused by another party's false statement, rendering contracts voidable and offering rescission and damages. The Misrepresentation Act 1967 significantly expanded protection by introducing damages for negligent misrepresentations and shifting the burden of proof. Mistake addresses shared fundamental error where neither party is at fault, potentially rendering contracts void under the narrow test from *Bell v Lever Bros Ltd*. The Court of Appeal's decision in *Great Peace Shipping* confirms that there is no equitable jurisdiction to render contracts voidable for common mistake where the common law would uphold them.

These doctrines reflect the common law's enduring tension between two values: protecting parties from defective consent and preserving contractual certainty. The balance currently favours certainty, particularly in mistake cases, while misrepresentation law has developed more generous remedies through legislative intervention. Practitioners should attend carefully to pre-contractual statements, allocate key assumptions explicitly in their agreements, and recognise that the common law will not rescue parties from mere errors of judgment about quality or value.

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