

# The a coach and four through the essay



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The principle of caveat emptor is a doctrine that was dominant in the English legal system pre-19th century. Its literal translation means 'let the buyer beware.' The common law maxim is as the translation suggests, that the courts will not offer any protection for consumers who have entered into a contract which is a bad bargain. Only in circumstances where there is actually illegality or undue unfairness would the courts find in favour of the consumer.

However, since the late 19th century the courts and more recently, government legislation have attempted to move away from the old traditions and move towards a more consumer protective atmosphere. This consumer protection comes, in part, in the form of Misrepresentation.

Misrepresentation can be defined as "a false statement of fact that does not become a term of a the contract, made either before or at the time of the making of the contract by one part to the other which induces that other to enter into the contract. 1 In basic terms this means that a representor cannot make a false statement to induce the representee into the contract.

Professor Atyiah notes the move from the old system to the new by saying, "The older notion that a man could say what he liked to a prospective contracting party, so long as he refrained from positively dishonest assertions of fact seems to have come up against a new morality in the late nineteenth century. The courts began to insist on the duty of a party not to mislead the other party by extravagant or unjustified assertions... n their determination to stamp out laxer business morality. " 2 Under common law an actionable Misrepresentation can be brought under the following three heading; innocent, negligent and fraudulent.

Taking into account also the Misrepresentation Act 1967 we can see there is an abundance of consumer protection in this area. To bring about an action for a Misrepresentation a consumer needs to prove the fact that he relied upon the Misrepresentation to induce him into the contract, something that is not very difficult in most circumstances as only partial reliance need be proved. The burden is left mainly on the representor to prove that he actually believed what he was saying was actually the truth, which is contrast is very difficult to prove. The burden of investigation now has also shifted from the representee to the representor. Previously under caveat emptor it was very much for the representee to do all the investigations before entering into the contract.

Now, however, a representor cannot defend a misrepresentation on the grounds that with due diligence, the representee could have discovered the Misrepresentation before he entered into the contract. Despite all of this it can, and will in this essay, be argued that the doctrine of caveat emptor has not been completely discarded by the English legal system. As mentioned above, there is wide scope to bring an action against a Misrepresentation. The two main actionable Misrepresentations are fraudulent Misrepresentations and Negligent Misrepresentations.

As in *Derry v Peek* (1889) 12 App Cas 337, the definition of a fraudulent Misrepresentation is, " A false statement made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false. A negligent Misrepresentation is where the representor is negligent in his dispensation of the facts to the representee. In both cases damages and possibly rescission of the contract are possible remedies available to the

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claimant. The enactment of the Misrepresentation Act 1967 also gave consumers further protection and remedy. Section 2 (1) of the act provides that, ' Where a person has entered into a contract after a misrepresentation has been made and.

.. has suffered loss..

.. that person shall be so liable... unless he proves that he had reasonable ground to believe.

... hat the facts represented were true. ' We could say that this in itself, i.

e. the process for claiming against a Misrepresentation and its remedies amount to protecting the consumer from entering into a contract that is unfair, i. e. a bad deal. On this initial basis alone, there is an argument to say that the law regarding Misrepresentation is replacing the doctrine of caveat emptor in certain respects.

The simple fact that the consumer now has some protection against false statements made by the representor is a move away from the ' buyer beware' doctrine. As well as the initial protection the consumer now has increased remedies to resolve situations where a Misrepresentation has occurred. Previously this was not the case, and the buyer was responsible for any contracts he had entered into. Looking in more detail at the law of Misrepresentation we can see that there is further evidence to suggest that caveat emptor is being replaced.

As mentioned in the introduction the onus on investigation has passed from the representee to the representor. In fact, the representee does not have to

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make any investigations at all. For example in *Redgrave v Hurd* (1881) 20 Ch D 1, a solicitor told the prospective buyer of his practice brought in £300 per year although the accounts showed that the practice had never had an income that high. The solicitor offered the buyer the accounts to look at, which would have revealed the Misrepresentation, but the buyer chose not to look at them. The courts found in favour of the buyer when he brought an action for a Misrepresentation. We can see then, that the precedent started by *Redgrave v Hurd* gives the consumer far greater protection.

The consumer now can rely on the fact that the representor must give correct facts or not disclose them at all. This would have been unheard of earlier in the 19th century when *caveat emptor* still reigned supreme. In an instance where the Misrepresentation is not relied upon, but the representee does carry out his own investigations the Misrepresentation cannot be said to have been relied upon. We can see from the case of *Attwood v Small* (1836) 6 Cl & F 232 an example of this.

The vendor was selling some mines that he owned and greatly exaggerated their capacities. The buyer sent in a team of his own experts who (incorrectly) agreed with the vendor's assessment. When the buyer tried to claim a Misrepresentation the courts found that he had relied on his expert's representations, not the vendors' and therefore there was no action. However, only partial reliance needs to be proved, which adds further protection to the consumer.

In *Edington v Fitzmaurice* (1885) 29 Ch D 459 shows that the Misrepresentation need not be the only reason for reason for inducement,

which means that consumer protection is enhanced still further. Leading on from this we can see yet another move from caveat emptor towards the consumer protective climate we now find ourselves in. We have seen that the burden of investigation now no longer lies with the representee, but as well as this, the representee must be kept informed by the representor over any changes in circumstances which might cause one of his previous representations to become a Misrepresentation. This was the case in *With v O'Flanagan* [1936] Ch 575, where the representor was found to be guilty of a fraudulent Misrepresentation for not informing the representee of a change in circumstances which cause an earlier representation to become false. We can now see that virtually the entire burden of investigation has been removed from the representor, a stark change from the idea of caveat emptor.

Of course there are other concepts in the modern legal system which perhaps conflict with the idea of caveat emptor, not only the law of Misrepresentation. Other government legislation such as the Unfair Contract Terms Act 1977 has helped us to move away from the 19th century 'Laissez-faire' attitude of caveat emptor. Under this piece of legislation exclusion of negligence is severely limited, the use of standard term contracts more closely governed and more protection offered to the consumer by introducing the idea of reasonableness. Section 11(1) of UCTA says, “.

.. a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or the completion of the parties when the contract was made. Even the inclusion of the words 'fair' and 'reasonable' are not in the spirit of caveat

emptor, but on closer inspection we see that the legislation has more to it than that. We can see that the burden now lies very much with the representor to make sure that the contract is fair and that everything is conducted properly.

Previously it was very much up to the consumer to ensure that they were entering into a fair contract and that the terms of that contract were acceptable. There is now legislation protecting consumers from not only Misrepresentations before entering into the contract but also guarding what can actually go into the contract. We can therefore say that coupled with other pieces of common law and legislation that the law of Misrepresentation is only part of the general movement towards a more consumer protective environment. Despite all of the above, it would be an incomplete argument if the merits of caveat emptor were not mentioned. There is no doubt that in certain respects caveat emptor has been left behind in the 19th century, however, not completely. The representor, for example, has the right to remain silent over all issues and not find himself making a Misrepresentation, an example being *Dimmock v Hallett* (1866) 2 Ch App 21.

Also, reliance must on the Misrepresentation must be proved by the claimant and affirmation must be avoided. Also looking to consideration we can see that a consumer is not completely protected. The idea that consideration has to be 'adequate but not sufficient' is in the same vein as caveat emptor. The consumer is still not protected from making a bad deal in some respects.

Prices of goods and services are not regulated for example.