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# FRAUD - NEGLIGENT MISREPRESENTATION - LIABILITY WITHOUT FAULT - CONTRIBUTORY NEGLIGENCE AS A DEFENSE

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FRAUD — NEGLIGENT MISREPRESENTATION — LIABILITY WITHOUT FAULT — CONTRIBUTORY NEGLIGENCE AS A DEFENSE — Plaintiff purchased a pearl necklace from the defendant. In a suit for fraud, plaintiff alleged that the defendant had misrepresented the quality of the necklace and his own expert ability. Before purchasing, plaintiff had secured the services of another expert. The trial court found that there was no reliance by the plaintiff on the defendant's misrepresentation and that the plaintiff was guilty of contributory negligence. *Held*, by the trial court, (1) that lack of reliance barred recovery for fraud; (2) that contributory negligence barred recovery for negligent misrepresentation; and (3) that if New York courts recognize a liability without fault in this field, recovery on that theory was also barred by the plaintiff's contributory negligence. *Gould v. Flato*, 170 Misc. 378, 10 N. Y. S. (2d) 361 (1938).[1]

It is a matter of interest that in reaching its conclusion the trial court gave consideration to three possible theories of liability in a field which has produced much legal literature in the past decade, and many of the comments in this field have concerned themselves with leading New York cases.[2] There can be no quarrel with denial of liability for fraud if, as found, plaintiff did not actually rely on the defendant's misrepresentation. Nor should there be any doubt as to the validity of the proposition that contributory negligence bars an action for merely negligent misrepresentation.[3] However, if, as plaintiff's attorney argued

[1] Extended comment on the actual opinion is not made because of the possibility of an appeal from this trial court decision.

[2] Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931); Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184 (1900); Carpenter, Responsibility for Intentional, Negligent and Innocent Misrepresentation," 24 ILL. L. REV. 749 (1930); Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty," 42 HARV. L. REV. 733 (1929).

[3] HARPER, TORTS, § 222 (1933); International Products Co. v. Erie R. R., 244 N. Y. 331, 155 N. E. 662 (1927); Ultramares Corp. v. Touche, 255 N. Y. 170, 174 N. E. 441 (1931); Maxwell Ice Co. v. Brackett, Shaw, & Lunt Co., 80 N. H. 236, 116 A. 34 (1921).

in the instant case, relief as granted in *Hadcock v. Osmer*[4] is a recognition of a third type of liability rather than the illustration of well-recognized application of ordinary fraud principles, the most interesting portion of the opinion is that which deals with this type of liability and denies recovery in such cases when the plaintiff's own negligence contributed substantially to the loss. It was early argued that the field of misrepresentation had been thrown out of balance by the doctrine of *Derry v. Peek*[5] and that scienter should not be required in the tort actions for misrepresentation.[6] The more conventional position, however, has been to regard tort liability for misrepresentation as similar to other tort fields and to group the cases into the three customary divisions of tort liability—i.e., liability without fault, liability for negligent wrongs, and liability for intentional wrongs.[7] Liability without fault has been imposed in cases[8] where a representation, false in fact, is made as of the speaker's knowledge, of a fact capable of accurate ascertainment "even though made in the best of faith, and even though the one who made it had every reason to believe it to be true."[9] Such liability being imposed without negligence or intent to deceive, the trial court expresses considerable doubt as to its justification and existence in New York. Analogous to warranties in sales transactions,[10] the justification seems to be found in the idea that even an innocent misrepresentor should not be allowed to profit by the loss of another when that loss was induced by his misrepresentation. But the effect of allowing recovery of damages in tort is to compensate the plaintiff for his loss without regard for the profit of the defendant. While loss to the plaintiff and profit to the defendant may sometimes be identical, it is suggested that often the two are not equivalents. Thus, because of the failure of the damage remedy to accomplish the avowed purpose of the action[11]—i.e.,

[4] 153 N. Y. 604, 47 N. E. 923 (1897).

[5] 14 App. Cas. 337 (1889).

[6] Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 (1911).

[7] HARPER, TORTS, §§ 221-223 (1933); Carpenter, "Responsibility for Intentional, Negligent and Innocent Misrepresentation," 24 ILL. L. REV. 749 (1930); Bohlen, "Misrepresentation as Deceit, Negligence, or Warranty," 42 HARV. L. REV. 733 (1929).

[8] E.g., Pellette v. Mann Auto Co., 116 Kan. 16, 225 P. 1067 (1924); Palmer v. Goldberg, 128 Wis. 103, 107 N. W. 478 (1906); Braley v. Powers, 92 Me. 203, 42 A. 362 (1898); Reed v. Hester, (Tex. Comm. App. 1932) 44 S. W. (2d) 1107; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168 (1888); Aldrich v. Scribner, 154 Mich. 23, 117 N. W. 581 (1908). See also Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415 at 423 et seq. (1911).

[9] Aldrich v. Scribner, 154 Mich. 23 at 32, 117 N. W. 581 (1908).

[10] Carpenter, "Responsibility for Intentional, Negligent and Innocent Misrepresentation," 24 ILL. L. REV. 749 (1930).

[11] Many courts give damages on a basis of loss of bargain to the plaintiff. Roche v. Gryzmish, 277 Mass. 575, 179 N. E. 215 (1932); Baloyan v. Furniture Exhibition Bldg. Co., 258 Mich. 244, 241 N. W. 886 (1932). Others give only "out of pocket loss" in damages. Reno v. Bull, 226 N. Y. 546, 124 N. E. 144 (1919); Mitchell v. Bassett, 99 N. J. L. 110, 123 A. 761 (1924). This standard tends to make the result in the tort action more nearly that of restitutionary remedies and to reduce the force of the argument suggested against the tort liability for innocent misrepresentation. See also McCormick, "Damages in Actions for Fraud and Deceit." 28 ILL. L. REV. 1050 (1934).

prevention of profit—it would seem that such cases are best left to the field of quasi-contract and restitutionary devices which look to the restoration of both parties to the status quo.[12] It is illuminating that the court in the principal case felt that, even if the liability without fault was recognized in New York, still contributory negligence should constitute a defense. It is well established that contributory negligence is no defense to an action for damages due to an intentional wrong.[13] On the other hand, contributory negligence of a plaintiff bars his recovery in ordinary negligence cases, since the plaintiff in the latter case is equally blameworthy with the defendant. However, where liability without fault is imposed, it is held in fields other than misrepresentation that negligence is no bar.[14] There the policies which justify imposition of such liability are deemed to be of sufficient force to make the question of the plaintiff's blameworthiness unimportant. Accordingly, unless it is possible to say that the factors which would constitute contributory negligence in a proper case destroy the causal relation, it would seem that contributory negligence should be no defence in a case where the imposition of liability without fault is supported by policy reasons of similar force to those reasons which support such liability in other tort fields.[15] The very fact, then, that in the principal case contributory negligence was thought to constitute a bar to recovery on this theory of strict liability for an innocent misrepresentation perhaps indicates that there is an essential weakness in the reasons advanced for the doctrine. It is suggested, therefore, that the proper approach is to consider liability without fault for an innocent misrepresentation as insufficiently supported by a sound policy and to disregard the doctrine rather than to accept it and then to allow the defence of contributory negligence, which has no place in an action where blameworthiness is not involved.

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[12] HARPER, TORTS, § 222 (1933); 2 TORTS RESTATEMENT, § 481 (1934).

[13] Ibid., § 150.

[14] HARPER, TORTS, §§ 152, 153 (1933).

[15] Compare a somewhat related type of case in which considerations of policy lead to imposition of liability. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118 (1932) (recovery allowed person injured by flying glass in car whose windshield had been represented as shatterproof).