

LIES, RECKLESSNESS AND DECEPTION: DISENTANGLING DISHONESTY IN CIVIL FRAUD

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Despite expressions of judicial distaste for the “current fashion” of alleging civil fraud, there continue to be significant advantages to pleading the tort of deceit as alternate or concurrent liability to negligent misstatement. This article explores the evidentiary difficulties of proving the requisite mental intent for the tort of deceit, with particular focus on recent pronouncements from the British Columbia Court of Appeal and the Supreme Court of Canada requiring that a plaintiff prove that the defendant intended to deceive the plaintiff in making the false statement. The author contends that this view is mistaken, and that both precedent and policy dictate that the requisite mental intent be merely that of inducing reliance upon the misstatement. To impose an additional requirement of proof of intent to deceive would extinguish recklessness as a separate avenue to establishing the dishonesty which is the essence of the tort, and might well result in making the tort of fraud more difficult to prove than the criminal offence of fraud.

Bien que la magistrature dise qu'elle n'aime pas la mode actuelle d'alléguer la fraude civile, il continue d'y avoir des avantages significatifs à plaider le tort de tromperie comme argument subsidiaire ou concurrent de celui de déclaration inexacte faite par négligence, pour établir la responsabilité. Cet article explore les difficultés de faire la preuve de l'intention requise pour le tort de tromperie, en portant une attention particulière à des décisions récentes de la Cour d'appel de la Colombie Britannique et de la Cour suprême du Canada, lesquelles exigent que le demandeur prouve que le défendeur avait l'intention de le tromper en faisant la déclaration inexacte. D'après l'auteure, cette vision des choses est erronée, et aussi bien les précédents que des considérations politiques veulent que l'intention requise se limite à celle d'avoir incité quelqu'un à se fier à la déclaration inexacte. Imposer une exigence additionnelle de prouver l'intention de tromper éliminerait la possibilité de considérer la témérité comme une voie distincte pour établir la malhonnêteté essentielle à ce tort; de plus, cela pourrait bien conduire à rendre la preuve du tort de fraude plus difficile à faire que celle de l'infraction criminelle de fraude.

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Introduction

The old judicial adage that the state of a man's mind is as much a fact as the state of his digestion¹ is easily stated but, as every counsel who has ever pleaded fraud can attest, it is much more difficult to prove.² A dishonest state of mind divides the fraudulent misrepresenter from the merely negligent one. Given that a plaintiff who pleads negligent misstatement need not embark on a necessarily problematic inquiry into the subjective state of mind of the defendant at some time in the past, but has only to construct an attitude for a hypothetical reasonable person, it is perhaps surprising that the tort of deceit continues to be litigated, particularly in light of recent judicial criticism of the perceived "fashion" of pleading fraud in commercial cases.³

There continue, however, to be significant advantages to pleading the common law action of deceit, as a concurrent or alternative basis of liability to that derived from *Hedley Byrne*.⁴ Deceit defeats any terms purporting to limit

¹ *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459 at 483 (C.A.), Bowen L.J.

² Particularly since Canadian legislatures have not modified the common law of misrepresentation along the lines of England's *Misrepresentation Act, 1967* (U.K.), 1967, c. 7, s. 2(1), which, once the representee establishes that a misrepresentation was made, shifts the burden of proof to the representor to establish reasonable grounds for his or her belief in the truth of the statement. Otherwise, the misrepresentation is treated as though it were fraudulently made. The statute applies, however, only to cases where a contract was induced by a misrepresentation, and where the representor was the other party to the contract, rather than a third party.

³ *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, [1989] 1 W.W.R. 673 at 701, (B.C.C.A.), Esson J.A.; reiterated in *BG Checo International Limited v. British Columbia Hydro and Power Authority*, [1990] 3 W.W.R. 690 at 713, (B.C.C.A.), Southin J.A..

⁴ *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

or exclude liability in any contract induced thereby,⁵ or any disclaimers placed upon the information when it was conveyed to the plaintiff.⁶ The damage award may be larger, since in the tort of deceit the losses need not have been intended or reasonably foreseeable by the fraudulent party,⁷ and are recoverable as long as the necessary causal link can be established.⁸ Because deceit is an intentional tort, there are no policy reasons, akin to those influencing negligence, to seek to protect the reasonable freedom of action of the defendant, and the court does not have to look to the consequences to judge the reasonableness of the defendant's actions.⁹ The plaintiff's own negligence will not furnish a partial or a complete defence, whether the plea goes to want of care which enables commission of the fraud¹⁰ or to want of care which goes to the loss subsequently flowing therefrom.¹¹

The anomaly subsists that where the plaintiff has discovered the misrepresentation in time to rescind the contract and so elects,¹² an

⁵ *S. Pearson & Son, Limited v. Dublin*, [1907] A.C. 351 at 356, 362 (H.L.); 476 *K.R.M. Construction Ltd. et al. v. British Columbia Railway Co.* (1982), 18 C.L.R. 277 at 284-285 (B.C.C.A.); *TWT Enterprises Ltd. v. Westgreen Developments Ltd.*, [1991] 3 W.W.R. 80 (Alta. Q.B.), aff'd [1992] 5 W.W.R. 341 at 350 (Alta. C.A.); *Williamson Brothers Construction Ltd. v. British Columbia* (1990), 41 C.L.R. 193 at 220 (B.C.S.C.).

⁶ *Commercial Banking Co. of Sydney Ltd. v. R.H. Brown & Co.* (1972), 126 C.L.R. 337 at 339, 344 (Aus. H.C.).

⁷ *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158 at 167, 171 (C.A.), approved in *Canson Enterprises Ltd. et al. v. Boughton & Company et al.*, [1991] 3 S.C.R. 534 at 552h-553c; *Royscot Trust v. Rogerson et al.*, [1991] 3 All E.R. 294 at 299, 302 (C.A.); *Schwartz v. Stinchcombe* (1994), 152 A.R. 241 at 258 ¶75 (Q.B.).

⁸ The causal link may be broken by a new intervening cause, including the plaintiff's failure to mitigate its loss: *Doyle v. Olby (Ironmongers) Ltd.*, *supra* footnote 7 at 168, 171; *Canson Enterprises v. Boughton & Co.*, *supra* footnote 7 at 553d-554g. *Canson* holds, however, that the innocent party's actions in dealing with his predicament will not be judged as harshly as would be the case if the cause of action is framed in negligence or contract. The chain of causation may also become just too attenuated, on a common sense view [*Rainbow Industrial Caterers Ltd. v. Canadian National Railway Company*, *supra* footnote 3 at 425-426].

⁹ *Canson Enterprises Ltd. v. Boughton & Co.*, *supra* footnote 7 at 552d-553c, holding, by analogy with the tort of deceit, that the same "direct consequences" test of recoverability of damages should apply to breach of fiduciary duty; see also *Jacks v. Davis*, [1983] 1 W.W.R. 327 (B.C.C.A.).

¹⁰ *Redgrave v. Hurd* (1881), 20 Ch.D. 1 at 13-14; *Sager v. Manitoba Windmill Co. Ltd.* (1913), 13 D.L.R. 203 (Sask. S.C.); *Linfield v. Walker* (1986), 182 A.P.R. 413 at 421 ¶19 — 423 ¶26 (N.B.C.A.).

¹¹ *Alliance & Leicester Building Society et al. v. Edgestop Ltd.*, [1993] 1 W.L.R. 1462 at 1473, 1474-1477 (Ch.D.). Southin J. (as she then was) vividly expressed the policy underlying this principle in *Allen et al. v. Richardson Greenshields of Canada Ltd.* (1988), 48 D.L.R. (4th) 98 at 111 (B.C.S.C.):

There may be greater damages [*sic*] to civilized society than endemic dishonesty. But I can think of nothing which will contributed to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault I fool you". Such a defence should not be countenanced from a rogue.

¹² See *Morrison-Knudsen v. British Columbia Hydro* (1978), 85 D.L.R. (3d) 186 (B.C.C.A.).

additional remedy in damages will lie only if the misrepresentation was made fraudulently, not negligently.¹³ Finally, the applicable limitations of action period may be longer for an action in deceit than in negligence.¹⁴

The potentially wider liability offered by the tort of deceit makes it all the more crucial to define clearly the mental element which distinguishes it from negligence. Unfortunately, unnecessary confusion has been recently injected into this area by ill-considered *dicta* from several Canadian appellate courts describing the requisite mental element for civil fraud as the "intention to deceive".¹⁵ The thesis of this article is that this description conflates two distinct, and equally essential, concepts of the defendant's mental state, the first pertaining to his dishonest frame of mind at the time he or she makes the misrepresentation, and the second being his or her active intention in deciding to make the misrepresentation to the plaintiff. This misdescription creates the risk that Canadian courts may set the standard too high for plaintiffs by demanding that they adduce proof that the defendants intended to deceive them with their misstatements, thereby extinguishing recklessness as a foundation for an action in deceit.

Given the fluidity of tort law in this century, it is remarkable that the foundations of the tort of deceit established by the English courts in the late nineteenth century have undergone little development since then, possibly due to the attention attracted by its younger sibling, negligent misstatement. The English principles governing civil fraud have been transplanted without mutation

¹³ M.P. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 12th ed. (London: Butterworths, 1991) at 289, 295.

¹⁴ At common law, where the defendant was liable for fraud or other wilful wrongdoing, the period of limitation did not begin to run until the existence of the cause of action became known to the plaintiff: *Nesbitt, Thomson & Co. Ltd. v. Pigott*, [1938] 4 D.L.R. 593 at 605 (Ont. C.A.), *aff'd*, [1941] S.C.R. 520 at 530. The common law "discovery" rule was also applied to actions in negligence by *Kamloops v. Neilson* (1984), 10 D.L.R. (4th) 641 at 685 (S.C.C.) and *Central Trust Co. v. Rafuse* (1986), 31 D.L.R. (4th) 481 at 534-536 (S.C.C.), but its applicability is still subject to the specific limitation of actions legislation in the jurisdiction in question.

¹⁵ *Sorenson et al. v. Kaye Holdings Ltd. et al.*, [1976] 6 W.W.R. 193 at 198, 205 (B.C.C.A.), *McFarlane J.A.*, and at 225, *Lambert J.A.*, leave to appeal refused by S.C.C. (1980) 31 N.R. 445n.; *BG Checo International Limited v. British Columbia Hydro and Power Authority*, *supra* footnote 3 at 726-728, 729-735, *Southin J.A.* (dissenting in part), specifically approved [1993] 1 S.C.R. 12 by *La Forest* and *McLachlin J.J.* for the majority at 22, and by *Iacobucci J.* for the minority at 54, 76; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Company*, *supra* footnote 3 at 711-712, *Wallace J.A.*, *rev'd.* on other grounds, without discussing this point: [1991] 3 S.C.R. 3; *Flynn v. Steve Butler Construction*, (1993) 78 B.C.L.R. (2d) 302 (B.C.C.A.); *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.*, *supra* footnote 5 (Alta. C.A.). Trial judges have also adopted this description of the requisite mental intent: *Dixon v. Deacon Morgan McEwan Easson et al.*, (1990) 70 D.L.R. (4th) 609 at 614 (B.C.S.C.); *473759 Alberta Ltd. v. Heidelberg Canada Graphic Equipment Ltd.*, [1995] 5 W.W.R. 214 (Alta. Q.B.).

into Canadian tort law.¹⁶ To discover the gist of fraud, then, it behooves us to return to the early common law cases which constructed the boundaries between dishonest and merely careless representations, boundaries which were crucial since the latter were deemed innocent, and hence non-actionable, until 1963. It is necessary to explore first what is meant by a fraudulent state of mind, and then consider whether this is compatible with a requirement for proof of an intention to deceive.

1. *Defining and Proving Dishonesty in the Tort of Deceit*

The elements of the *actus reus* of deceit (for want of a better term) have long been without controversy: the plaintiff must prove that the defendant (1) made to the plaintiff a representation (2) of existing fact¹⁷ (3) which, judged objectively, was false at the time it was made, and (4) upon the truth of which the plaintiff relied, with resulting harm.¹⁸

Since deceit is an intentional tort, locating the requisite intent was soon acknowledged as the key question. This developed into a two-stage process; first, to identify the subjective attitude of the defendant toward the truth, and then to ascertain the active intention of the defendant in conveying the false information to the plaintiff.

1.1 *Defining the defendant's dishonest attitude*

The problem with defining fraud is that the inexhaustible ingenuity of rogues defeats any attempt to define exhaustively their tort.¹⁹ This dilemma invites resort to loose pejorative descriptions of the requisite mental element, such as "a wicked mind",²⁰ "moral fraud",²¹ or "a gambling spirit",²² which are more

¹⁶ A transplant which has been more successful in tort law than in the criminal law of fraud: see Pierre Rainville, "Droit et droiture: le critère de la malhonnêteté et la fraude criminelle" (1992) 33 *Les Cahiers de Droit* 189 at 199; Jacques Gagné et Pierre Rainville, *Les infractions contre la propriété: le vol, la fraude et certains crimes connexes* (Cowansville: Les éditions Yvon Blais Inc., 1996) at 189-197, 344-352. The Supreme Court of Canada has rejected the English requirement for a subjective appreciation of dishonesty as part of the *mens rea* for criminal fraud: see *R. v. Théroux*, [1992] 3 S.C.R. 5, rejecting *R. v. Landy*, [1981] 1 All E.R. 1172 (C.A.) and *R. v. Ghosh*, [1982] 2 All E.R. 689 (C.A.). The English mix of objectivity and subjectivity continues to attract strong criticism: e.g., Campbell, "The Test of Dishonesty in *R. v. Ghosh*" (1984) 43 C.L.J. 349; Halpin, "The Test for Dishonesty" [1996] *Crim. L.J.* 283.

¹⁷ Which may include an implicit statement that an opinion is genuinely held.

¹⁸ *Bradford Third Equitable Benefit Building Society v. Borders*, [1941] 2 All E.R. 205 at 211 (H.L.).

¹⁹ As was noted by Lord Wright in *Bradford Third Equitable Benefit Building Society v. Borders*, *supra* footnote 18 at 220. The same difficulty has been noted in the criminal law of fraud: *R. v. Olan* [1978] 2 S.C.R. 1175 at 1182; *R. v. Coningham* (1977) 39 C.C.C. (2d) 169 at 174 (Ont. Prov. Ct.).

²⁰ *Le Lievre v. Gould*, [1893] 1 Q.B. 491 at 498, 501 (C.A.); *Bradford Third Equitable Benefit Building Society v. Borders*, *supra* footnote 18 at 220.

²¹ *Derry v. Peek* (1889), 14 A.C. 337 (H.L.) at 356, Lord Fitzgerald.

²² *Edgington v. Fitzmaurice*, *supra* footnote 1 at 465, Denman J. (Ch.D.).

vivid than helpful to a trier of fact, or to dogmatic statements of what is *not* fraud, defined by subjectively determined moral standards of “honest” conduct.²³

The *locus classicus* of common law fraud, *Derry v. Peek*,²⁴ sought to dissect the mind of the fraudster in more subtle terms; the House of Lords required proof of “actual fraud”, that is, that a false representation was made:

- (a) knowingly, or
- (b) without belief in its truth, or
- (c) recklessly, careless whether it be true or false.²⁵

Although these three permutations of dishonesty have been castigated as being “as unscientific a classification as a division of the animal creation into horses, vertebrates, and animals would be”,²⁶ they have been adopted and applied by the Supreme Court of Canada in numerous decisions.²⁷

It is often pointed out that the three mental variations can easily be collapsed into one — the absence of honest belief by the representor at the material time that his or her statement was true.²⁸ Lord Herschell himself acknowledged in *Derry v. Peek* that recklessness is but an instance of lack of belief, “for one who makes a statement under such circumstances can have no real belief in the truth of what he states”; thus “non-belief covers everything”.²⁹ But does this unitary concept of dishonesty smother a vital distinction between actual knowledge of falsity and attributed knowledge of falsity derived from a reckless attitude towards the truth? Or is recklessness merely “a needlessly added term of opprobrium”?³⁰

It is submitted that recklessness is in fact a different species of dishonesty; the cheat who sets out to defraud someone through deliberate connivance and

²³ See, for example, Lord Wright’s definition of fraud as being “something which an honest man would not do; not merely what a logical and clear-headed man would not do” in *Bradford Third Equitable Benefit Building Society v. Borders*, *supra* footnote 18 at 220, adopting the argument of counsel for the defendant in *Derry v. Peek*, *supra* footnote 21 at 339.

²⁴ *Supra* footnote 21 at 374, Lord Herschell.

²⁵ See also *Edgington v. Fitzmaurice*, *supra* footnote 1 at 479, 480, 481 (C.A.).

²⁶ Spencer Bower & Turner, *The Law of Actionable Misrepresentation*, 3rd ed. (London: Butterworths, 1974) at 115, cited with approval by Fawcus J. in *K.R.M. Construction Ltd. v. British Columbia Railway* (1982), 18 C.L.R. 159 at 191 (B.C.S.C.).

²⁷ See, for example, *Parna v. G. & S Properties Ltd.* (1970), 15 D.L.R. (3d) 336 at 343, 344 (S.C.C.); *Nesbitt, Thomson & Co. Ltd. v. Pigott*, *supra* footnote 14 (S.C.C.); *De Vall v. Gorman, Glancey & Grindley Limited* (1919), 58 S.C.R. 259 at 274.

²⁸ See, for example, Spencer Bower & Turner, *Law of Actionable Misrepresentation*, *supra* footnote 26 at 116-117.

²⁹ *Supra* footnote 21 at 374. Spencer Bower and Turner vigorously argued for the excision of recklessness from the vocabulary of fraud, as being irrelevant and inessential since the sole issue is the existence of an honest belief: *Law of Actionable Misrepresentation*, *supra* footnote 26 at 116-117. This does not, however, answer the question of what constitutes dishonesty.

³⁰ Spencer Bower & Turner, *Law of Actionable Misrepresentation*, *supra* footnote 26 at 115.

trickery must be guilty of greater moral obliquity than the sharpster who, anxious to close a deal, is oblivious to the truth of his or her representations, yet both may be held liable for deceit.³¹ Further, the evidence must take on different colours to establish these two sets of facts. Consciousness of one's own ignorance of whether the statement is true or false³² provides a different foundation for dishonesty than consciousness that one is telling a lie, even though both paths lead to the same liability for deceit.³³ Thus if counsel chooses to conduct the trial on the basis that the defendant knew that his or her statement was false when he or she made it, this strategy may preclude any closing argument, or finding by the trier of fact, that the defendant was recklessly indifferent to the truth, since these are inconsistent positions.³⁴

1.2 *Proving the requisite dishonest attitude*

It usually should be easier for the plaintiff to meet a test of recklessness than of deliberate lies. This lightened burden of proof was recognized by the Supreme Court of Canada in *De Vall v. Gorman, Glancy & Grindley Limited*,³⁵ where the Court held that the Alberta Appellate Division had erred in law in ruling that a finding of fact by the trial judge that misrepresentations were "at least made with reckless carelessness as to their truth" failed to meet the test of absence of honest belief necessary to ground an action in deceit.³⁶ In *Nesbitt, Thomson & Co. Ltd. v. Pigott*³⁷ the Supreme Court confirmed that proof that a representor is "indifferent" as to the truth or falsity of his or her false statements is sufficient to create civil liability.

While theoretically it may be easier for the plaintiff to argue that the defendant was reckless, rather than proving that he or she had actual knowledge of the truth, there is a risk that the evidence may stray too close to the boundary between fraudulent recklessness and negligence. Here the frontier is far from clear. As Viscount Haldane L.C. observed in *Nocton v. Ashburton*, "it is plain that between the grossly careless use of language and the reckless use which will still give a right to succeed in an action for deceit the line of demarcation may seem to plain persons to be very fine".³⁸ Thus "if, when a man thinks it is highly

³¹ *Reese River Silver Mining Co. Ltd. v. Smith*, (1869) L.R. 4 H.L. 64 at 79-80.

³² *Derry v. Peek*, *supra* footnote 21 at 370-371, Lord Herschell, explaining the *dictum* of Lord Cairns in *Reese River Silver Mining Co. v. Smith*, *supra* footnote 31 at 79-80. See also *Chua v. Van Pelt* (1977), 74 D.L.R. (3d) 244 at 252-253 (B.C.S.C.).

³³ See *Arkwright v. Newbold* (1881), 17 Ch.D. 301 at 320, and *Reese River Silver Mining Co. v. Smith*, *supra* footnote 31 at 79-80.

³⁴ *McAllister v. Richmond Brewing Co.* (1942), 42 S.R. (N.S.W.) 187 at 189-191 (N.S.W. C.A. *in banco*).

³⁵ *Supra* footnote 27 at 265, 273. This was also recognized by Denman J. in *Edgington v. Fitzmaurice*, *supra* footnote 1 at 465.

³⁶ See also *Commercial Banking Co. of Sydney Ltd. v. R.H. Brown & Co.*, *supra* footnote 6 at 343, and *Power v. Kenny*, [1960] W.A.R. 57 at 65 (S.C.) to the same effect.

³⁷ *Supra* footnote 14 at 530 (S.C.C.).

³⁸ [1914] A.C. 932 at 949 (H.L.).

probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false — it is positive fraud”,³⁹ but “neither bungling, ineptitude nor gross negligence establishes fraud”.⁴⁰

However fine, that demarcation exists. Spencer Bower & Turner warned of the “heresy” of assimilating negligence in belief to absence of belief,⁴¹ as counsel for the defendants in *Derry v. Peek* argued, foreshadowing *Hedley Byrne* 75 years later, it is not the carelessness leading to an untrue statement which makes fraud, but rather it is the carelessness whether the statement is untrue or not.⁴² Unfortunately, this admirable distinction is easier to state than to discern in the mass of evidence in a particular case.

How then can a plaintiff discharge the burden of proving deliberate or reckless dishonesty?

While the falsity or truth of the statement in issue is tested objectively by the meaning it would convey to a reasonable representee rather than by the meaning intended by the representor,⁴³ in the next stage of the analysis the honesty of belief in the truth of what is stated must be assessed on the basis of the subjective state of mind of the representor. Here, the relevant question is not whether the defendant honestly believed the representation to be true in the sense assigned to it by the trier of fact in the previous step in the inquiry, but whether the defendant honestly believed the representation to be true in the sense in which he or she understood it, albeit erroneously, when it was made.⁴⁴

But how is that subjective state of mind to be assessed? It will be rare indeed for a defendant accused of fraudulent misrepresentation to admit that he or she had a dishonest state of mind and knew that the statement was untrue when he or she made it. The plaintiff, and the court, will most often be driven to finding proof of dishonest belief in inferences from the surrounding circumstances. Thus, an objective assessment of those circumstances will be called in aid of the task of delving into the defendant’s mind, creating a tension between subjective culpability and objective standards of honesty and diligence which also permeates the criminal law of fraud.⁴⁵ As Lord Herschell acknowledged in *Derry v. Peek*, since the court cannot accept blindly the statements of witnesses as to their belief, the probabilities must be considered and, in the final analysis:

³⁹ Lord Blackburn in *Brownlie v. Cambell* (1880), 5 App. Cas. 925 at 953 (H.L.).

⁴⁰ *K.R.M. Construction Ltd. v. British Columbia Railway*, *supra* footnote 26 at 200.

⁴¹ Spencer Bower & Turner, *Law of Actionable Misrepresentation*, *supra* footnote 26 at 115.

⁴² *Derry v. Peek*, *supra* footnote 21 at 340. This distinction was accepted by Lord Herschell at 361. A similar distinction had been drawn by Lord Cranworth in *Western Bank of Scotland v. Addie*, (1867) L.R. 1 Sc. & Div. 145 at 168. See also *Le Lievre v. Gould*, *supra* footnote 20 at 501, Bowen L.J.

⁴³ Spencer Bower & Turner, *Law of Actionable Misrepresentation*, *supra* footnote 26 at 79-80, 117.

⁴⁴ *Akerheim v. De Mare*, [1959] 3 All E.R. 485 at 503 (P.C.); *John McGrath Motors (Canberra) Pty. Limited v. Applebee* (1963-1964), 110 C.L.R. 656 at 659 (Aus. H.C.).

⁴⁵ Rainville, “Droit et droiture”, *supra* footnote 16 at 191-193; Gagné et Rainville, *Les infractions contre la propriété*, *supra* footnote 16 at 187-189, 199-201, 272-274.

Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe.⁴⁶

The surrounding circumstances may reveal that the defendant had the means of ascertaining the truth, or that he or she had no reasonable grounds for believing the statement to be true. Obviously these are closely allied arguments for dishonesty, although one requires positive proof of access to the truth, while the other proof of a negative.⁴⁷ How can this evidence be converted to proof of disbelief rather than honest, albeit perhaps negligent, ignorance?

The early cases suggested that although possession of the means of knowledge cannot be equated with actual knowledge,⁴⁸ this evidence may support an inference of actual knowledge of falsity, so as to fall within the first category of *Derry v. Peek* dishonesty.⁴⁹ Evidence of availability of the truth may also permit another inference, that the defendant was "diligent in ignorance"⁵⁰ by wilful blindness to, or purposeful abstention from inquiry into, the truth⁵¹ — in short, that he or she was reckless.

While the courts after *Derry v. Peek* hastened to disavow the once popular view which equated the absence of reasonable grounds for belief in the truth of the statements with culpable recklessness,⁵² the problem of divining the defendant's true state of mind made resort to an objective assessment of the basis for his or her avowed belief irresistible.⁵³ The

⁴⁶ *Derry v. Peek*, *supra* footnote 21 at 380.

⁴⁷ A task which of course can be facilitated by proof that the defendant did have access to the means of discovering the truth.

⁴⁸ *Brownlie v. Campbell*, *supra* footnote 39 at 952.

⁴⁹ *Bell v. Gardiner* (1842), 4 Man. & G. 11 at 24, 134 E.R. 5 at 10; *Brownlie v. Campbell*, *supra* footnote 39 at 952.

⁵⁰ A phrase coined by Knight-Bruce L.J. and adopted by Spencer Bower & Turner, *Law of Actionable Misrepresentation*, *supra* footnote 26 at 116.

⁵¹ As Lord Herschell acknowledged in *Derry v. Peek*, *supra* footnote 21 at 376; see also *Edgington v. Fitzmaurice*, *supra* footnote 1 at 465, Denman J.

⁵² As the Court of Appeal in *Derry v. Peek* had held [37 Ch.D. 541]; see Lord Herschell's refutation of the cases adopting this fallacy, *supra* footnote 21 at 363-374.

⁵³ As Lord Chelmsford L.C. asked somewhat plaintively in *Western Bank of Scotland v. Addie*, *supra* footnote 42 at 162:

"But supposing a person makes an untrue statement which he asserts to be the result of a bona fide belief in its truth, how can the bona fides be tested except by considering the grounds of such belief?"

However, in *Angus v. Clifford*, [1891] 2 Ch. 449 at 471, Bowen L.J., in response to a similar argument, pointed out that:

"[T]here is no such thing as an absolute criterion which gives you a certain index to a man's mind. There is nothing outside his mind which is an absolute indication of what is going on inside. So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him"

solution was to use the absence of reasonable grounds for the belief as an evidentiary scale against which to weigh the defendant's protestations of good faith; the more gross the defendant's negligence in failing to ascertain the truth, the more incompatible it was likely to be with the notion of honesty.⁵⁴ Interestingly, the absence of objective grounds for the belief also tended to be treated in the early cases as evidence supporting subjective actual disbelief,⁵⁵ perhaps betraying a certain judicial wariness of the more uncertain terrain of recklessness.

Derry v. Peek itself shows how finely drawn the distinction between negligent and reckless conduct may be. The House of Lords absolved the company's directors of deceit for a false statement in their prospectus, claiming that they had statutory power to use steam-powered cars, when they knew that they still had to obtain the consent of the Board of Trade; they were found not to be dishonest on the basis of their sincere but erroneous belief that such consent would be automatically given, even though they had no reasonable grounds for their belief.⁵⁶ When the necessary consent was withheld, the company went into liquidation. Lord Herschell stated that making a false statement through want of care falls far short of fraud, and that the same may be said of a false representation honestly believed although on insufficient grounds. Nevertheless, he acknowledged the evidential utility of the absence of reasonable grounds to support the truth of the statement as being a most important test of the reality of the defendant's purported belief.⁵⁷

What if the plaintiff succeeds in showing that the defendant at one time knew the truth, but the defendant avers that he or she simply forgot it at the time the misrepresentation was made? *Dicta* in *Derry v. Peek* suggested that this might not constitute dishonesty.⁵⁸ However, recent English authority indicates that the defendant's own assertion that, while at one time he or she knew the truth, those facts were not in his or her mind in making the representation, can supply the necessary evidence of recklessness. In *Rous v. Mitchell*⁵⁹ the plaintiff, the sixth Earl of Stradbroke, had served a notice to quit upon a tenant of a farm in 1988. The notice stated as ground for eviction that the tenant had sublet several cottages on the farm without the landlord's permission, in breach of the lease agreement. In fact, in 1984 and again in 1985 the plaintiff had given written permission to the defendant tenant for the subletting of those cottages for holiday accommodation. The plaintiff had recollected this permission as recently as November of 1987 in correspondence to his land agents, but testified that

⁵⁴ *Le Lievre v. Gould*, *supra* footnote 20 at 500; *Derry v. Peek*, *supra* footnote 21 at 337, 375, 376.

⁵⁵ *Western Bank of Scotland v. Addie*, *supra* footnote 42 at 168; *Akerheim v. De Mare*, *supra* footnote 44 at 503.

⁵⁶ *Supra* footnote 21 at 344.

⁵⁷ *Supra* footnote 21 at 375.

⁵⁸ *Derry v. Peek*, *supra* footnote 21 at 352, Lord Herschell and at 348, Lord Bramwell.

⁵⁹ [1991] 1 All E.R. 676 (C.A.).

in May of 1988, when he instructed his solicitors to prepare the notice to quit, he had forgotten this fact. At trial, Aldous J. accepted the defendant's excuse that he had a bad memory, and further stated his belief that the plaintiff had not sought to mislead the Court by giving false evidence. Nevertheless, he found that the plaintiff was guilty of fraud on the ground of recklessness, on the basis of his impression that the plaintiff was "a person who did not bother himself with details which did not coincide with that which he considered important", and that the plaintiff's recollection at trial did not accord with the documentation and was "contrary to reasonable explanation".⁶⁰ The Court of Appeal did not accept the plaintiff's argument that this verdict of recklessness was inconsistent with the trial judge's acceptance that the plaintiff did not perjure himself in testifying that he had genuinely forgotten. The Court of Appeal agreed with the trial judge that the plaintiff's indifference as to the accuracy of his instructions to his solicitors respecting the grounds for the alleged breach of the lease, and the fact that he never bothered to read the solicitors' instructions to counsel with sufficient care to form a view that they were correct, constituted fraud. It sufficed that he "shut his mind to the true situation" and that "he never bothered to think; he impulsively went ahead with an intention to achieve his aims".⁶¹

Thus, the dishonest mind required of a fraudulent misrepresenter does not mean that he must be shown to have had in mind the information contradicting his statement at the very time he made it; it suffices merely that this knowledge had been actively in his mind at some prior time, and that he failed to take any steps to verify the accuracy of his statement prior to making it.⁶² The dishonesty arises because he represents that he knows a fact, when he does not actually recollect the fact to be so and does not so qualify his statement.⁶³ Here again liability for deceit turns on a difficult distinction between *bona fide* forgetfulness that one ever knew facts to the contrary, and simply not troubling to make the necessary inquiries to confirm the facts; the latter frame of mind is fraudulent, even where the representer believes it is highly probable that the facts are as he has stated them.⁶⁴

2. *The Defendant's Active Intent in Making the Misrepresentation*

We turn now to the second component of the defendant's mental state which the plaintiff must prove: the active intent of the representer in making the statement. There can be no question but that, deceit being an

⁶⁰ *Supra* footnote 59 at 697, 698.

⁶¹ *Supra* footnote 59 at 697-700.

⁶² *Opron Construction Co. Ltd. v. Alberta* (1994), 151 A.R. 241 at ¶644 (Alta. Q.B.).

⁶³ *Brownlie v. Campbell supra* footnote 39 at 945.

⁶⁴ *Brownlie v. Campbell. supra* footnote 39 at 945, Lord Hatherley and at 953, Lord Blackburn.

intentional tort, deliberate intent is required.⁶⁵ But to what end must that intent be directed?

It is in the area of recklessness that the dissection of the evidence may become particularly entangled with these conceptual and evidentiary problems:

(1) If the plaintiff establishes the defendant's dishonest belief respecting the truth of the statement, does the plaintiff also have to prove a motive for making the statement?

(2) Need the plaintiff go even further and establish an active and deliberate intention to deceive the representee? Or will proof of an intention to induce reliance by the representee suffice?

It will be seen that these questions are intimately connected.

2.1 *Intention to induce reliance upon the statement*

The leading English authorities are clear that here the burden is merely to prove that the defendant intended the plaintiff to rely upon the misstatement.⁶⁶ This was confirmed by the Supreme Court of Canada in *Redican v. Nesbitt*.⁶⁷ In discharging this burden, the plaintiff can call in aid of proof the intention which the law imputes to a person to produce those consequences which are the natural result of that person's own acts.⁶⁸

2.2 *Is proof of a motive also required?*

The English position is that the moral blameworthiness which is the hallmark of fraud resides in the defendant's mental attitude towards the truth, tested at the time the representation was made to the plaintiff. The intention to induce reliance, in contrast, may itself be morally neutral. Lord Herschell emphasized in *Derry v. Peek* that the motive of the maker of the statement is irrelevant, and that there need be no intention to cheat or injure the person to whom the statement is made. On the contrary, the representor might even honestly believe that the representee would benefit from the transaction, or have

⁶⁵ *Bradford Third Equitable Benefit Building Society v. Borders*, *supra* footnote 18 at 220, Lord Wright.

⁶⁶ *Peek v. Gurney*, (1873) L.R. 6 H.L. 377; *Smith v. Chadwick* (1884), 9 App. Cas. 187 at 195-196, 201 (H.L.); *Edgington v. Fitzmaurice*, *supra* footnote 1 at 481-482; *Le Lievre v. Gould*, *supra* footnote 20 at 498, 500; *Bradford Third Equitable Benefit Building Society v. Borders*, *supra* footnote 18 at 211, adopted by the Australian High Court in *Commercial Banking Co. of Sydney & Co. v. R.H. Brown & Co.*, *supra* footnote 6 at 346, 350. See also *Nicholas v. Thompson*, [1924] V.L.R. 554 at 576, 577 (F.C.).

⁶⁷ Discussed *infra* in section 2.3.3.

⁶⁸ *Smith v. Chadwick*, *supra* footnote 66 at 190; *Arnison v. Smith* (1889), 41 Ch.D. 348 at 372-373.

no corrupt motive of gain for himself or herself, but that would not save him or her from being fraudulent.⁶⁹

That intention to cheat the victim is not a prerequisite in tort was confirmed by the Supreme Court of Canada in *McKinnon and McKillop v. Campbell River Lumber Company, Limited*,⁷⁰ where parties to a land transaction deliberately decided to keep the true purchase price from a third party from whom they were seeking financing for the sale. Mr. Justice Duff noted that the parties believed that the third party would suffer no loss or detriment from the non-disclosure and the transaction itself, but ruled that nonetheless the concealment of material facts misled the third party in a manner savouring of dishonesty.

The law thus distinguishes between the immediate intention to induce reliance, which is relevant, and the ultimate purpose or motive of the defendant, which is irrelevant. This is explained with exemplary clarity by Bowen L.J. in *Edgington v. Fitzmaurice*:

In order to sustain [the plaintiff's] action he must first prove that there was a statement as to facts which was false; and secondly that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. *It is also clear that it is wholly immaterial with what object the lie was told ... but it is material that the defendant should intend that it should be relied on by the person to whom he makes it.* [emphasis added]⁷¹

The tort of fraud in this respect is consistent with the crime of fraud: provided the accused has subjective knowledge that his or her act could as a consequence expose the victim to the risk of prejudice to that person's pecuniary interests, the offence of fraud is made out, even if the accused sincerely did not intend or expect that the victim would suffer actual loss as a consequence.⁷²

2.3 *Is intention to deceive also required?*

Does a plaintiff pleading deceit also bear a burden of establishing, over and above proof that the representor intended the representee to rely on the false

⁶⁹ *Derry v. Peek*, *supra* footnote 21 at 365, 371, 372, 374; *Foster v. Charles* (1830), 7 Bing. 105 at 106, 131 E.R. 40 at 41; *Polhill v. Walter* (1832), 3 B.& Ad. 114 at 123, 110 E.R. 43 at 46; *Crawshay v. Thompson* (1842), 4 Man. & G. 357 at 382, 134 E.R. 146 at 156; *Peek v. Gurney* (1873), L.R. 6 H.L. 377 at 409-410 (H.L.); *Smith v. Chadwick*, *supra* footnote 66 at 201; *Edgington v. Fitzmaurice*, *supra* footnote 1 at 482; *Arnison v. Smith*, *supra* footnote 68 at 372; *Armstrong v. Jackson*, [1917] 2 K.B. 822 at 827; *Bradford Third Equitable Benefit Building Society v. Borders*, *supra* footnote 18 at 211; *United Motor Finance Co. v. Addison & Co., Ltd.*, [1937] 1 All E.R. 425 at 429 (P.C.).

⁷⁰ [1922] 3 W.W.R. 1069 at 1078, 1080, Duff, J. The same position is taken in *Beckmann v. Wallace* (1913), 13 D.L.R. 541 (Ont. C.A.) and in *TransCanada Trading Co. v. M. Loeb Ltd.*, [1947] 2 D.L.R. 849 (Ont. H.C.).

⁷¹ *Supra* footnote 1 at 481 (C.A.).

⁷² *Criminal Code of Canada* s. 380; *R. v. Olan*, *supra* footnote 19; *R. v. Théroux*, *supra* footnote 16; *R. v. Zlatic*, [1993] 2 S.C.R. 29. See also Gagné et Rainville, *Les infractions contre la propriété*, *supra* footnote 16 at 330-334, 349.

statement, that this intention was also consciously directed at perpetrating a deception on the plaintiff? As noted in the introduction to this article, several Canadian courts have recently asserted that civil fraud is not established without proof that the defendant did intend to deceive the plaintiff. Before exploring the jurisprudential foundation for this assertion, however, the issue can be tested as a matter of principle.

2.3.1 *Is a requirement of intention to deceive compatible with recklessness?*

As Lord Halsbury noted in *Arnison v. Smith*, where the representor *knows* he is lying, and expects the representee to rely on that lie, it is impossible to find that he did not intend to deceive the representee.⁷³ Logically, then, for intention to deceive to stand as an independent element of the tort, it must hinge upon a prior finding of a reckless attitude toward the truth. But is it possible to find that a representor actually intends to deceive another where he or she makes the statement recklessly, without caring whether it be false or true? Merely juxtaposing these two findings exposes their inherent incompatibility. A person who thinks that it is highly probable that what he or she is saying is the truth has, to echo Lord Blackburn in *Brownlie v. Campbell*,⁷⁴ a positively fraudulent attitude, but surely he or she cannot at the same time subjectively intend to deceive the recipient of the statement. The same inconsistency may be seen in cases of wilful blindness to the truth, as described in *Derry v. Peek*. Put at its highest, the representor can only expect and intend the representee to rely on the statement, hoping that the future will ultimately confirm that the statement was true rather than false.

Deception will certainly be the *result* of the defendant's recklessness, because the plaintiff justifiably assumes that the defendant at the very least is warranting the existence of his or her belief in the truth of what he or she is saying,⁷⁵ but it is quite a different matter to say that the defendant *intended* to deceive the plaintiff. If the plaintiff must prove intention to deceive, rather than merely intention to induce reliance, the court is enticed into the prohibited territory of motive. For how else can a plaintiff prove a deliberate intention to deceive where the evidence points in the direction of recklessness, than to show that the representor had a motive to deceive the representee?

2.3.2 *The emergence of a requirement of proof of intention to deceive in Canadian jurisprudence*

The modern emergence of a putative separate requirement of an intention to deceive as an essential element of tortious fraud originated with the British Columbia Court of Appeal.

⁷³ *Supra* footnote 68 at 367.

⁷⁴ *Supra* footnote 39 at 953.

⁷⁵ *Derry v. Peek*, *supra* footnote 21 at 368, citing *Evans v. Edmonds* (1853), 2 Smith's L.C. 74; see also *Angus v. Clifford*, *supra* footnote 53 at 470-471.

The concept appears to have made its debut in *Sorenson et al. v. Kaye Holdings Ltd.*⁷⁶ At issue was whether there had been fraudulent concealment of the non-conformity of a swimming pool with health regulations by its vendor when the property was sold. Both judges forming the majority were of the view that the plaintiff had to prove "a fraudulent intention to deceive in the strict sense".⁷⁷ Proof of an intention to deceive did not really come into play, however, because McFarlane J.A. concluded that the plaintiff purchasers knew of the problem at the time of the sale and so were not deceived, while Lambert J.A. doubted that there even had been a misrepresentation arising from the vendor's silence.

The issue re-emerged in stronger form in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*.⁷⁸ The Court of Appeal allowed an appeal from the trial verdict of fraudulent non-disclosure, on the basis that there was no finding that the defendant "deliberately designed to mislead the plaintiffs",⁷⁹ and that such a finding was necessary to ground an action in deceit.

However, this assertion in *Rainbow* rested on a false foundation. Both Esson J.A.⁸⁰ and Wallace J.A.⁸¹ cited the trial and appellate judgments in *K.R.M. Construction Ltd. v. British Columbia Railway Co.*⁸² as supporting their contention that fraud must rest on proof of an intention to deceive. This is directly contrary to what the trial judge in *K.R.M.*, Fawcus J., found:

The defendant submits that fraud is not established unless there is an intent to mislead or deceive. However, I agree with the plaintiffs' submission that *the required intent must be looked at according to the nature of the fraud allegation* and, I add, in accordance with the facts as I have found them. That is to say, *where, as here, the representor has made misrepresentations without knowing whether they were true or false and without a genuine or honest belief in their truth, then, on my understanding of the law, the only intent which must be proved by the representee is that the representor intended that he act upon such misrepresentations in the manner in which he did act and thereby induced him to enter into the contract.* In the context of the case at Bar, I agree with the plaintiffs' submission that the question to be answered is this: did the defendant intend prospective bidders, including the plaintiffs, to rely and to act on the information contained in the tender documents in bidding on the contract?⁸³ [emphasis added]

The Court of Appeal in *K.R.M.* upheld the trial judge's finding of fraud based on CN's recklessness in making certain estimates of quantities in the tender

⁷⁶ *Supra* footnote 15.

⁷⁷ *Supra* footnote 15 at 198, 205, McFarlane J.A. and at 225, Lambert J.A. The only authority cited by the Court in support of this proposition, *Nocton v. Ashburton*, *supra* footnote 38, will be discussed *infra* in section 2.3.3.

⁷⁸ *Supra* footnote 3 (B.C.C.A.) and footnote 15 (S.C.C.).

⁷⁹ *Supra* footnote 3 at 699.

⁸⁰ *Supra* footnote 3 at 700-701.

⁸¹ *Supra* footnote 3 at 711.

⁸² *Supra* footnote 5 (B.C.C.A.) and footnote 26 (B.C.S.C.).

⁸³ *Supra* footnote 26 at 204.

package for a unit price construction contract,⁸⁴ and made no comment at all on his observations on the question of whether proof of intent to deceive is required where recklessness has been established.

There were in fact two separate findings of fraud against B.C. Rail in *K.R.M.*, one pertaining to the inaccurate estimates of quantity in the tender documents, and the other in relation to a revised contract negotiated between the parties once the contractor got into difficulties as a consequence of the original misrepresentation. The Court of Appeal upheld the trial judge's finding that the defendant's employees deliberately withheld critical information from the contractor in the course of these negotiations, because disclosure would have brought the discussions to a halt, as the revised contract would be unworkable.⁸⁵ In this context, the Court of Appeal cited a *dictum* of Lord Blackburn in *Brownlie v. Campbell* to the effect that when a representation has been made in the *bona fide* belief that it is true, and the representor later discovers that this was untrue, then he can no longer remain silent, but must retract his statement, failing which he will be liable for fraud.⁸⁶ Here again, there is no reference to requiring an intention to deceive.

Thus, *Rainbow* cannot claim *K.R.M.* as part of its parentage. The only other foundation cited in *Rainbow* for the purported rule was another typically forceful *dictum* of Lord Blackburn in *Brownlie v. Campbell*,⁸⁷ which was not quoted by either court in *K.R.M.*:

I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; in plain English, and Scotch also, it is a downright lie told to induce the other party to act upon it, and it should of course be treated as such.

[italics added by Wallace J.A. in *Rainbow*⁸⁸]

There are three points to be noted here. Firstly, Lord Blackburn was describing the mental state of the calculating liar who, as noted earlier, inevitably intends to deceive his or her victim by his or her lies. Secondly, this passage appears in the midst of a description of various situations which would constitute fraud,

⁸⁴ *Supra* footnote 5 at 284.

⁸⁵ *Supra* footnote 5 at 289.

⁸⁶ *Supra* footnote 39 at 950. This proposition has recently been doubted, in *Thomas Witter Ltd. v. TBP Industries Ltd.* [1996] 2 All. E.R. 573 (Ch.D.), on the basis that dishonesty must taint the original decision to make the statement. However, the *dictum* in *Brownlie v. Campbell* now seems well established: *With v. O'Flanagan*, [1936] 1 Ch. 575 at 583 (C.A.); *Toronto-Dominion Bank v. Peat Marwick Thorne Inc.* (1991), 4 B.L.R. (2d) 220 at 248-249 (Ont. Gen. Div.); *Robertson & Moffat v. Belson*, [1905] V.L.R. 555 at 561-562 (Victoria C.A.). There are powerful policy reasons to support rendering an originally innocent misstatement retroactively fraudulent, as otherwise the representor has a strong inducement to remain silent and so profit from the representee's continuing ignorance of the truth.

⁸⁷ *Supra* footnote 39 at 950.

⁸⁸ *Supra* footnote 5 at 711.

and immediately precedes the circumstance of non-disclosure following discovery of the truth quoted above, and so does not appear to have been intended to pronounce a comprehensive test for deceit. Thirdly, *Brownlie v. Campbell* was decided nine years before *Derry v. Peek* confirmed recklessness as part of the lexicon of fraudulent dishonesty.

Thus the ruling in *Rainbow* that deliberate intention to deceive is a necessary element of a civil action in fraud has a false pedigree.

One senses from the judgment of Wallace J.A. in *Rainbow* that His Lordship may have been aware of the difficulties in citing *K.R.M.* as authority for the desired proposition. He distinguished *K.R.M.* on the basis that it dealt with active misrepresentation rather than non-disclosure:

In the *K.R.M.* case both the trial judge and the British Columbia Court of Appeal found that the defendants did not have an honest belief in the truth of the representation made to the plaintiff [i.e. they were reckless] and that they made such representation because they were well aware that otherwise an agreement between the parties would have been impossible.

In my view, neither decision can be construed as authority for the proposition that fraud based on misrepresentation through non-disclosure can be established in the absence of an intention on the part of the representor to deceive and thereby defraud the representee.⁸⁹

With respect, Wallace J.A. is confounding the two different species of fraud found in *K.R.M.*, based on two separate sets of facts: a reckless positive misrepresentation in the tender documents, and a deliberate non-disclosure in the course of subsequent negotiations to revise the contract.⁹⁰ While it is very likely that deliberate non-disclosure will be accompanied by an intention to deceive, it is at least conceivable that the decision not to disclose may have been made recklessly. Granted, recklessness takes on a rather different hue where a non-disclosure rather than a positive misstatement is concerned. In the latter case, the defendant is careless whether the information he or she is conveying is true or false. In the case of non-disclosure, the defendant may make a deliberate decision not to disclose information he or she knows or suspects the other party would regard as relevant to the pending decision, or the defendant may simply close his or her mind to the relevance of the information, letting the decision as to disclosure to go by default.⁹¹ In either instance, the representor's frame of mind is just as fraudulent as if he or she had chosen to make a statement knowing it was false or without ascertaining its accuracy. The second stage of

⁸⁹ *Supra* footnote 3 at 711. The attempt to delineate different requirements of proof for active misstatement and non-disclosure was eschewed by Esson J.A. in *Rainbow*, *supra* footnote 3 at 699, on the basis that these are merely different factual bases for a finding of fraud, rather than different categories of fraud.

⁹⁰ See the Court of Appeal's description of the issues in its judgment in *K.R.M.*, *supra* footnote 5 at 279.

⁹¹ For example, a used car dealer may know that a vehicle has been involved in a serious accident, but he may decide not to disclose this information to a prospective purchaser on the basis that it might or might not be of concern to her.

the analysis of the defendant's mental state remains the same; there must be evidence, or an inference, that the defendant intended the other party to rely on either his or her statement or his or her silence as establishing a fact.

In any event, any special rule requiring non-disclosure to be accompanied by an intent to deceive disappeared by the time the British Columbia Court of Appeal revisited the issue in *BG Checo International Limited v. British Columbia Hydro and Power Authority*,⁹² a case which again involved incorrect information provided in a tender package for a construction contract. The trial judge had characterised this information as fraudulent because British Columbia Hydro conveyed false information with knowledge of its falsity; the Court of Appeal disagreed, and substituted a finding of negligent misstatement.⁹³

Hinkson J.A., writing for the majority, interpreted *Derry v. Peek*⁹⁴ and *Angus v. Clifford*⁹⁵ as establishing "the requirement of a conscious intention to deceive as a necessary element in the tort of deceit", but did not cite any specific references in these cases to support this proposition.⁹⁶ Such language does not appear in the leading speeches in *Derry v. Peek*.⁹⁷ Lindley L.J. was the only Lord Justice in *Angus v. Clifford* to use the phrase "intention to deceive", and he also cited *Derry v. Peek* as authority. This was in the context of a finding that the defendants had not in fact even intended to make a representation of the sort that was attacked by the plaintiff, a representation which the Court of Appeal found in any event was not even material.⁹⁸

Relying directly on *Rainbow*, the majority in *BG Checo* found that the plaintiff had failed to establish an intention to deceive, which Hinkson J.A. elevated to "a fundamental proposition" for the tort of deceit, apparently now applicable to all of the forms of misconduct which that tort may take.

Southin J.A., dissenting on other issues, gave a more extended analysis to this question. She interpreted the factual issue as being one of misrepresentation by silence,⁹⁹ rather than a positive misstatement as the trial judge and the

⁹² *Supra* footnote 3.

⁹³ The Court of Appeal also remitted the case to the trial judge to ascertain whether there was concurrent liability for breach of contract. The facts are discussed in greater detail *infra*, section 2.3.4.

⁹⁴ *Supra* footnote 21.

⁹⁵ *Supra* footnote 53.

⁹⁶ *Supra* footnote 3 at 704.

⁹⁷ Lord Halsbury L.C., in his brief concurring speech in *Derry v. Peek*, *supra* footnote 21, does state at 344 that the defendants were innocent of any intention to deceive, following a discussion indicating that a false statement "if wilfully made with the consciousness of its inaccuracy" would give rise to an action in deceit. This requirement of conscious lies echoes his judgment in the Court of Appeal in *Arnison v. Smith*, *supra* footnote 68 at 369 in the same year, and clearly is inconsistent with the other speeches in *Derry* discussing fraudulent recklessness, particularly that of Lord Herschell which is usually taken as stating the *ratio decidendis* of the case.

⁹⁸ *Supra* footnote 53 at 468-469.

⁹⁹ *Supra* footnote 3 at 717.

majority had found.¹⁰⁰ Her discussion of fraud commenced with the proposition that “the first issue is whether the speaker or author or the person who authorized [the words of inducement] intended them to deceive.” She then quoted extensive extracts from *Akerheim v. De Mare*,¹⁰¹ the speeches of Lord Halsbury and Lord Bramwell in *Derry v. Peek*,¹⁰² and *Angus v. Clifford*,¹⁰³ but none of these extracts makes any reference to an intention to deceive. Southin J.A., after quoting from *Rainbow’s* discussion of *K.R.M.*, concluded her discussion of the law with the statement:

In my opinion, the law of deceit has not shifted one iota since *Angus v. Clifford* and there is no reason why it should ... [A] conscious intention to deceive, i.e. mens rea, is a necessary ingredient of the tort of deceit...¹⁰⁴

With great respect, if *Rainbow* and *BG Checo* are correct, then the law of deceit has shifted considerably.

While the plaintiff in *Rainbow* did not pursue its action in fraudulent misrepresentation when the case went to the Supreme Court of Canada, that Court did have to deal with the issue in *BG Checo v. B.C. Hydro*. The majority, in an opinion written by La Forest and McLachlin JJ., simply stated that the conclusion of the British Columbia Court of Appeal that the evidence fell short for the tort of deceit, because there was no evidence of intention to deceive, “cannot seriously be contested”.¹⁰⁵ Sopinka J., dissenting on other grounds, discussed the tort of deceit in the context of the historical development of liability for negligent misstatement. After briefly considering *Derry v. Peek*, and noting that recklessness suffices as proof of dishonesty, His Lordship summarized that case as standing for the rule that “misrepresentations must be made with intent to deceive in order to be actionable in deceit”,¹⁰⁶ again without any reference to specific supporting passages in the speeches in the House of Lords.

The other authorities holding that intention to deceive is an essential element of the tort of deceit are equally weak. *Dixon v. Deacon Morgan McEwan Easson*¹⁰⁷ merely recited *Sorenson* and *BG Checo*. In *TWT Enterprises Ltd. et al. v. Westgreen Developments (Northern) Ltd.*,¹⁰⁸ the trial judge, Picard J. (as she then was) held that the plaintiff had to establish that the statements were *knowingly false*, and made with the intention to deceive the plaintiff. The absence of any reference to recklessness is perhaps explicable by her reliance

¹⁰⁰ *Supra* footnote 3 at 697, 701.

¹⁰¹ *Supra* footnote 44 at 503.

¹⁰² *Supra* footnote 21 at 344, 351-352 respectively.

¹⁰³ *Supra* footnote 53 at 472.

¹⁰⁴ *Supra* footnote 3 at 728.

¹⁰⁵ *Supra* footnote 15 at 22h-j.

¹⁰⁶ *Supra* footnote 15 at 76 g-h.

¹⁰⁷ *Supra* footnote 15 at 614.

¹⁰⁸ *Supra* footnote 5 (Alta. Q.B.).

on *Pasley v. Freeman*,¹⁰⁹ decided precisely a century before *Derry v. Peek*.¹¹⁰ Picard J. found such intention to deceive in the deliberate falsehoods of the defendant;¹¹¹ the Court of Appeal contented itself with holding that she had not erred in law in enunciating the essential elements of fraudulent misrepresentation, and upheld her finding of deceit.¹¹² The doctrine expounded in *TWT Enterprises* has since taken on its own authority, being cited in the trial judgment of Ritter J. in *473759 Alberta Ltd. v. Heidelberg Canada Graphic Equipment Ltd.* as imposing a requirement on the plaintiff of proof of both knowingly false representations and an intention to deceive.¹¹³

Only one note of disquiet, barely audible, has been heard from British Columbia about the compatibility with recklessness of the emerging requirement for an intention to deceive. In *Williamson Brothers Construction Ltd. v. British Columbia*,¹¹⁴ Hamilton L.J.S.C. rejected the contention that the pronouncement of Wallace J.A. in *Rainbow* that fraud cannot be established in the absence of an intention to deceive is a derogation from the principles of *Derry v. Peek*. Instead, the trial judge adopted the simple expedient of confining the requirement of intention to deceive to cases where the representor made the false statement knowingly or without belief in its truth, placing recklessness in an entirely separate category where intention to deceive is irrelevant.¹¹⁵ He was therefore able to reconcile his finding that the provincial government did not intend to deceive bidders for a construction project by failing to disclose evidence that the working conditions might be hazardous due to the presence of undetonated explosives on the site, with his conclusion that the responsible government employees had acted with a reckless disregard of the safety of the workers, and hence were fraudulent.¹¹⁶ This pragmatic solution is however impossible to reconcile with the *dicta* and rulings of the British Columbia Court of Appeal just discussed.

2.3.3 *The jurisprudential foundation for a requirement of intention to deceive*

We have seen that the edifice constructed by the British Columbia Court of Appeal rests on pillars which have their footings in sand. Can

¹⁰⁹ (1789) 3 Term Rep. 51, 100 E.R. 450.

¹¹⁰ Picard J. also cited *Derry v. Peek*, *supra* footnote 21 and G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto: Carswell, 1986) at 276-283. Fridman at 276 defines fraudulent misrepresentation as "one which is made with knowledge that it is untrue and with the intent to deceive". On the face of it, this is clearly too succinct for accuracy, and at 277 Fridman redefines the tort more precisely as "a representation of fact made without any belief in its truth, with intent that the person to whom it is made shall act upon it". In Fridman's *Torts* (London: Waterlow, 1990) at 451-460, his discussion of the tort of deceit nowhere states that an intention to deceive is required.

¹¹¹ *Supra* footnote 5 at 90 (Alta. Q.B.).

¹¹² *Supra* footnote 5 at 348 (Alta. C.A.).

¹¹³ *Supra* footnote 15 at 223, 227.

¹¹⁴ *Supra*, footnote 5 at 218.

¹¹⁵ *Supra* footnote 5 at 219-224.

¹¹⁶ *Supra* footnote 5 at 222-224.

support be found for the Court's position elsewhere in the jurisprudence of the tort of fraud?

Certainly the phrase "intention to deceive" appeared occasionally in the early English cases. However, with only rare exceptions, the phrase was used in the context of comments upon deliberate wrongdoing, so that it was the logical, and indeed inescapable, conclusion that the defendant in fact intended to deceive.¹¹⁷

Bowen L.J. in *Le Lievre v. Gould*¹¹⁸ also used the phrase, but given that he had just reiterated the test for the mental element of fraud as encompassing recklessness, it is unlikely he regarded the phrase as anything more meaningful than a shorthand description of fraudulent intent, however misleading that choice of words might have been. Lord Dunedin and Viscount Haldane L.C. also employed the terms "intention to cheat" and "intention to deceive" in *Nocton v. Ashburton*¹¹⁹ to describe the action in deceit; it is clear however that their object was to distinguish the common law action in deceit, where negligence in ascertaining the facts is irrelevant, from the action in equity for breach of fiduciary duty, where such negligence will suffice, rather than to detract from the liability for recklessness delineated in *Derry v. Peek*.¹²⁰ It is possible, however, that the contamination of the tort of deceit with erroneous *dicta* respecting the requisite intention originated with *Nocton v. Ashburton*.

Finally, the comment of Lord Wright in *Bradford Third Equitable Benefit Building Society v. Borders*¹²¹ that the directors in *Derry v. Peek* were exonerated because "they were innocent of any intention to deceive" must be incorrect, because, as noted earlier, the leading speeches in *Derry* never used such a phrase, and clearly exonerated the defendants on the ground of recklessness as well as deliberate deceit.

Certainly the leading academic authorities on actionable misrepresentation, Spencer Bower and Turner, have been firm that nothing beyond intention to induce reliance need be proved:¹²²

¹¹⁷ *Armstrong v. Jackson*, *supra* footnote 69 at 827; *Arnison v. Smith*, *supra* footnote 68 at 372-373; *United Motor Finance Co. v. Addison & Co.*, *supra* footnote 69 at 429; *Nocton v. Ashburton*, *supra* footnote 38 at 945.

¹¹⁸ *Supra* footnote 20 at 502.

¹¹⁹ *Supra* footnote 38 at 945, 953, 954, 957, Viscount Haldane, and at 963, Lord Dunedin.

¹²⁰ Indeed, Viscount Haldane stressed the importance of preserving reckless dishonesty within the domain of the common law tort of deceit: *supra* footnote 20 at 949, 954.

¹²¹ *Supra* footnote 18 at 220.

¹²² Spencer Bower & Turner, *Law of Actionable Misrepresentation*, *supra* footnote 26 at 118, ¶100. See also B.S. Markesinis & S.F. Deakin, *Tort Law*, 3rd ed. (Oxford: Clarendon Press, 1994) at 372, 375; K.M. Stanton, *Modern Law of Tort* (London: Sweet & Maxwell, 1994) at 330-331; J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book Co. Ltd., 1992) at 635-636. None of these leading texts refers to any requirement to prove intent beyond intent to induce reliance.

[A]lthough fraud necessarily involves an intention on the part of the representor that the representee shall act in the way in which he does eventually act, *yet there is no necessity to prove any intention further or more remote than this* — and certainly the *motive* of the representor is quite irrelevant ... A false representation made without honest belief in its truth will be fraudulent if made with intention that the representee act upon it, even if it be made without any demonstrable motive or intention whatsoever. [emphasis in original]

If English jurisprudence does provide some slender authority to support the emergence of a requirement for intention to deceive, it is more remarkable that none of the Canadian courts espousing this position has considered the leading Canadian case directly addressing this issue, the decision of the Supreme Court of Canada in *Redican v. Nesbitt*.¹²³ The trial judge there had instructed the jury that there must be “deliberate intention to defraud” shown, and refused counsel’s request to put recklessness to the jury. The Supreme Court Justices were unanimous in finding a serious misdirection which warranted a new trial. Mr. Justice Duff provided an illuminating gloss on the term “recklessness”:¹²⁴

The learned trial judge overlooked the settled doctrine based on the plainest good sense that an affirmation of fact made for the purpose of influencing people in the transaction of business involves an affirmation of belief in the existence of the fact stated. If there is no belief, *if the mind of the proponent has never been applied to the question and if he is in truth consciously ignorant upon the subject of his affirmation* there is obviously a false statement and, *if made with intent that it shall be acted upon* in the way of business in a matter involving his own interests, a fraudulent statement. [emphasis added]

Thus according to Duff J., the requisite intention is to induce reliance. The judgment of Mr. Justice Anglin makes the inherent incompatibility of recklessness with an intention to deceive even sharper:¹²⁵

I am clearly of the opinion, however, that a new trial must be directed because the issue of fraud was not properly presented to the jury. In substance the learned trial judge charged that, in order to establish fraud, the [party averring fraud] must show that Wing [the party alleged to be fraudulent] actually knew his representations were false. He did not tell the jury that the representations would be fraudulent if they were false and were made without belief in their truth, or recklessly, careless whether they were true or false...

Had the jury been properly instructed upon the distinction between innocent and fraudulent misrepresentation their finding that the misrepresentations had been innocent would, no doubt, cover the ground. But how can that be said in view of the explicit instruction given them that “the word +innocent’ is used in law to convey +not knowingly” and that only a deliberate and intentional lie would justify a finding that the misrepresentations had been fraudulent? ...

The learned judge distinctly stated his view that intention to deceive was essential and impliedly that a false statement made with reckless carelessness as to its truth or falsehood would not be fraudulent ...

¹²³ [1924] S.C.R. 135.

¹²⁴ *Supra* footnote 123 at 147.

¹²⁵ *Supra* footnote 123 at 154, 155, 156.

The refusal to put to the jury the question whether Wing's statements were made without caring whether they were true or false coupled with the instruction that, although so made, they were innocent and not fraudulent, unless there was an intention to deceive — to tell a deliberate lie — was clearly misdirection and entitles the defendants to a new trial. [emphasis added]

Mr. Justice Mignault was equally firm in asserting that the representee need not prove that the representor deliberately lied, or intended to deceive:¹²⁶

Unfortunately the learned trial judge left the jury under the impression that to be fraudulent the misrepresentations had to be *[sic]* made wilfully and without belief in their truth, in other words that Wing deliberately lied when he made them. Where misrepresentations are made recklessly, with indifference whether they be true or false, they are fraudulent and this was not explained to the jury ...

[T]he burden of the appellants was unduly increased when the jury were told that they must find that "there was a deliberate intention to defraud" to prevent the misrepresentations from being innocent. This was misleading because if the jury were of opinion that Wing had recklessly, that is to say with indifference to the truth or falsity of his statements, misrepresented the facts which the jury found were misrepresented, they could not answer that these misrepresentations were innocent. [Emphasis added]

The trial judge in *K.R.M.* quoted *Redican v. Nesbitt* in concluding that intention to deceive is not necessary where the plaintiff has established that the defendant was reckless;¹²⁷ it is curious then that the British Columbia Court of Appeal has not so much as cited the case in expounding the revisionist doctrine.

In 1994 Feehan J. of the Alberta Court of Queen's Bench in *Opron Construction Co. Ltd. v. Alberta* similarly relied on *Redican v. Nesbitt* to find that fraudulent recklessness does not require proof of an intention to deceive, because the two concepts are incompatible.¹²⁸

It is interesting to find that the Alberta Appellate Division also considered this issue in 1931, in *Whitney v. MacLean*.¹²⁹ In a vendor's action for specific performance of an agreement for sale of land, the defendant pleaded that the vendor had represented that the land included 140 acres of irrigated land for which he held water rights, whereas he knew that only 85 acres were entitled to be irrigated. The trial judge made a finding of fact that the vendor did not intend to deceive the purchaser respecting water rights, because he did not realize the duty incumbent upon him to disclose the actual facts.

The majority found that the evidence fully supported the finding that there was no intention to deceive.¹³⁰ The reasoning of Harvey C.J.A. bears close examination, especially in light of the powerful dissenting judgment of McGillivray J.A. The Chief Justice first noted an earlier decision of that

¹²⁶ *Supra* footnote 123 at 157, 158.

¹²⁷ *Supra* footnote 26 at 204.

¹²⁸ *Supra* footnote 62 at ¶659, ¶662 (A.R.), 223, 235-236 (C.L.R.).

¹²⁹ [1932] 1 W.W.R. 417.

¹³⁰ *Supra* footnote 129 at 425, Harvey, C.J.A., and at 437, Clarke J.A.

Division, *McLeod v. Hughes*¹³¹, that a claim for fraudulent misrepresentation cannot be supported in the absence of a fraudulent intent where the representor has knowledge of the truth or falsity of the representation (without any reference, it will be noted, to a situation of reckless disregard for the truth). The Chief Justice did note the statement in *Spencer Bower on Actionable Misrepresentation*¹³² that "it is immaterial whether the representor in making the representation, had or had not any intention to deceive, defraud or injure the representee...." He went on:¹³³

Now, if this means more than that the motive, including the intention involved in it, is immaterial, which it probably does not, it is clearly contrary to authority for the Judicial Committee in *Tackey v. McBain* [1912] A.C. 186 ... held that:

'In an action in deceit the plaintiff must prove that the untrue statement ... was made with a fraudulent intent.'

And in *Kerr on Fraud*, 6th ed., at 29 and 30, it is stated that:

'An intention to deceive being a necessary element or ingredient of fraud, a false representation does not amount to a fraud at law, unless it is made with a fraudulent intent ... There must be an intention to deceive.

'The motive as distinguished from the intention is immaterial.'

Two things are to be further noted about this discussion. First, the excerpt from *Spencer Bower* was properly noted by the Chief Justice to relate to motive; other passages from that authority stating that intention to induce reliance rather than intention to deceive is vital are not cited.¹³⁴ Further, the excerpt from *Kerr on Fraud and Mistake* makes an important qualifier to this statement, in the same paragraph:¹³⁵

It is immaterial that there may have been no intention on his part to benefit himself or to injure the person to whom the representation is made. *It is enough that it be made wilfully and with the view to induce another to act on it*, who does so to his prejudice. The law imputes to him a fraudulent intent, although he may not have been in fact instigated by a morally bad motive. An intention to deceive, or a fraudulent intent in the legal acceptance of the term, depends upon the knowledge or belief respecting the falsehood of the statement, and not upon the actual dishonesty of purpose in making the statement. [emphasis added]

It is to be noted that neither of the judgments of the majority cited the Supreme Court of Canada's decision in *Redican v. Nesbitt*.¹³⁶ McGillivray J.A., in contrast, dwelt at some length on *Redican* in his dissenting judgment, in support of his contention that an intention to deceive is not compatible with recklessness:¹³⁷

¹³¹ (1930) 1 W.W.R. 835.

¹³² 2nd ed. (1929) at 6 and 110.

¹³³ *Supra* footnote 129 at 425.

¹³⁴ *Supra* footnote 122.

¹³⁵ *Kerr on Fraud and Mistake*, 6th ed. (London: Sweet & Maxwell, 1929) at 30.

¹³⁶ *Supra* footnote 123.

¹³⁷ *Supra* footnote 129 at 453.

If the effect of the decision in *McLeod v. Hughes*, *supra*, is, as the Chief Justice and my brother Clarke appear to think it is, that a person to succeed on a claim of fraudulent misrepresentation must show an active intent to deceive on the part of his opponent, then in my view that decision is not in accord with the decision of the Supreme Court in the *Redican* case, *supra*, and must be ignored.

It is not only that which is said that may constitute misrepresentation, but also that which is imported into what is said by what is left unsaid ... [T]o my mind the implication is plain and clear and this is the view taken by the trial Judge, that this is a representation that there were water rights to 140 acres. *If the appellant made this representation even though at that moment he did not have in his mind the intent to deceive, which I greatly doubt, he still would be speaking recklessly and without a belief in the truth of his statements, which is fraud* according to the Supreme Court's decision [in *Bickell & Co. v. Cutten*, [1926] S.C.R. 340]. [emphasis added]

It is submitted that the decision of the majority in *Whitney v. MacLean*¹³⁸ can only be reconciled with the Supreme Court's clear pronouncement in *Redican v. Nesbitt*¹³⁹ that fraudulent recklessness does not require proof of intention to deceive, if the majority's views are taken as being restricted to situations where recklessness is not in issue.¹⁴⁰ Otherwise, the dissent of McGillivray J.A. is compelling from the standpoint of logic as well as of authority.

2.3.4 *Would imposition of a requirement for proof of an intention to deceive make a difference?*

It remains for us to consider whether this debate is merely one of academic interest, or whether it has more pragmatic implications in terms of unduly weighting the burden of proof against plaintiffs.

The most significant case to test this hypothesis is *BG Checo v. B.C. Hydro*. The trial judge had found Hydro liable for the tort of deceit, based on a false statement in the tender documents that the clearing of the right-of-way had been done by others, and formed no part of the work to be performed by the contractor. He concluded that Hydro knew at the time of tendering that the clearing was incomplete, and was aware of the impact that would have on the successful tenderer, but nonetheless deliberately decided to omit from the tender package a reference to logs remaining on the right-of-way.¹⁴¹ The British Columbia Court of Appeal accepted that the statement was included in

¹³⁸ *Supra* footnote 129.

¹³⁹ *Supra* footnote 123.

¹⁴⁰ As Feehan J. concluded in *Opron Construction Co. Ltd. v. Alberta*, *supra* footnote 62 at ¶661 (A.R.), 235 (C.L.R.). This interpretation is consistent with the expedient adopted by Hamilton L.J.S.C. in *Williamson Brothers Construction Ltd. v. British Columbia*, discussed *supra* at footnote 115.

¹⁴¹ The trial level decision in *BG Checo* is reported only at [1988] C.L.D. 1215, [1988] B.C.W.L.D. 2324. It is summarised by the British Columbia Court of Appeal in its own judgment, *supra* footnote 3, at 697.

the tender documents notwithstanding that the tender review committee knew that it was false,¹⁴² but, as noted earlier, reversed the finding of fraud on the basis that there was no evidence of an “intention to deceive”.¹⁴³ This was upheld by both the majority and the dissenters in the Supreme Court of Canada.¹⁴⁴ Iacobucci, J. stated:

In my view there was insufficient evidence to support a finding of deceit (i.e., of fraudulent intent ...) against Hydro, and the Court of Appeal correctly intervened to reverse the trial judge on this point. As Hinkson J.A. noted (at pp. 161-162):

“... a committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications for this contract. Rather, it is possible to conclude that they mistakenly or negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.”¹⁴⁵

It is submitted that the conclusion on appeal absolving the committee members of fraudulent intent can only be sustained on the basis that, with the knowledge that the statement was inaccurate, they nonetheless subjectively did not intend to induce reliance on that misstatement by the tenderers because they expected that the true state of affairs would be apparent to tenderers on their site visit. However, the Court of Appeal and the Supreme Court found that the committee members were negligent in making the statement on the basis of this expectation, because they overlooked the possibility that a reasonable tenderer might assume that the clearing work was still ongoing, as BG Checo did.

Since negligent misstatement is not an intentional tort, unlike deceit, it was not necessary for BG Checo to prove that the BC Hydro actually intended the tenderers to act upon the misinformation. However, a plaintiff pleading negligence still must prove particular aspects of the defendant’s mental state:

- (1) that the representor knew that the information would be communicated to the plaintiff (or members of a limited class including the plaintiff) for use for a particular purpose, and
- (2) that the representor knew, or should have foreseen, that the information was likely to be relied upon by the recipient for that purpose.¹⁴⁶

A further essential element of a successful action in negligent misstatement is that the representee acted reasonably in relying on the statement.¹⁴⁷

¹⁴² *Supra* footnote 3 at 701, Hinkson J.A.

¹⁴³ *Supra* footnote 3.

¹⁴⁴ *Supra* footnote 15.

¹⁴⁵ *Supra* footnote 15 at 54.

¹⁴⁶ *Haig v. Bamford*, [1976] S.C.R. 466; *V.K. Mason Construction Ltd. v. Bank of Montreal*, [1985] 1 S.C.R. 271. Foreseeable reliance is thus a weaker requirement than the intended reliance necessary for deceit.

¹⁴⁷ *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110.

Therefore, implicit in the appellate courts' conclusion of liability for negligent misrepresentation in *BG Checo* are the following findings of fact:

- (1) the committee members knew that the false statement would be communicated to BG Checo and other bidders for their consideration in preparing their tenders;
- (2) they also knew, or should have foreseen, that the bidders would rely on the statement, and specifically should have known that the site visit would not give the bidders information which unequivocally contradicted the false information they had provided; and
- (3) BG Checo acted reasonably in relying on the statement in the tender documents that the site would be cleared by another contractor, and further in assuming that the clearing work was still ongoing when they observed during the site visit that the right of way was not yet cleared.

It is difficult to reconcile the finding which exculpated the committee members of deceit, that they subjectively did not intend the tenderers to rely upon the erroneous information, with the finding that the members must have expected this reliance, so as to sustain liability for negligent misstatement. The only solution is to conclude that the committee members did not expect, but should have anticipated, that the tenderers would rely on the false statement. This finding was not explicitly made by any of the three courts considering the evidence.

It is submitted that the very fact that the committee members decided to include the statement in the tender package in the knowledge that it was false raises the legitimate inference that they intended the bidders to rely upon that statement; otherwise, why not simply omit it and permit the bidders to draw their own conclusions on the site visit?

Even stronger criticism of this chain of reasoning may be warranted. It has long been held that it is no answer to an action in deceit that the representee could have ascertained the true facts had he or she investigated them further. As Lord Dunedin said in *Nocton v. Ashburton*, "no one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction".¹⁴⁸ In particular, it was held in *Cardinal Construction Ltd. v. Brockville* that as a general principle, a bidder for a construction contract is entitled to rely on the tender documents, and inaccuracies will not be excused by the owner's intention that an experienced contractor will be able to ferret them out.¹⁴⁹ The Court of Appeal in *BG Checo* actually cited this authority with approval, in finding liability for negligent misrepresentation.¹⁵⁰ Even clauses in the instructions to tenderers requiring bidders to investigate the site conditions and to form their own conclusions will not

¹⁴⁸ *Supra* footnote 38 at 962. See also *Redgrave v. Hurd*, *supra* footnote 10, and *Northern & Central Gas Corporation Limited v. Hillcrest Collieries Limited et al.*, [1976] 1 W.W.R. 481 (Alta. Q.B.).

¹⁴⁹ (1982), 45 C.L.R. 149 at 170 (Ont. S.C.); *A.B.S. Contracting Ltd. v. Richmond* (1988), 27 C.L.R. 113 (B.C.S.C.).

¹⁵⁰ *Supra* footnote 3 at 703.

absolve an owner of responsibility for inaccuracies in the information provided in the tender package, where the owner has not specified the sources of information to which the bidders may have regard in conducting those investigations, and in particular has not expressly prohibited bidders from relying upon any material supplied by the owner or its engineer as a basis for making the investigations.¹⁵¹ Even if, on a strict interpretation, the fact that the committee members actually knew that the statement was incorrect precluded a finding of recklessness as to its truth, surely their expectation that bidders would ascertain the true facts on the site visit was recklessly, and not merely negligently, formed. It is respectfully submitted that this unjustified expectation, coupled with the knowledge that the information was wrong, should have added up to the dishonest frame of mind required for actionable deceit.

Conclusion

The recent Canadian cases discussed in this article have used "intention to deceive" as a test of liability, while the English authorities have tended to adopt this phrase as a conclusion of fact flowing from a finding of conscious lies. With only two exceptions, both from Alberta, the Canadian courts in these cases have found there to be no fraudulent mentality, without considering separately the possibility of recklessness apart from actual knowledge of falsity.

In the only case thus far from this group where the plaintiff successfully maintained a trial finding of fraud on appeal,¹⁵² *TWT Enterprises Ltd. v. Westgreen Developments Ltd.*, the trial judge concluded that the defendant knew that her statement was false, but Picard J. appeared to assume that this could be the only basis for a finding of dishonesty, a view upheld by the Alberta Court of Appeal.¹⁵³ In *473759 Alberta Ltd. v. Heidelberg Canada Graphic Equipment Ltd.*, the trial judge made a finding of a business practice of deliberate systematic misrepresentation from which he inferred an intention to deceive, backstopped with an alternative finding of recklessness.¹⁵⁴

¹⁵¹ *Morrison-Knudsen v. Commonwealth of Australia* (1972), 46 A.L.J.R. 265 at 267, 271 (Aus. H.C.); *Hollerbach v. United States*, 233 U.S. 165 at 173 (1914 U.S.S.C.), adopted in *Cardinal Construction Ltd. v. Brockville*, *supra* footnote 149 at 177, 178; *United States v. Atlantic Dredging*, 253 U.S. 1, (1919 U.S.S.C.); *Bernard McMenamy Contractors, Inc. v. Missouri State Highway Commission*, 582 S.W. 2d 305 at 310, 311, 312, 313 (1979 Missouri C.A.); *Public Constructors, Inc. v. State of New York*, 390 N.Y. 2d 481 at 484, 485 (1977); *Thomsen-Abbott Construction Co. v. City of Wausau*, 100 N.W. 2d 921 at 926 (1960 Wisconsin S. C.). This reasoning was adopted by Feehan J. in *Opron Construction Co. Ltd. v. Alberta*, *supra* footnote 61 at ¶721 — ¶738 (A.R.), 247-251 (C.L.R.).

¹⁵² In *Opron Construction Ltd. v. Alberta*, *supra* footnote 62, the Government of Alberta did appeal the finding of fraud at trial, in relation to misrepresentations and nondisclosures in a tender package for a construction contract. The appeal was abandoned pursuant to a settlement, for an amount substantially in excess of the judgment awarded the plaintiff contractor at trial, as reported in the media.

¹⁵³ *Supra* footnote 5 at 348.

¹⁵⁴ *Supra* footnote 15 at 227; see also 225.

The British Columbia courts, echoed by the Supreme Court of Canada, have tended to treat “intention to deceive” as encapsulating the entire question of the mental element for civil fraud.¹⁵⁵

A further concern is that the gathering momentum for a requirement to prove an intention to deceive could make civil fraud more difficult to prove than criminal fraud. The Supreme Court of Canada has ruled that the *mens rea* for criminal fraud requires only proof that:

- (1) the accused had subjective knowledge of the act which, on an objective assessment, is fraudulent; and
- (2) had subjective knowledge that this act could have as a consequence the deprivation of another by jeopardizing his or her pecuniary interest; proof that the accused actually intended this consequence is not required, as recklessness that this might occur will suffice.

As noted earlier, a Canadian prosecutor, unlike his or her English counterpart, need not prove that the accused subjectively considered his or her conduct to be dishonest.¹⁵⁶ Yet in tort law, imposing a requirement of proof that the defendant intended to deceive the plaintiff necessarily imports both a subjective appreciation of dishonesty — that the defendant realizes that he or she is practising deception — and an intention to bring about this consequence.¹⁵⁷ *deception*: (1996), 21 O.R. (3d) 798 at 802. An intention merely to induce reliance, on the other hand, accepts the possibility that the defendant did not judge his or her own conduct as dishonest, but merely, in a state of indifference to the truth which *the law* determines was dishonest, desired to persuade the plaintiff to take a particular course of action.

The introduction of a requirement for proof of the defendant’s intention to deceive the plaintiff illustrates how an erroneous principle can be constructed from a misreading of the authorities by the extraction of phrases from their context, and then reinforced through repetition. The danger is that by conflating the separate questions of a dishonest attitude and active intention accompanying the making of the statement, the court will never give proper consideration to the question of recklessness, and the terrain of recklessness will, by default, come to be annexed to the less powerful tort of negligent misstatement.

¹⁵⁵ The error is reiterated unquestioningly by P.M. Perell, “The Fraud Elements of Deceit and Fraudulent Misrepresentation” (1996) *Advocates’ Quarterly* 23, e.g. at 23, 26, 28.

¹⁵⁶ *R. v. Thérault*, supra footnote 16; *R. v. Zlatić*, supra footnote 72.

¹⁵⁷ The confusion which this can engender is exemplified by the trial judgment in *Harland v. Fanscali* (1993), 102 D.L.R. (4th) 577 at 582-585, 13 O.R. (3d) 103 at 107-109 (Gen. Div.). Ferguson J. first held that intention to deceive is a requisite element of deceit as a tort, but expressed uncertainty as to whether the defendant’s conduct satisfied the dishonesty requirement, or merely constituted sharp practice. He resorted to the *Criminal Code*’s definition of fraud in section 380, reasoning that if conduct constituted fraud under the criminal law, it would constitute a wrong for which a civil court could grant relief; on this basis he awarded the plaintiffs tort damages. The Ontario Divisional Court corrected this transposition of civil and criminal principles, but upheld the finding of tort liability on the basis that the plaintiffs had proved a knowing and intentional