A mistaken turn in the law of misrepresentation

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Rescission of a contract for misrepresentation has traditionally been justified on the basis that the defendant's false representation induced a mistake in the claimant. However, in Zurich Insurance v Hayward, *the Supreme Court held that a contract could be set aside on the basis of misrepresentation even if the claimant did not believe the defendant's representation and was therefore not mistaken about the truth of the representation. This article argues that such an approach should be rejected for reasons of policy, principle and precedent, and considers what doctrinal tools exist to confine the unwelcome consequences of the decision.*

The rules of misrepresentation have been "developed over the years without any real attempt by judges or Parliament to devise a unified theory of misrepresentation".[1] This inevitably leads to difficulties. One issue that has recently troubled the courts is whether the claimant needs to believe the false representation made by the defendant. If the claimant does not believe that the representation made is true, then the claimant is not mistaken about the veracity of that representation. Nevertheless, in *Zurich Insurance Co Plc v Hayward*,[2] the Supreme Court held that even in such circumstances a contract could be rescinded for misrepresentation.

In a recent article in this *Quarterly*, Elise Bant has discussed some of the broader consequences that result from driving a wedge between fraud and mistake.[3] As she recognises, the implications of the decision in *Zurich* are potentially very serious and wide-ranging. It is therefore both important and timely to subject the decision of the Supreme Court itself to rigorous examination. We consider that *Zurich* is an unwelcome relaxation of the requirements for a claim to rescind a contract for misrepresentation. As a matter of policy, it undermines the certainty and the security which contractual rights are supposed to provide. The Supreme Court's decision is also to be criticised in its approach to precedent, since the Justices assumed, without explanation, that the authorities on this point from the tort of deceit were equally applicable to a claim to set aside a contract for

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1. J Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 4th edn (Sweet & Maxwell, London, 2016), [2.02].
2. [2016] UKSC 48; [2017] Lloyd's Rep IR 84; [2017] AC 142.
3. E Bant, "Unravelling Fraud in the Wake of *Hayward v Zurich Insurance*" [2019] LMCLQ 91.

misrepresentation. Finally, this decision is divorced from the principles underpinning the law of rescission for misrepresentation. These points will all be considered in turn, before analysing whether the outcome of the case can be explained on alternative bases, and how the courts might deal with *Zurich* in the future.

It is important at the outset to distinguish between claims in the tort of deceit and claims to rescind a contract for misrepresentation.[4] A claimant may well suspect a defendant fraudster of having committed the tort of deceit, but nonetheless settle the claim. If a term of the agreement is that no claims in deceit will be pursued against the defendant, that will, *prima facie*, prevent the claimant from later claiming damages from the fraudster in the tort of deceit. In order to bring such a claim, the claimant must first be able to set aside the settlement agreement for misrepresentation. The two claims—deceit and misrepresentation—are therefore closely linked, but should be considered separately. After all, the primary remedy for misrepresentation is rescission, not damages, whereas the only remedy for deceit is damages.[5]

The scenario given in the previous paragraph was effectively raised on the facts of *Zurich*. The merits of the case appear to favour the innocent claimant over the defendant fraudster, which may explain why the decision of the Supreme Court to set the contract aside has received a largely positive reaction in journals,[6] and generally neutral comment in textbooks.[7] But that does not mean that a claim in misrepresentation should have succeeded. The law of misrepresentation should not be distorted by hard cases.[8] The claimant was not duped by the misrepresentation, and did not believe the representations made at the time of entering into the settlement agreement. Since there was no induced mistake, rescission should not have been granted for misrepresentation. If the result in *Zurich* is to be supported, it should therefore be on a different basis.[9]

ZURICH INSURANCE CO PLC v HAYWARD

Mr Hayward injured his back in a work accident. His employer admitted liability but Hayward overstated his injuries and sought a large damages award of over £400,000. In the proceedings which followed, Zurich Insurance—the employer's insurer—correctly believed Hayward to be exaggerating the consequences of the accident. In particular, it obtained a video of Hayward, post-injury, engaged in heavy lifting inconsistent with his apparent condition. The video called into question Hayward's case on the quantum of

4. See further *post*, text to fnn 37–63 and 106.

5. *Salt v Stratstone* [2015] EWCA Civ 745; [2015] 2 CLC 269, [24] (Longmore LJ).

6. See, eg, R Lee, "Proof of Inducement in the Law on Misrepresentation" [2017] LMCLQ 150; K Lindeman, "Unravelling settlements made with 'eyes wide open'" [2017] CJQ 273; PJ Rawlings and JP Lowry, "Insurance Fraud and the Role of Civil Law" (2016) 79 MLR 525. *Cf* M Hemsworth, "English Insurance Law" [2017] IMCLY 45, 51–56; KCF Loi, "Pre-contractual misrepresentations: mistaken belief induced by mis-statements" [2017] JBL 598.

7. See, eg, H Beale (ed), *Chitty on Contracts*, 33rd edn (Sweet & Maxwell, London, 2018), [7.036]; J Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 4th edn (2016), [3.50]; P MacDonald Eggers, *Vitiation of Contractual Consent* (Informa Law, London, 2016), 670–671, 686–687.

8. This was the view of the Court of Appeal, which refused to set aside the contract, but was overturned by the Supreme Court: [2015] EWCA Civ 327; [2015] 1 CLC 581; [2015] Lloyd's Rep IR 585.

9. Such as illegality: see *post*, text to fnn 108–115.

damages. Nonetheless, after further negotiations, Zurich Insurance decided to settle for around £135,000.

Some time later, Hayward's neighbours came forward with evidence that Hayward had grossly and intentionally inflated the value of his claim, which was in reality around £15,000. That encouraged the insurer to reopen the case. It brought a new claim, arguing that the settlement agreement could be set aside. However, Hayward argued that the settlement agreement could not be rescinded because Zurich Insurance had never believed his exaggerations. At first instance, HHJ Moloney QC thought that it was an "interesting (and apparently unresolved) question of principle" whether the insurer had to believe in the truth of Hayward's representations.[10] The judge held that this was not necessary and set aside the settlement. The Court of Appeal disagreed, but the Supreme Court restored the order of HHJ Moloney QC.

Lord Clarke gave the leading judgment, with which all members of the Supreme Court agreed,[11] and Lord Toulson also gave a concurring judgment, with which the other Justices (apart from Lord Clarke) agreed. Both Lord Clarke and Lord Toulson accepted that the claimant's belief in a representation might be relevant to the question of causation, but such a belief was "not necessary, as a matter of law".[12] This opened up the conceptual space for the misrepresentation claim in *Zurich* to succeed, even though the insurer did not believe Hayward but merely thought there was a possibility that the judge at trial would accept his claims.[13] As a result, the Supreme Court was satisfied that the exaggerations regarding Hayward's injuries had caused the insurer to settle for £135,000 rather than closer to £15,000. Accordingly, the settlement could be rescinded even though the misrepresentation had not been believed by the insurer.

Speaking more generally, Lord Clarke found it "difficult to envisage any circumstances in which mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established".[14] Further, Lord Clarke left it open as to whether a claim in misrepresentation could succeed even where the representee was not merely suspicious but knew of the falsity of the statement made.[15] Lord Clarke thought that the facts of *Zurich* itself did not require him to answer that question as the insurer had not known the true extent of Hayward's embellishments.[16] However, in fact the case did require an answer to that question: the insurer knew that Hayward was lying,[17] and had pleaded a case to that effect in the original proceedings. To say that it did not know of the extent of Hayward's lies is a distinction without a difference. Given the outcome, *Zurich* therefore must be understood as authority for the proposition

10. *Zurich Insurance Co Plc v Hayward* (6 September 2013) Unreported, [2.5].
11. Lord Neuberger, Baroness Hale, Lord Reed and Lord Toulson (the latter made his agreement clear at [2016] UKSC 48, [50]).
12. *Ibid*, [18] (Lord Clarke); see too [67] (Lord Toulson).
13. *Ibid*, [19] and [32] (Lord Clarke) [71] (Lord Toulson).
14. *Ibid*, [48].
15. *Ibid*, [43–45].
16. *Ibid*, [44].
17. At first instance, it was found that "neither" of the witnesses for Zurich Insurance "can be said to have believed the representations complained of to be true": *Zurich v Hayward* (6 Sep 2013) Unreported, [2.6] (HHJ Moloney QC). We are grateful to Guy Sims for providing us with a copy of this judgment.

that a claim for misrepresentation may succeed even when the claimant knows that the representations it has received are not true.

ZURICH AND POLICY

Certainty and the security of contractual rights are important principles in contract law. But they can be undermined if clear and robust requirements for doctrines that allow a party to rescind a contract are watered down or removed.[18] The ability to rescind a contract for misrepresentation may be considered an exception to the general principle of *caveat emptor* or "buyer beware".[19] Fraudulent misrepresentation might even be seen as one piecemeal solution to the lack of a broad doctrine of "good faith" in English contract law.[20] As an exception to *caveat emptor* (or, to put it the other way, an exceptional example of good faith in contract law), it would be appropriate to draw the scope of misrepresentation relatively narrowly. The further the boundaries of misrepresentation are pushed, the greater the challenge to certainty and security of contractual rights. The rejection in *Zurich* of a requirement that a claimant should believe a misrepresentation leaves very little content to the causal test for misrepresentation: it is not difficult for a claimant to argue plausibly that a representation was "a" cause for entering into a contract, particularly with the benefit of the "inference of inducement".[21] This consequently makes it easier for contracts to be set aside for misrepresentation.

It is significant that *Zurich* concerned compromise agreements. The insurance industry has apparently welcomed *Zurich*,[22] which is no wonder because settlement can be undone with relative ease. Settling now reduces the risk that can backfire on insurers—or indeed anyone else who ends up regretting a settlement. Lindeman has argued that *Zurich* should be welcomed for that very reason. A key aim of the Civil Procedure Rules is early settlement,[23] and, Lindeman argues, *Zurich* encourages early settlement because

18. The same point can be made in respect of duress, particularly so-called lawful act duress: see PS Davies and W Day, "'Lawful Act' Duress" (2018) 134 LQR 5.

19. J Steyn, "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy" (1991) 6 Denning LJ 131, 136: "The philosophy of *caveat emptor* rather than notions of good faith and fair dealing has dominated English contract law."

20. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA), 439 (Bingham LJ).

21. See, eg, *Zurich v Hayward* [2016] UKSC 48, [34] (Lord Clarke).

22. PJ Rawlings and JP Lowry, "Insurance Fraud and the Role of Civil Law" (2016) 79 MLR 525, 537. It was suggested to us that, in the context of an accelerating number of insurance claims each year, the result in *Zurich* will make insured parties more meticulous in telling the truth about the extent of their losses, which in turn might lead to greater pay-outs or lower premiums. However, that rests on the assumption that a significant number of potential insurance fraudsters will be aware of this development in the law. We suggest that that assumption is an unlikely one, and in any event the impact of *Zurich* on the law of misrepresentation extends far beyond the context of insurance.

23. The overriding objective of the Civil Procedural Rules 1999 ("CPR") is for the court to deal with cases justly and at proportionate cost; cases should be dealt with expeditiously and fairly, and in a cost-efficient manner: CPR 1.1. Thus, the court is under a duty to case manage, to help the parties settle the whole or part of a case (CPR 1.4(2)(f)) and to encourage/facilitate the use of alternative dispute resolution mechanisms (CPR 1.4(2)(e)), which typically end in a settlement agreement. Further, CPR 36 provides economic incentives for settlement. See further discussion in A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 3rd edn (Sweet & Maxwell, London, 2013), [1.124–1.136].

a compromise agreement can now be set aside at a later date if evidence emerges that the other side misrepresented their case.[24] Lindeman may be right that *Zurich* promotes early settlement, but it does so at the cost of settlement being a mechanism for effectively ending disputes with finality.[25] Looked at this way, *Zurich* actually undermines a central objective of the CPR and dispute resolution more broadly, unless it can be confined in some way—a point to which we return below.[26]

The very aim of a compromise agreement is to bring a final end to the dispute, not simply to pause litigation for the time being.[27] As Lord Romilly MR put it in *Plumley v Horrell*,[28]

"Prima facie everybody would suppose that a compromise means that the question is not to be tried over again. That is the first meaning of compromise. When I compromise a law suit with my adversary, I mean that the question is not to be tried over again."

The Court of Appeal in *Zurich* rightly recognised the policy implications of the claimant's argument that it should be able to set aside the settlement agreement. As Underhill LJ sensibly remarked, "there is a wider principle at stake, that parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later".[29] The Supreme Court did not engage at all with these policy considerations for settlement agreements.

A party should not be able to wait and see whether or not the bargain made is a good one; they should be able to rescind for misrepresentation only if they have in fact been misled.[30] That is true in all cases, since new facts may always emerge that change the prospects of success after settlement. By settling, the parties have allocated the risk that either one of them might have been able to improve their case before or at trial: that is "priced in" to the consideration that the claimant charges the defendant for abandoning the claim.[31] A party should not be allowed to resile from an agreement when it becomes a bad bargain if that party knew or suspected the true position all along.[32] Moreover, settlement agreements are

24. K Lindeman, "Unravelling settlements made with 'eyes wide open'" [2017] CJQ 273, 278–279.

25. *Cf Roocroft v Ball* [2016] EWCA Civ 1009; [2017] 1 WLR 1137, [71] (King LJ).

26. See further Zuckerman, *Civil Procedure*, 3rd edn (2013), [25.1]: "Just as citizens need to be able to access the court in order to assert their rights, so they need rights that are certain. As long as their rights are susceptible to challenge in court, there is uncertainty about the outcome of such a challenge and therefore about the rights themselves. Uncertainty tends to weaken the rule of law because people cannot fully enjoy rights which are doubtful. There is, accordingly, a strong public interest in ensuring that the possibility of litigation is not open ended."

27. Indeed, in the interests of wiping the slate clean, the parties often contract to include in the settlement even claims which are not known to them at the time. See further D Foskett (ed), *Foskett on Compromise*, 8th edn (Sweet & Maxwell, London, 2015), [5.22–5.33].

28. (1869) 20 LT 473 (CA), 474. See too *Binder v Alachouzos* [1972] QB 151 (CA), 158 (Lord Denning MR), 159 (Phillimore LJ), 160 (Roskill LJ), which was cited to the Supreme Court in *Zurich*. See further discussion in *Foskett on Compromise*, 8th edn (2015), ch.6.

29. [2015] EWCA Civ 327, [25].

30. *Foskett on Compromise*, 8th edn (2015), [4.37] and [4.50].

31. As recognised by the Court of Appeal in *Zurich*: [2015] EWCA Civ 327; [2015] Lloyd's Rep IR 585, [16] (Underhill LJ) and [32] (Briggs LJ).

32. Indeed, this is no more than the mirror image of the principle that, where a party does not know or does not suspect of a particular cause of action, the court "will be very slow to infer that [the] party intended to surrender rights and claims": *Bank of Credit and Commerce International SA (In Liq) v Ali (No 1)* [2001] UKHL 8; [2002] 1 AC 251, [10] (Lord Bingham of Cornhill) (also [17]).

not contracts of utmost good faith, so there is no obligation by the counterparty to confirm or deny the suspicions of the other before the compromise is concluded: usually "the basis of the negotiations between … the parties" in a settlement is "that neither side [is] making full disclosure".[33]

The difficulties that flow from the decision in *Zurich* may be particularly acute where the consideration provided under the compromise agreement is an asset whose value can fluctuate substantially, such as shares. It goes against the usual instincts of contract law to allow a party who knows of the misrepresentation to bide his time to find out whether the asset goes up or down in value, and to decide to rescind the contract only at a much later date when it turns out that the bargain made was disadvantageous. Yet this is effectively what *Zurich* permits.

After *Zurich*, compromise agreements no longer have the effect of ending proceedings with finality and certainty. As the very facts of the case show, if a party doubts its chances of prevailing on an issue of fact at trial, it can settle knowing that, if better evidence emerges in the future, it can have another bite of the cherry by rescinding the compromise agreement for misrepresentation.[34] *Zurich* makes it especially difficult to settle claims of fraud conclusively.

Further, the remedy of rescission is not limited to fraudulent misrepresentation; an innocent misrepresentation will do. If the approach in *Zurich* extends to innocent misrepresentation, then all that a settling party need now show in order to reopen the litigation, when it feels that it has improved its case, is that the other side overstated the strength of its case in some way and that such statement influenced the settlement sum originally agreed. This is a very low hurdle, that parties will be able to clear in most cases, and would largely undermine the finality of settlement agreements. As a minimum, therefore, *Zurich* should be confined to fraudulent misrepresentations. We return to that point below;[35] in the particular context of settlement agreements, at least, distinguishing between fraudulent and non-fraudulent contexts would be consistent with the rule that settlement agreements are not generally interpreted to exclude fraud claims.[36]

ZURICH AND PRECEDENT

Lord Clarke and Lord Toulson's analysis of previous case law left them unpersuaded that the claimant's belief in the truth of the misrepresentation was a necessary element for a claim to rescind a contract for misrepresentation.[37] Although the Supreme Court was obviously able to depart from earlier orthodoxy, we suggest that the Supreme Court's approach to precedent is open to criticism because the Justices did not appear to realise

33. *Wales v Wadham* [1977] 1 WLR 199 (Fam), 215–218 (Tudor Evans J).

34. Though, in a press statement after the Supreme Court's decision, the claimant said, without a trace of irony, that it had been "unflinching in its pursuit of fraudulent claims": see *www.zurich.co.uk/en/about-us/media-centre/general-insurance-news/2016/zurich-v-hayward-supreme-court-judgement*.

35. See *post*, text to fnn 125–132.

36. *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 2 Lloyd's Rep 61, [16] (Lord Bingham). See also *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) and *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487; [2008] 2 All ER (Comm) 465.

37. See eg [2016] UKSC 48, [23] (Lord Clarke).

that they were so doing. That is because the Justices conflated the ingredients of a claim to rescind a contract for misrepresentation with those for a claim for damages for the tort of deceit. They appeared not to distinguish between the two.[38] Indeed, Lord Clarke cited more authorities involving claims for damages for deceit in support of his conclusion that the contract could be set aside[39] than he did cases involving rescission for misrepresentation.[40] Similarly, Lord Toulson cited only one true case of rescission for misrepresentation,[41] alongside three cases of damages for deceit.[42]

Admittedly, there has always been a close relationship between deceit and misrepresentation, and there is nothing inherently wrong with reasoning by analogy from one to the other. But that should be done carefully, and identity of approach should not be simply assumed. Lord Herschell warned in *Derry v Peek*[43] about the dangers of this, albeit from the perspective of drawing on authorities on misrepresentation when deciding issues in the tort of deceit, rather than the other way around as in *Zurich*:

> "The principles which govern the two actions differ widely … I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit."

The Justices in *Zurich* did not seem to apply the care called for by Lord Herschell.[44] It is suggested that they gave insufficient weight to the fact that (even fraudulent) misrepresentation and deceit are different causes of action and have been since the decision of *Pasley v Freeman* in 1789.[45] The gist of deceit is that the defendant has

38. See eg *ibid*, [23] (Lord Clarke) and [58] (Lord Toulson).

39. *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA), cited at [2016] UKSC 48, [26–27]; *Arkwright v Newbold* (1881) 17 Ch D 301, cited at [2016] UKSC 48, [42]; *Briess v Woolley* [1954] AC 333 (HL), cited at [2016] UKSC 48, [24]; *Gipps v Gipps* [1978] 1 NSWLR 454 (NSWCA), cited at [2016] UKSC 48, [29] and [43]; *Gould v Vaggelas* [1984] HCA 68; 157 CLR 215, cited at [2016] UKSC 48, [33]; *Downs v Chappell* [1997] 1 WLR 426 (CA), cited at [2016] UKSC 48, [29] and [38]; *Standard Chartered Bank Ltd v Pakistan National Shipping Corp Ltd (Nos 2 and 4)* [2002] UKHL 43; [2003] 1 Lloyd's Rep 227; [2003] 1 AC 959, cited at [2016] UKSC 48, [33]; *Sprecher Grier Halberstam LLP v Walsh* [2008] EWCA Civ 1324; [2009] Lloyd's Rep PN 58, cited at [2016] UKSC 48, [42]. M Jones (ed), *Clerk & Lindsell on Torts*, 20th edn (Sweet & Maxwell, London, 2010), [18.34] was also cited at [2016] UKSC 48, [26] and [30].

40. *Smith v Kay* (1859) 7 HL Cas 750, cited at [2016] UKSC 48, [37]; *Australian Steel & Mining Corp Pty Ltd v Corben* [1974] 2 NSWLR 202 (NSWCA), cited at [2016] UKSC 48, [35]; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL), cited at [2016] UKSC 48, [24] and [35]; *Strover v Harrington* [1988] 1 Ch 390 (Ch), cited at [2016] UKSC 48, [42]; *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), cited at [2016] UKSC 48, [35]; *Kyle Bay Ltd v Underwriters Subscribing under Policy No. 019057/08/01* [2007] EWCA Civ 57; [2007] Lloyd's Rep IR 460; *Sharland v Sharland* [2015] UKSC 60; [2016] AC 871, cited at [2016] UKSC 48, [37]. HG Beale (ed), *Chittty on Contracts* 32nd edn (London, Sweet & Maxwell, 2015), [7.37] and [7.040] was also cited, at [2016] UKSC 48, [33–34] and [43], as was KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation*, 5th edn (LexisNexis, London, 2014), [11.07], at [2016] UKSC 48, [43].

41. *Redgrave v Hurd* (1881) 20 Ch D 1 (CA), cited at [2016] UKSC 48, [64].

42. *Smith v Chadwick* (1884) 9 App Cas 187 (HL), cited at [2016] UKSC 48, [65–66]; *Gipps v Gipps* [1978] 1 NSWLR 454 (NSWCA), cited at [2016] UKSC 48, [68–69]; and *Downs v Chappell* [1997] 1 WLR 426 (CA), cited at [2016] UKSC 48, [70].

43. (1889) 14 App Cas 337 (HL), 359–360. The warning has been made by many other judges (see, eg, *Arkwright* (1881) 17 Ch D 301 (CA), 320 (Cotton LJ)) and commentators (see eg Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 4th edn (2016), [2.02] and [3.01]).

44. In contrast with the careful analogies drawn between the two causes of action in *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc* [2019] EWCA Civ 596, [13–45] (Longmore LJ).

45. (1789) 3 TR 51; 100 ER 450. For an excellent contextual discussion of this foundational case, see M Lobban, "Contractual Fraud in Law and Equity c1750–c1850" (1997) 17 OJLS 441, 459–476.

committed a wrong by consciously lying, and thereby causing damage, to the claimant.[46] The claimant's belief in the lie has never been a freestanding requirement for deceit,[47] although such a belief can inform the question whether the lie has caused loss.[48] There was, for instance, no reference to a requirement that the claimant believe the deceit in *Pasley* itself,[49] nor in the speeches of the House of Lords in *Derry v Peek*.[50] Similarly, Viscount Maugham did not say that the claimant must have had an erroneous belief when he set out his classic statement of the tort in *Bradford Third Equitable Benefit Building Soc v Borders*.[51] The claimant's belief in the lie is simply to be taken into account when determining whether the lie has caused damage—albeit that is clearly a very important factor in that causal analysis.[52]

By relying on authorities on deceit, the Supreme Court's decision that belief in a misrepresentation is not required in claims to rescind a contract for misrepresentation seems unsurprising. But a different conclusion might have been reached had the Justices focused squarely on cases of misrepresentations which induce a contract: the authorities on rescission for misrepresentation do not establish the same propositions.

In contrast to the early cases on deceit, the early cases on rescission for misrepresentation are replete with references suggesting that the claimant should believe the representation. For example, in *Edwards v M'Leay*,[53] Lord Eldon LC said: "if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract". Similarly, in the juggernaut Victorian case of *Attwood v Small*,[54] Lord Brougham held that "the representation so made must have had the effect of deceiving the purchaser; and moreover, the purchaser must have trusted to that representation".[55] Indeed, as the Court of Appeal emphasised in *Redgrave*

46. See eg *Clerk & Lindsell*, 20th edn (2010), [18.01]; P MacDonald Eggers, *Deceit: the Lie of the Law* (Informa, London, 2009), [1.10]. *Cf* R Stevens, *Torts and Rights* (OUP, Oxford, 2007), 8, 89; J Murphy, "Misleading Appearances in the Tort of Deceit" (2016) 75 CLJ 301, 316–323.

47. *Clerk & Lindsell*, 20th edn (2010), [18.05–18.38], which identifies the requirements to be (a) a misrepresentation (b) made by the defendant knowing or without belief or reckless as to its truth (c) with the intention that the misrepresentation will be acted upon by the claimant and (d) that the claimant must have been influenced by the misrepresentation. See too WE Peel and J Goudkamp, *Winfield & Jolowicz on Tort*, 19th edn (Sweet & Maxwell, London, 2014), [12.004]. *Cf* Hemsworth [2016] IMCLY 45, 53–54, esp fn.25, where some authorities on deceit which may suggest the need for an erroneous belief are set out.

48. See *Clerk & Lindsell*, 20th edn (2010), [18.34–18.38]. There is, perhaps, an irony in the name of the cause of action: a successful deceit claim does not require, in all cases, that the claimant be deceived.

49. See eg (1789) 3 TR 51, 56 ("The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs": Buller J); 61 ("fraud without damage, or damage without fraud, will not found an action; but where both concur, an action will lie": Ashhurst J); 65 ("I am of opinion that the action is maintainable on the grounds of deceit in the defendant, and injury and loss to the plaintiffs": Lord Kenyon CJ).

50. (1889) 14 App Cas 337 (HL). The only state of mind which is a freestanding requirement is that of the defendant: see, eg, *ibid*, 374 (Lord Herschell).

51. [1941] All ER 205 (HL), 211.

52. *Clerk & Lindsell*, 20th edn (2010), [18.34–18.38]; MacDonald Eggers, *Deceit* (2009), [7.56–7.59]; *Winfield & Jolowicz*, 19th edn (2014), [12.015–12.017].

53. (1818) 2 Swanston 287, 289.

54. (1838) 6 Cl & F 232 (HL). The proceedings could have inspired Dickens' *Jarndyce v Jarndyce*. The case appeared before the House of Lords for 16 days in June and July 1835 and 30 days between May and August in 1836. Written arguments ran to 10,000 pages. Judgment was not given until 1838.

55. (1838) 6 Cl & F 232 (HL), 448. See too, eg, 335–336, 338 (Earl of Devon), 352, 393–394 (Lord Cottenham LC), 395–397 (Lord Lyndhurst), 502–503 (Lord Wynford). See too *Vigers v Pike* (1842) 8 Cl & F 562; 8 ER 220 (HL), 253 (Lord Cottenham); *Reynell v Sprye* (1852) 1 De GM & G 660 (Ch), 691 (Lord Cranworth); *Jennings v Broughton* (1853) 17 Beav 234; 51 ER 1023 (Ch), 1027.

v Hurd,[56] the fact that the claimants in *Attwood* were not mistaken was one of the grounds on which the House of Lords rejected the misrepresentation claim: "all the material facts were known before they entered into the contract". That meant that suspicion might, in some cases, mean that a claimant was not mistaken and therefore not able to rescind for misrepresentation.[57]

Attwood and *Redgrave* were cited to the Supreme Court in argument in *Zurich*, but *Attwood* was not covered by Lord Clarke and Lord Toulson in their judgments, and *Redgrave* attracted only limited attention.[58] This is surprising because the mistake-based approach seen in those (and other) earlier authorities continued to be entirely orthodox in the twenty-first century. For instance, Lord Nicholls of Birkenhead characterised misrepresentation as induced belief in *Shogun Finance Ltd v Hudson*.[59] Consistent with that characterisation, in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*,[60] Moore-Bick LJ reasoned that a claim in misrepresentation cannot succeed where the claimant was "aware of the true facts". Moreover, that characterisation was central in the earlier decisions in the *Zurich* proceedings. In the first Court of Appeal decision (on whether the claim in misrepresentation against Hayward could proceed or was barred by estoppel or abuse of process), Moore-Bick LJ said that the claimant needed to be "misled" by the representation.[61] In the second Court of Appeal decision (which was overturned by the Supreme Court), Briggs LJ held that:[62]

"the authorities on rescission for misrepresentation speak with one voice. For a misstatement to be the basis for a claim to rescind a contract, the claimant must have given some credit to its truth, and been induced into making the contract by a perception that it was true rather than false."

This conceptualisation of misrepresentation as induced mistake has been widely echoed in academic commentary. For example, MacDonald Eggers has written that:[63]

"The effect of fraud, misrepresentation or mistake … is to inculcate into the mind of the innocent party an error or misrepresentation that itself induces that party to consent [to the contract]. That is not to say that the innocent party did not freely state 'I consent', but the consent was proffered based on a mistaken assumption. … In such cases, there is no true consent, but there is consent based on the misapprehension."

Had the Supreme Court adopted the induced mistake understanding of misrepresentation, it could then have benefited from a broader perspective of the case law on the impact of

56. (1881) 20 Ch D 1, 15–17 (Sir George Jessel MR). See too the emphasis on the claimant's belief at 21–22 (Sir George Jessel MR) and 23 (Baggallay LJ).

57. *Ibid*, 23 (Baggallay LJ).

58. [2016] UKSC 48, [64] and [69] (Lord Toulson).

59. [2003] UKHL 62; [2004] 1 Lloyd's Rep 532; [2004] 1 AC 919, [2], [6], [10] and [18].

60. [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511, [40], albeit also discussing a deceit case, *Pattinson v Flack* [2002] EWCA Civ 1820, [38–39].

61. [2011] EWCA Civ 641, [58] (Moore-Bick LJ).

62. [2015] EWCA Civ 327; [2015] Lloyd's Rep IR 585, [28] (Briggs LJ).

63. MacDonald Eggers, *Vitiation of Contractual Consent* (2016), 25–26. See too Loi [2017] JBL 598, 600–601, citing, additionally, Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 4th edn (2016), [1.03], J Heydon et al, *Meagher, Gummow & Lehane's Equity: Doctrine and Remedies*, 5th edn (LexisNexis Australia, Sydney, 2014), [13.030], D O'Sullivan et al, *The Law of Rescission*, 2nd edn (OUP, Oxford, 2015), [4.01–4.02] and SJ Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (Sweet & Maxwell, London, 1968), 83–84.

doubt and suspicion on mistake-based claims.[64] It would have been particularly worthwhile to take a sideways look at the developing case law on claims for restitution reversing the unjust enrichment arising from a mistaken payment of a non-existent debt.[65]

Two divergent approaches to doubts and suspicions have arisen in light of the decision of the House of Lords in *Deutsche Morgan Grenfell Plc v IRC*.[66] First, Lord Hoffmann suggested that the "real point" was whether the claimant in a state of doubt or suspicion had taken a risk that he might be wrong.[67] It is notable that, in the Court of Appeal in *Zurich*,[68] Underhill LJ used almost identical reasoning. This is understandable: by concluding a compromise agreement, each party inevitably takes a risk that the other's case was not as strong as thought. Risk-taking may be another underlying justification for why settlements should not be lightly unwound, but it is controversial as a doctrinal rule. In practice, "risk-taking" may struggle to distinguish between those doubts and suspicions which preclude a mistake-based claim and those which do not, and has been criticised as being little more than a conclusory label.[69] In any event, Lord Hoffmann's suggestion was not adopted by the other judges in *Deutsche Morgan Grenfell*,[70] and has been doubted as representing the present law.[71]

A second approach, proposed by McKendrick, is to ask whether the claimant had considered it more likely than not that the debt was due.[72] McKendrick was cited with apparent approval by Lord Hope of Craighead in *Deutsche Morgan Grenfell*,[73] and his suggested test has since been applied at first instance[74] and adopted in the wider commentary.[75] This is a test of probabilities not mere possibilities,[76] familiar to courts who engage with the similar test used for civil burden of proof on a daily basis. This is a sensible and workable approach which could be applied equally well in cases of rescission for misrepresentation: the question would be whether the claimant considered it more likely than not that the representation was true at the time of entering into the contract. On the facts of *Zurich*, that would probably have meant that the insurer could not have rescinded the settlement agreement. As HHJ Moloney QC found at first instance, "neither" of the witnesses for Zurich Insurance "can be said to have believed the representations complained of to be true", and both were aware of a "real possibility that this was a

64. *Cf* Lee [2017] LMCLQ 150, 158.

65. See generally C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (Sweet & Maxwell, London, 2016) (hereafter "*Goff & Jones*"), [9.18–9.40].

66. [2006] UKHL 49; [2007] 1 AC 558.

67. *Ibid*, [25–27].

68. [2015] EWCA Civ 327; [2015] Lloyd's Rep IR 585, [16]: "In deciding to settle the defendant takes the risk that those statements are in fact untrue (or, to put it more accurately, would not be proved at trial) and pays a sum commensurate with his assessment of that risk."

69. *Goff & Jones*, [9.35–9.39].

70. [2006] UKHL 49, [65] (Lord Hope of Craighead) and [175] (Lord Brown of Eaton-under-Heywood).

71. *BP Oil International Ltd v Target Shipping* [2012] EWHC 1590 (Comm); [2012] 2 Lloyd's Rep 245, [245] (Andrew Smith J) (not considered on appeal: [2013] EWCA Civ 196; [2013] 1 Lloyd's Rep 561).

72. E McKendrick, "Mistake of Law: Time for a Change", in W Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (BIICL, London, 1997), 232–233.

73. [2006] UKHL 49, [65].

74. *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm); [2010] 1 Lloyd's Rep 631 [76–77] (Flaux J).

75. A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP, Oxford, 2012), 68; *Goff & Jones*, [9.26].

76. G Virgo, *The Principles of the Law of Restitution*, 3rd edn (OUP, Oxford, 2015), 178.

fraudulent claim".[77] For reasons of policy already given, and of principle given below, it is submitted this would have been the better outcome. Unfortunately, the approach adopted in *Zurich*, which was overly reliant upon authorities on damages for deceit, meant that this potential solution already developed in the law of restitution was not considered.[78]

ZURICH AND PRINCIPLE

As has already been noted, the Supreme Court in *Zurich* approached the question of the claimant's state of mind as a narrow one about the causal test for a claim in misrepresentation. By treating the issue that way, the Justices did not consider whether requiring the claimant's belief in the representation was demanded by and followed from the underlying justification for the doctrine. In fact, it does. Both of the main justifications for the doctrine turn on the existence of a mistake on the claimant's part.[79] As Cartwright has put it in the leading text in this area, "misrepresentation is really a sub-category of mistake: induced mistake".[80]

The first justification often advanced is claimant-focused. The argument is that, while the parties manifested sufficient objective consent for a contract to arise, the claimant's consent was nonetheless defective as a result of the mistake induced by the defendant. The law therefore does not hold the claimant to the consequences of his actions: the claimant, through the remedy of rescission, has an option to set aside the contract and recover benefits conferred under it. As Lord Nicholls said in *Shogun Finance*:[81]

> "The existence of a fraudulent misrepresentation means that a person's intention is formed on a false basis—a basis, moreover, known by the other party to be false. The effect of fraud is to negative legal rights or obligations otherwise flowing from an intention to enter into a contract."

It was this claimant-focused justification which, in *An Introduction to the Law of Restitution*, Birks put at the heart of his explanation for why the law allows restitution for mistake, whether induced or otherwise: "the plaintiff is saying … 'My judgement was not properly exercised'".[82] That theoretical explanation was adopted by the Privy Council in *Dextra Bank & Trust Co Ltd v Bank of Jamaica*,[83] and is still mainstream in

77. *Zurich v Hayward* (6 September 2013) Unreported, [2.6]; see too [6.6].

78. Contrast *Brennon v Bolt Burdon* [2004] EWCA Civ 1017; [2005] QB 303, where the Court of Appeal cited the House of Lord's decision in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) to remove the distinction between mistakes of fact and of law as justification for removing that same distinction in respect of misrepresentations.

79. The better view may be that these are not separate justifications but together amount to a bilateral justification of rescission from both parties' perspectives. For other justifications, see, eg, M Chen-Wishart, "The Nature of Vitiating Factors in Contract Law", in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP, Oxford, 2015); NJ McBride, "Rescission", in G Virgo and S Worthington, *Commercial Remedies: Resolving Controversies* (Cambridge, CUP, 2017), 159–161.

80. Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 4th edn (2016), [1.03].

81. [2003] UKHL 62, [6–7].

82. P Birks, *An Introduction to the Law of Restitution*, rsvd edn (Clarendon, Oxford, 1989), 140; and see specifically on misrepresentation 167–173.

83. [2001] UKPC 50; [2002] 1 All ER (Comm) 193 (PC), [29] (Lord Bingham and Lord Goff of Chieveley).

unjust enrichment scholarship today.[84] It is also remains influential in contract law, both in commentary[85] and the case law.[86] The attraction of this theory is its resonance with the idea of contract as a consensual phenomenon.[87] However, by itself, the theory runs into difficulties because it does not explain why the defendant must have induced the mistake or at least have notice of it before the claimant can rescind.[88]

The usual defendant-sided justification for misrepresentation is that it would be wrong for one party to retain the advantages of a contract arising as a result of a mistake he induced the other party to make.[89] This justification has historical pedigree; according to Macmillan, the "most significant concern of courts of equity was that it offended conscience to enforce an agreement that had been procured by mistake. Most other reasons advanced for intervention are linked to this central concern".[90] On this basis, rescission is an appropriate remedy, since it removes the unjust advantage by undoing the contract between the parties and reversing benefits transferred by way of performance. Judges still invoke this justification for many grounds of rescission. Indeed, in the Court of Appeal in *Zurich*, Briggs LJ said: "the true principle is that the equitable remedy of rescission answers the affront to conscience occasioned by holding to a contract a party who has been influenced into making it by being misled or, worse still, defrauded by his counterparty".[91]

By rejecting the belief requirement for misrepresentation, *Zurich* challenges both the claimant-sided and the defendant-sided explanation for why contracts can be rescinded for misrepresentation. As Bant has put it, *Zurich* "drives a wedge" between misrepresentation and mistake.[92] If a claimant, such as the insurer in *Zurich*, considers it more likely than not that a defendant is lying but nonetheless contracts with the defendant, then it is much more difficult to say that the claimant's intention was formed on a false basis and therefore not properly exercised. As for the defendant-sided explanation, rescission cannot be justified on the ground that the defendant should not

84. See, eg, A Burrows, *The Law of Restitution*, 3rd edn (OUP, Oxford, 2011), 203 and 405; J Edelman and E Bant, *Unjust Enrichment*, 2nd edn (Hart, Oxford, 2016), 126–128; *Goff & Jones*, [9.08–9.10]; Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015), 121.

85. See eg *supra*, fn.63, and MacDonald Eggers, *Vitiation of Contractual Consent* (2016), ch.1 generally. See too N Andrews *et al*, *Contractual Duties: Performance, Breach, Termination and Remedies*, 2nd edn (Sweet & Maxwell, London, 2017), [1.001] ("A contract can be rescinded if there was some relevant flaw at the time the contract was made which can be considered as a matter of law to have impaired the consent of one of the parties to the contract so that their consent to enter into the contract can be treated as vitiated").

86. See, eg, *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67; [2016] 1 Lloyd's Rep 55; [2016] AC 1172 [13] (Lord Neuberger and Lord Sumption): misrepresentation is a challenge "going to the reality of consent".

87. *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2018] 1 Lloyd's Rep 495; [2018] 2 WLR 1353, [31] (Lord Reed). For leading contract law theorists adopting a consensual analysis, see eg C Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd edn (OUP, Oxford 2015) and D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart, Oxford, 2005).

88. Following *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL), notice of a misrepresentation induced by a third party is sufficient to justify avoidance against the party with that notice. However, mere notice of a unilateral mistake (not induced by misrepresentation) is not a ground of rescission.

89. See eg T Weir, "Contracts in Rome and England" (1992) 66 Tulane LR 1615, 1624 ("it would be very bad of you to try to take advantage of the mistake you innocently caused, and equity will not allow you to do it").

90. C Macmillan, *Mistakes in Contract Law* (Hart, Oxford, 2010), 45.

91. [2015] EWCA Civ 327, [31]. By "defrauded" we understand Briggs LJ to mean "deliberately misled".

92. [2019] LMCLQ 91, 91.

have the advantage of a mistake he induced in the claimant, because the claimant has made no such mistake. It would be a distortion of the principle to argue that Zurich Insurance made a mistake as to the strength of Hayward's claim at trial: any mistake would be of the effect of the misrepresentation on a third party rather than in respect of the subject matter of the representation itself. In those circumstances, the insurer is better regarded as having made a misprediction rather than a mistake, and it is well established that a claimant should not be able to recover a benefit conferred that has been caused by a misprediction.[93]

Zurich may suggest that the law might be developing a different (also defendant-sided) principle, namely that a defendant should not retain the fruits of his or her untruths regardless of any deception.[94] A comparison might be drawn with developments in criminal law. A range of deception-based offences was to be found in the Theft Act 1968.[95] Indeed, the language of the 1968 Act was deliberately framed to direct attention to the need for the victim to have been mistaken.[96] In 2002 the Law Commission subjected the deception offences regime to searching criticism,[97] and the Fraud Act 2006 which followed provided that a defendant could have committed the criminal offence of fraud by false representation without the victim's having ever been deceived.[98] But the reformed criminal law does not go as far as to support the existence of a general principle against retaining profits made by lying regardless of any deception: the 2006 Act's primary concern is to punish fraudsters, whether by way of fine or imprisonment,[99] not to confiscate their ill-gotten gains.[100]

Moreover, this alternative defendant-sided justification is not found elsewhere in the civil law. That is seen most clearly in the case of deceit. The tort of deceit is not actionable *per se*; proof of damage is a necessary component of the action.[101] The tort is concerned to remedy loss caused by untruths rather than to respond to untruths *per se*.[102] Consistent with this underlying rationale of the tort,[103] it appears that English law recognises compensatory

93. *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50. For this reason, we think *Zurich* also poses difficulties for the "balance theory" offered in McBride, *supra*, fn.79, since where there is no mistake there is no unfair advantage-taking in the sense targeted by misrepresentation. Chen-Wishart, on the other hand, does not take issue with the reasoning in *Zurich*, though she does not explain how exactly it fits with her theoretical approach for misrepresentation: M Chen-Wishart, *Contract Law*, 6th edn (OUP, Oxford, 2018), 222.

94. *Redgrave v Hurd* (1881) 20 Ch D 1, 12–13 (Sir George Jessel MR) discussing the pre-fusion decisions of the courts of equity: "One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false…' The other way of putting it was this: 'no man ought to seek to take advantage of his own false statements'."

95. Theft Act 1968, ss 1, 2, 15, 15A, 16 and 20.

96. Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences* (Cmnd 2977, 1966), para.77.

97. Law Commission, *Fraud* (Law Com No 276, 2002), [3.25–3.42].

98. Fraud Act 2006, s.2.

99. *Ibid*, s.1(3).

100. Albeit this may be a secondary consequence under the Proceeds of Crime Act 2002. For discussion, see M Dyson and P Jarvis, "Remedies of the Criminal Courts", in Virgo & Worthington (eds), *Commercial Remedies: Resolving Controversies* (2017), 535–536.

101. See eg *Diamond v Bank of London and Montreal* [1979] QB 333 (CA), 349 (Stephenson LJ); *Khakshouri v Jimenez* [2017] EWHC 3392 (QB), [138] (Green J).

102. *Cf* Stevens, *Torts and Rights* (2007), 8; Murphy (2016) 75 CLJ 301, 323.

103. *Cf* MacDonald Eggers, *Deceit* (2009), [8.79], who argues that the requirement for loss to complete the cause of action does not preclude restitutionary damages. We disagree: the remedy should be consistent with the gist of the cause of action.

but not restitutionary damages for deceit.[104] So a defendant may well be able to retain the gains of not telling the truth if the claimant suffers no loss as a result, or if the claimant's loss is less than the defendant's gain, unless the claimant is able to bring a concurrent mistake-based claim in unjust enrichment. In a similar vein, where rescission is barred, a defendant who commits an innocent misrepresentation may be able to keep any benefits conferred under a contract, and in such circumstances not have to pay any damages at all to the claimant.[105]

ZURICH RE-EXPLAINED?

Can the outcome in *Zurich* be explained using reasoning that avoids these objections of precedent, principle and policy? Perhaps the same result might have been reached by focusing upon Hayward's deceit, duress or illegal conduct, rather than misrepresentation. However, it is suggested that there are problems with all these reinterpretations.

The insurer had originally brought a tortious claim in deceit for damages reflecting the sum paid over by way of previous settlement, before later amending its case to include rescission.[106] There would be no objection in principle to the insurer's recovering on this basis. However, on the facts, a deceit claim appears to have been caught by the scope of the compromise agreement itself, and that may be why it was necessary for the insurer to amend its case to add a claim to set the contract aside for misrepresentation. It is obviously possible for compromise agreements to prevent claims being brought in deceit; indeed, if the contrary were true, it would be very difficult indeed to settle claims of fraud.

Loi has argued that the settlement in *Zurich* could have been rescinded on the ground of duress,[107] since duress does not require the claimant be mistaken but merely under illegitimate pressure when contracting. It is true that there was an unlawful threat by Hayward to commit fraud by false representation and to pervert the course of justice. This may well be sufficient to establish illegitimate pressure. However, there are real difficulties with the argument that the insurance company was under such pressure by the litigation with Hayward that it had no practical choice but to settle; it plainly could have proceeded to trial.

There are also arguments to be made that Hayward's illegal conduct could have given rise to a claim in unjust enrichment. One reinterpretation would be that the contract should

104. See eg *Halifax Building Soc v Thomas* [1996] Ch 217 (CA), 227 (Peter Gibson LJ). Although at first instance in *Murad v Al-Saraj* [2004] EWHC 1235 (Ch), [344–347], Etherton J did accept the possibility of restitutionary damages for deceit, this was described as a "novel step" on appeal: [2005] EWCA Civ 959; [2005] WTLR 1573, [46] (Arden LJ). Restitutionary damages are most unlikely now after *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2009] Ch 390 and *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20. For the link between actionability *per se* and restitutionary damages, see W Day, "Restitution for Wrongs: One Step Forwards. Two Steps Back?" [2018] RLR 60, 61–63.

105. Misrepresentation Act 1967, s.2(2), discussed in *Salt v Stratstone* [2015] EWCA Civ 745; [2015] 2 CLC 269, [14–18] (Longmore LJ).

106. [2016] UKSC 48, [5] (Lord Clarke).

107. Loi [2017] JBL 598, 607–609. *Cf* Bant [2019] LMCLQ 91, 98–101, who accepts that a duress case is doctrinally "plausible", but concludes that the claim "ultimately rests on a policy-motivated reason for restitution, rather than one concerned with the quality of consent of the claimant to the transaction" which is the basis for duress.

be void for Hayward's criminal fraud, and the settlement made under it recoverable for absence of consideration.[108] However, the effect of illegality is usually to render a contract unenforceable rather than void,[109] and in those circumstances a claim based on absence of consideration may not succeed.[110] Moreover, there is a distinction between a contract induced by criminality, and a contract which on formation is itself illegal or performance of which involves an illegal action. It is in the latter circumstances that the illegality defence applies.[111] In the former circumstance, the question is whether the illegality corresponds to a recognised ground for restitution in private law. So, for example, if someone is threatened with bodily harm in order to make him sign a contract, the response is to rescind the contract for duress and not to claim that the contract is unenforceable because a criminal assault has taken place. The same analysis should also be true for an offence under the Fraud Act 2006: it should not render a contract unenforceable or void, but the same facts may also give rise to a claim in misrepresentation.[112]

A final reinterpretation of *Zurich* using unjust enrichment would be that Hayward's illegality could itself operate as a free-standing ground for restitution. This is the solution preferred by Bant.[113] However, even if illegality is a ground for restitution, its primary manifestation is in the context of allowing recovery of benefits conferred for an illegal purpose by a party seeking to withdraw before that purpose has been fulfilled.[114] *Zurich* was not such a case: the insurer had not been party to an illegal purpose, and, even if it had, the contract in question had been fully executed.

However, the law of illegality is in a state of flux after *Patel v Mirza*.[115] In that case, the Supreme Court appeared to express a clear preference for unwinding transactions tainted by illegality, even where the contract has been fully executed. As the implications of *Patel v Mirza* are worked out in the lower courts, it may be that the outcome in *Zurich* could be accommodated within illegality as a ground for restitution in a way that does not give rise to the wider problems associated with the relaxation of the requirements for a claim in misrepresentation.

108. Better seen as a form of failure of consideration: see Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012), 87.

109. *Chitty on Contracts*, 33rd edn (2018), [16.015].

110. There are other issues with reanalysing the claim in this way, as explored in Bant [2019] LMCLQ 91, 101–104.

111. *Chitty on Contracts*, 33rd edn (2018), [16.011], [16.016–16.017].

112. An anomalous decision in this respect is *Berg v Sadler and Moore* [1937] 2 KB 158 (CA), persuasively criticised in G Treitel, "Contract and Crime", in C Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, London, 1981), 107.

113. Bant [2019] LMCLQ 91, 104–106.

114. The so-called *locus poenitentiae* rule. See eg *Goff & Jones*, [25.18–25.30]; Burrows, *The Law of Restitution*, 3rd edn (2011), ch.19. For doubts that this is a freestanding ground for restitution as opposed to a case of absence of consideration as we have described in the previous paragraph, see G Virgo, "Illegality and Unjust Enrichment", in S Green and A Bogg (eds), *Illegality after Patel v Mirza* (Hart, Oxford, 2018).

115. *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2017] AC 467. For a recent example of the uncertainty in this area, post-*Patel*, see *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841; [2018] Med LR 479, from which the Supreme Court has granted permission to appeal.

ZURICH'S FUTURE

The Supreme Court has shown itself to be willing to revisit the correctness of one of its judgments, as seen by the recent series of cases on illegality,[116] so-called "joint enterprise" liability in the criminal law,[117] and on the availability of compound interest in unjust enrichment.[118] It is not inconceivable that the Supreme Court may be prepared to reconsider *Zurich*'s rejection of misrepresentation as induced mistake. However, that does not seem likely in the near future. It is nevertheless to be hoped that lower courts will confine and restrict *Zurich*. By way of conclusion, we canvass some potential strategies for limiting the impact of *Zurich*.

Restrictions on the scope of *Zurich* were proposed by Nugee J in *Holyoake v Candy*.[119] In that case, the claimant was "not for one moment taken in" by the defendant's lies.[120] The denial of rescission should therefore have been straightforward: as the judge said, "it is difficult to see how he can say that he has been induced to enter into a contract by a lie if he knows that it is untrue".[121] But Nugee J could not simply leave the matter there, and had to go further as a result of *Zurich*. Ultimately, the judge distinguished *Zurich* on two grounds.

First, Nugee J said that in *Zurich* there was no evidence that the insurer knew (as opposed to strongly suspected) that the defendant was lying. Of course, it was accepted by the insurer in the Supreme Court in *Zurich* that, if it had known of the full extent of the falsity of the representations, then rescission would not have been possible.[122] However, as has already been noted, the finding at first instance in *Zurich* was that the insurer was more than just suspicious of Hayward's claim; it never believed his representations to be true. Moreover, Lord Clarke had left open the possibility that a contract could sometimes be rescinded for misrepresentation even when the representee knew of the falsity of the representation.[123] In any event, a hard line between knowledge and suspicion drawn by Nugee J is difficult to apply in practice. The better approach is to treat this as a question of degree: if, on the balance of probabilities, the claimant had thought it more likely than not that the representations were false, then rescission should not have been available. Applying that approach, the right result was reached in *Holyoake* but not in *Zurich.*

Secondly, and more fundamentally, Nugee J distinguished *Zurich* because Hayward told lies not only to the insurer but also to the court, and the insurer had had to assess the risk of those lies being believed by the court.[124] This differs from the "paradigm" case involving

116. *Hounga v Allen* [2014] UKSC 47; [2014] 1 WLR 2889; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430; *Bilta (UK) Ltd v Nazir* [2015] UKSC 23; [2015] 2 Lloyd's Rep 61; [2016] AC 1; *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300.

117. *Chan Wing-Su v The Queen* [1985] AC 168 (PC); *R v Powell (Anthony)* [1999] 1 AC 1 (HL); *R v Jogee* [2016] UKSC 8; [2017] AC 387.

118. *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34; [2008] 1 AC 561; *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39; [2018] 3 WLR 652.

119. [2017] EWHC 3397 (Ch).

120. *Ibid*, [388].

121. *Ibid*, [388].

122. [2016] UKSC 48, [28] and [43] (Lord Clarke).

123. *Ibid*, [43–45].

124. [2017] EWHC 3397 (Ch), [391–395].

only the two parties. It may therefore be that *Zurich* will be restricted to instances where a third party—such as a court—is somehow involved.

This is to be welcomed, but by itself that would be an insufficient strategy for limiting the impact of *Zurich*. In addition, *Zurich* should be restricted to instances of fraudulent misrepresentation.[125] It would be unfortunate if *Zurich* extended to innocent misrepresentation. For example, modifying the facts of *Zurich*, a defendant may tell a claimant that his injuries are severe and that he is unable to work again. Such representations may be false, but not fraudulent because the defendant genuinely believes it to be true having consulted a doctor. But the claimant may well think that, on the balance of probabilities, the defendant cannot possibly be so severely injured, and know that the doctor in question has a history of exaggerating injuries. If the defendant nonetheless settles the claim, a binding contract is made, regardless of whether the defendant's arguments were hopeless from the outset. The defendant's promise not to take further action against the claimant is sufficient consideration for the agreement.[126] The claimant may have made a bad bargain, but that is not a good reason to escape the agreement.

There is some support for distinguishing between fraudulent and non-fraudulent misrepresentation claims. For instance, claims to rescind based on non-fraudulent misrepresentations can be "contractually estopped", whereas the same is not true for claims based on fraudulent misrepresentation.[127] Moreover, the factual presumption of inducement has been primarily applied in cases of fraudulent misrepresentation, and it may not apply at all (or merely in a weaker form) in non-fraudulent cases.[128] There is also an argument that, while a fraudulent misrepresentation need only be "a" cause of a contract, a more stringent "but for" approach is appropriate for non-fraudulent misrepresentations.[129] A result of this distinction is that, in cases of fraudulent misrepresentation, it is sufficient to consider what the claimant might have done had the representations not been made, rather than what the claimant would have done.[130] The reason given for thus distinguishing between the two types of rescission is to deter fraudsters.[131] *Zurich* could be regarded as

125. In *Zurich* [2016] UKSC 48, [53], Lord Toulson cited the well-known phrase from *HIH Casualty v Chase Manhattan* [2003] UKHL 6; [2003] 2 Lloyd's Rep 61, [15] (Lord Bingham) "fraud unravels all". However, Craig Orr QC has perceptively noted that *HIH Casualty* was concerned with a clause purporting to exclude liability for fraud prospectively, which should be distinguished from *Zurich*, which was concerned with a clause purporting to exclude liability for a fraud that had already occurred. The obvious public policy concern in the former context does not apply with the same force in the latter context, where fraud claims ought to be capable of settlement: see "Construction and Enforceability of Settlement Agreements: Review of Modern Case Law" at *www.oeclaw.co.uk/images/uploads/documents/Construction__Enforceability_of_Settlement_Agreements.pdf*.

126. *Cook v Wright* (1861) 1 B & S 559.

127. *HIH Casualty v Chase Manhattan* [2003] UKHL 6; [2003] 2 Lloyd's Rep 61, [15] (Lord Bingham), [125] (Lord Scott of Foscote).

128. See, eg, *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch), [241] (Briggs J); *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 1552 (TCC); [2009] BLR 505, [109–111] (Coulson J); *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm), [647] (Males J); *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc* [2019] EWCA Civ 596, [15], [32] and [45] (Longmore LJ).

129. O'Sullivan *et al*, *The Law of Rescission*, 2nd edn (2015), [4.104–4.107].

130. For a recent detailed discussion, see *Marme Inversiones 2007 SL v NatWest Markets Plc* [2019] EWHC 366 (Comm), [299–317] (Picken J), rejecting the argument that *Zurich* had extended this relaxation to non-fraudulent misrepresentations. See, similarly, *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc* [2018] EWHC 1857 (Comm), [95] (Teare J).

131. O'Sullivan *et al*, *The Law of Rescission*, 2nd edn (2015), [4.105]. EW Peel, *Treitel: The Law of Contract*, 14th edn (Sweet & Maxwell, London, 2015), [9.024].

a similar relaxation that applies only to fraudulent misrepresentations in the interests of deterring fraudulent settlements.[132]

The outcome in *Zurich* should be further confined by principles of affirmation, waiver by election and estoppel. These points were trailed by Briggs LJ the second time *Zurich* reached the Court of Appeal:[133]

> "if he already knows or perceives the truth by the time of the contract, he elects to proceed by entering into it, and cannot later seek rescission merely because he later obtains better evidence of that which he already believed, still less if he merely repents of it. This seems to me to be a fortiori the case where, as here, the misrepresentation consists of a disputed claim in litigation, and the contract settles that claim."

Waiver by election may be a particularly potent way of limiting *Zurich*. It arises in the context of misrepresentation when a party becomes aware of the true facts and faces a choice between rescinding or affirming the contract. If no decision is made within a reasonable time, the law may take the election out of the party's hands and take him or her to have affirmed the contract.[134] Importantly, an election may arise even when a party knows only part of the truth or has no more than doubts or suspicions.[135] In many cases, the very fact that a party has entered into a contract with such suspicions, and has started to perform it, should mean that rescission is then barred.

An example which starkly contrasts with the result in *Zurich* is *Law v Law*.[136] Two brothers were partners in a wool manufacturing business, one actively running the business and the other being a passive investor. The former offered to buy out the latter, and that offer was accepted. However, after entering into that agreement, the exiting partner discovered that the partnership had had significant assets of which he was not aware. He initiated proceedings against his brother to rescind the buy-out agreement for fraudulent misrepresentation but an out-of-court settlement was reached. The exiting partner later sought to rescind the settlement on that basis that there were still further hidden partnership assets. The court held that the claimant could not unravel the settlement since he had suspected, when entering it, that there may well be further partnership assets of which he was not aware. As Cozens-Hardy LJ put it:[137] "after the settlement so come to, in our opinion it was not possible for [the claimant] to reopen the transaction. He deliberately made his election, and by that election he is bound".

Doubt and suspicion will not always mean that a party is in a position to have made an election. Mance J wrestled with this point in a series of judgments concerned with

132. This policy consideration may also provide an explanation for why the law regards a contract to settle a claim known by the claimant to be invalid as being unsupported by consideration, but regards a contract settling an invalid claim but wrongly believed by the claimant to be valid as being supported by good consideration: see eg *Foskett on Compromise*, 8th edn (2015), [3.11] and *Treitel on Contract*, 14th edn (2015), [3.036–3.308].

133. [2015] EWCA Civ 327; [2015] Lloyd's Rep IR 585, [31].

134. *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL), 397–398 (Lord Goff). Affirmation may be more difficult, since the defendant will need to demonstrate that the claimant knew not only of the misrepresentation but also of its right to rescind: *Peyman v Lanjani* [1985] Ch 457 (CA).

135. *Campbell v Fleming* (1834) 1 A & E 40, 110 ER 1122.

136. [1905] 1 Ch 140 (Ch and CA).

137. *Ibid*, 158.

fraudulently inflated insurance claims made by the owner of the Royal Hotel in Guernsey in the wake of the hotel suffering arson attacks.[138] In his first judgment, he recognised that an election could obviously be made where the claimant was aware that the contract had been induced by a misrepresentation but did not know "all aspects or incidents of the fraud".[139] However, on the facts, the insurers had not affirmed the contract: although they had "very strong suspicions" of fraud, they did not have "any sufficient factual basis to justify what they rightly regarded as the extreme step of alleging fraud and avoiding cover".[140] Mance J returned to the point in his second judgment: he rejected the submission that all that was required to have made an election was sufficient belief to plead a case but, on the other hand, accepted that "knowledge is not be equated with complete certainty".[141] Indeed, a person who deliberately decides not to acquire definite knowledge of a fraud for "tactical reasons" must nonetheless be treated as having sufficient knowledge for the purposes of election.[142] Ultimately:[143]

> "… knowledge pre-supposes the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning. The element of regression or circularity involved in this description indicates why knowledge is a jury question."

Subsequent developments in the law of mistake mean that a much more straightforward approach could now be taken by the court: that is to ask whether the claimant believed at the relevant time that it was more likely than not that the contract had been induced by fraud.[144]

A final strategy for containing *Zurich* would be to draw an analogy with an important rule of civil procedure. The courts are cautious about allegations of fraud being used as a pretext to relitigate a dispute. Fresh, incontrovertible or admitted evidence is needed.[145] Further, when it comes to appeals, in *Ladd v Marshall*,[146] Denning LJ considered it important that "the evidence could not have been obtained with reasonable diligence for use at trial". That test is regularly applied to inform the court's discretion to admit new evidence under the CPR.[147] In *Zurich*, the insurers conceded this bar should apply,[148] but Lord Toulson thought it "better to say nothing about it",[149] and Lord Clarke's summary of the law of misrepresentation appeared to allow no room for this: "the representee has no duty to be careful, suspicious or diligent".[150] But this bar is an important buttress for

138. See too the other cases (many of which are Australian) discussed in O'Sullivan et al, *The Law of Rescission*, 2nd edn (2015), [23.17–23.33].
139. *Insurance Corp of the Channel Islands Ltd v McHugh and The Royal Hotel Ltd* [1997] LRLR 94 (Com Ct), 127.
140. *Ibid*, 129.
141. *Insurance Corp of the Channel Islands Ltd v The Royal Hotel Ltd (No 2)* [1998] Lloyd's Rep IR 151 (Com Ct), 162.
142. *Ibid*, 172.
143. *Ibid*, 162.
144. See *ante*, text to fnn 64–78.
145. *Noble v Owens* [2010] EWCA Civ 224; [2010] 1 WLR 2491, [27] (Smith LJ).
146. [1954] 1 WLR 1489, 1491.
147. See eg Zuckerman, *Civil Procedure*, 3rd edn (2013), [2.39], [22.161], [23.55], and [24.255–24.260].
148. [2016] UKSC 48, [76] (Lord Toulson)
149. *Ibid*.
150. *Ibid*, [39].

the principle of finality of litigation.[151] In order to strengthen compromise agreements, it should be extended to circumstances where such agreements are said to have been induced by misrepresentations.

Ultimately, all these solutions fall short of being complete and permanent solutions to the problems posed by *Zurich*. However, the willingness of the Chancery Division in *Holyoake* to characterise *Zurich* as not involving a "paradigm" case of misrepresentation suggests that the impact of the decision may nonetheless be limited by the lower courts. Such developments are to be encouraged to mitigate the consequences of this mistaken turn in the law of misrepresentation.

151. Although the bar does not also apply to claims to set aside judgments on the basis of fraud, where the fraud was not alleged in the original proceedings: *Takhar v Gracefield Developments Ltd* [2019] UKSC 13; [2019] 2 WLR 984.