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Notes and Comments

DECEIT AND NEGLIGENT MISREPRESENTATION IN MARYLAND

Falsehood is dangerous. The law recognizes that the victim of a false statement may suffer personal injury, property damage, or pecuniary loss as surely as may the victim of another's careless act. Traditionally the torts of libel and slander have allowed recovery to victims of defamatory false statements, and the tort of deceit has provided recovery for false statements fraudulently made. But in Maryland and elsewhere, courts have been cautious in permitting recovery in tort for loss caused by misrepresentations that have been made in good faith, but carelessly. As a result of this judicial caution, the Maryland case law on this subject is confused and perhaps somewhat contradictory. The purpose of this Comment is to explore the distinction between the traditional common law action for deceit and the more modern action for negligent misrepresentation first recognized by the Court of Appeals as a valid cause of action in *Virginia Dare Stores, Inc. v. Schuman.*

COMMON LAW DEVELOPMENT OF TORT LIABILITY FOR MISREPRESENTATION

Misrepresentation is a material component of a number of torts. For example, as Prosser has stated, misrepresentation may constitute an element of claims for battery, false imprisonment, trespass, or conversion. Such examples of misrepresentation customarily have not been treated as separate bases of liability; rather, they typically have been merged with the primary claim. At common law the only tort remedy available to a plaintiff who had relied to his injury upon misrepresentation was the writ of deceit, established as a cause of action in tort by *Pasley v. Freeman.* In *Pasley* the King's Bench adopted the rule that "fraud without damage, and damage without fraud gives no cause of action, but where the two

1. See Smith, Liability for Negligent Language, 14 Harv. L. Rev. 184, 190 (1900) [hereinafter cited as Smith].
2. See text accompanying notes 7-19 infra.
3. 175 Md. 287, 1 A.2d 897 (1938).
5. Id., § 105 at 684.
6. Id., § 105 at 684-85.
concur, an action lies.” As to the components of fraud, the opinion indicated that a false statement would constitute fraud if made both with a knowledge of the falsity of the matter asserted and with an intent to induce action in reliance upon the statement.

The rule of Pasley v. Freeman seemed to encompass only those situations where actual knowledge of the falsity of the representation on the part of the defendant could be shown. In Taylor v. Ashton plaintiff brought an action in deceit against particular bank directors for false and fraudulent misrepresentations contained in a published report that stated in substance that the bank was in a flourishing state financially. The Pasley rule was explicitly extended to include otherwise fraudulent statements which the defendant did not believe to be true, but which he did not know to be false. The landmark case of Derry v. Peek concerned a similar factual situation. An action for deceit was brought against directors of a tramway company which had issued a prospectus containing false statements upon which the plaintiff had relied to his detriment. The trial judge found as a matter of fact that while the statements in the prospectus were untrue, they were made with an honest although unreasonable belief in their truth on the part of the directors. He therefore held that the directors were not liable in the action for deceit. In Peek v. Derry the English Court of Appeals reversed, attempting to extend the action of deceit to include those cases where a defendant’s statement had

9. Id. at 453–54. In addition it was recognized that an action for deceit could not lie where the plaintiff was in a position to discover the fraud, but carelessly failed to do so: “Undoubtedly where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence.” Id. at 457 (Lord Kenyon, C.J.). Thus, in an action on the case for deceit, where it was within a carrier’s means to discover the truth by weighing goods entrusted to him, he could not recover when an overage was subsequently discovered, as in Baily v. Merrell, 81 Eng. Rep. 81 (K.B. 1616), or where a purchaser had the means to determine the true state of title to real estate by inspecting the title deeds, he could not recover if he had failed to so inspect. 100 Eng. Rep. at 457. On the other hand, the plaintiffs in Pasley had relied upon the fraudulent assertion that a third party was a safe credit risk. Because there was no other ready means to evaluate that person’s credit, the failure to discover the falsity of the defendant’s statement did not constitute negligence.
11. In Taylor the curious assertion was made that a defendant might be found liable for deceit under certain circumstances when his statement had been true! Thus: [I]f a person told that which was untrue, and told it for a fraudulent purpose, and with the intention to induce another to do an act, and that act was done to the prejudice of the plaintiff, then an action for fraud would lie. . . . [I]t [is] not necessary to show that the defendants knew that the fact they stated to be untrue; . . . it [is] enough that the fact was untrue, if they communicated that fact for a deceitful purpose . . . . [I]f they stated a fact which was true for a fraudulent purpose, they at the same time not believing that fact to be true, in that case it would be both a legal and moral fraud.

Id. at 866.
13. 37 Ch. D. 541 (C.A. 1887).
been made recklessly, without knowledge of its truth or falsity, or where the statement was "untrue in fact but believed to be true, but without any reasonable ground for such belief." This decision, which allowed recovery in deceit for a negligent misrepresentation made in good faith, was in turn reversed by the House of Lords. The Lords held that in a deceit action there must be a showing of scienter on the part of the defendant, as explained by Lord Herschell in the following rule:

First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think that the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think always be an honest belief in its truth.

The scienter requirement has survived to this day in England and many American common law jurisdictions.

The development of the common law action for deceit in Maryland closely paralleled its development in England. In McAleer v. Horsey the defendant had made certain allegedly false and fraudulent statements to induce the plaintiff to invest in highly speculative Nevada silver mines. Applying a rule similar to that of Pasley v. Freeman, the court determined that liability was established when four elements were shown: (a) that the defendant had knowingly made a false representation; (b) that the misrepresentation was made with an intent to induce the plaintiff to enter a contract; (c) that the plaintiff entered the contract in reliance upon the misrepresentation; and, (d) that the plaintiff thereby suffered damages.

14. Id. at 585.
16. 14 App. Cas. at 374. The opinions of the Lords in Derry v. Peek were delivered seriatim; Lord Herschell's opinion is considered controlling. See, e.g., Smith, supra note 1, at 183; Hill, Damages for Innocent Misrepresentation, 73 Colum. L. Rev. 679, 685 (1973) [hereinafter cited as Hill].
19. 35 Md. 439 (1872).
20. The rule is set out in the text accompanying notes 7-9 supra.
21. 35 Md. at 453. The Court of Appeals noted that an exception to this rule would exist under the doctrine of caveat emptor. Under this doctrine, in an action between vendor and vendee concerning an affirmation or representation with regard to real estate, a plaintiff would be unable to recover in deceit even though the false statements were made fraudulently and with knowledge of falsity on the part of the
This rule was subsequently applied in several cases, the Court of Appeals reaffirming the requirement of actual knowledge of falsity on the part of the defendant. However, in Phelps v. George's Creek & Cumberland Railroad Co., the scienter requirement was articulated more broadly, in terms quite similar to those later formulated by the English Court of Appeals in Peek v. Derry. In Phelps the Maryland Court of Appeals approved a jury instruction stating that recovery in deceit could be had where the defendant had made a false statement without reasonable belief in its truth. Admitting that the trial judge's statement of the law had been "liberal," the Court of Appeals nevertheless endorsed the instruction. Phelps supplied the potential for the creation of a remedy in deceit for negligent misrepresentation in that from a finding of unreasonable belief, "legal" or "constructive" fraudulent intent could be inferred.

This apparent extension of the action of deceit to include negligent misrepresentation was again articulated nine years later in Robertson v. Parks, decided three years after the House of Lords' decision in Derry.

22. Id. at 457, citing Medbury v. Watson, 47 Mass. (6 Met.) 259 (1843). With the decline of the doctrine of caveat emptor, this exception has passed into oblivion. See Piper v. Jenkins, 207 Md. 308, 113 A.2d 919 (1955).

23. E.g., Lamm v. Port Deposit Bldg. & Loan Ass'n, 49 Md. 233 (1878); Buschman v. Codd, 52 Md. 202 (1879).

24. 60 Md. 536 (1883).

25. See text accompanying note 16 supra.

26. 60 Md. at 548.

27. Id. at 554.

28. For a discussion of "legal" and "constructive" fraud, see note 53 infra. The court's approval of the instruction may be explained by the fact that it was initially offered to the trial court as a prayer by the defendant. 60 Md. at 542. Had the plaintiff offered such a prayer, and had it been accepted by the trial court, it probably would have been rejected on appeal. In spite of his odd generosity to the plaintiff in conceding a possible recovery in deceit for no more than negligence, the defendant prevailed on the merits.

29. 76 Md. 118, 24 A. 411 (1892).
v. Peek. In *Robertson* the court explained that in an action for deceit, "[i]t is only necessary to show that the defendant pretended to a knowledge which he must, according to principles of reason and good faith, have known he did not possess at the time of the representation made."\(^{30}\) Twelve years after the *Robertson* decision, however, the Court of Appeals in *Cahill v. Applegarth*\(^{31}\) expressly approved the rule of *Derry v. Peek*, thereby drawing the line for actionable scienter to exclude mere negligence.

At this time the Maryland Court of Appeals was quite restrictive in permitting recovery in deceit actions. In *Boulden v. Stilwell*,\(^{32}\) for example, the defendants, president and vice president of a closely held corporation, staged an elaborate charade to induce the plaintiff, who was secretary and treasurer of the corporation, to sell his stock in the corporation to the defendants for approximately one-fourth its real value. The defendants staged mock quarrels between themselves in the plaintiff's presence; they falsely informed the plaintiff that the corporation was losing money and that it was going to "fall down"; and one defendant falsely told the plaintiff that he had sold his share of the business to the other defendant, who as majority stockholder was about to discharge the plaintiff and to force the plaintiff to sell his stock for almost nothing. Recovery was denied the plaintiff not only because most of the defendants' false statements concerned future events rather than past or present facts,\(^{33}\) but also because the plaintiff, as secretary and treasurer, was in a position to know that many

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30. *Id.* at 131-32, 24 A. at 412-13. The court cited *Joice v. Taylor*, 6 G. & J. 54 (Md. 1833), to support this rule. *Joice* was not an action in deceit, however, but an action in equity to rescind a mortgage contract. In equitable actions for rescission it was never necessary for a plaintiff to show that the defendant's false statement was wilfully or even negligently made: "The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the statement made as true was believed to be true, and therefore, if false, deceived the party to whom it was made." *Id.* at 58 (emphasis in original). See Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231, 237 (1966) [hereinafter cited as Prosser, *Misrepresentation*].

31. 98 Md. 493, 56 A. 794 (1904). In *Cahill* the trial court had allowed recovery against a bank director whose negligent misrepresentation that his bank was in a "prosperous condition and making money" had induced the plaintiff to purchase bank stock. The Court of Appeals reversed, stating:

A bank officer may be, and generally is, liable for his want of reasonable care, or in other words for his negligence, but it does not follow that he had been guilty of fraud, or that he can be sued in a form of action that depends upon fraud for its foundation.

... [T]his is an *action for deceit*. If it were a bill in equity to rescind the contract different principles might be applied. ... "In such a case the Court will ... rescind the contract without any fraudulent intent being shown, without any knowledge actual or constructive on the part of the vendor that the statements were in fact false."

*Id.* at 503-04, 56 A. at 797, citing *Trimble v. Reid*, 97 Ky. 713, 31 S.W. 861 (1895), and *Joice v. Taylor*, 6 G. & J. 54 (Md. 1833), discussed in note 30 *supra*.

32. 100 Md. 543, 60 A. 609 (1905).

33. *Id.* at 556, 60 A. at 612.
of the defendants’ statements were false.\textsuperscript{34} The court additionally ruled that there could never be recovery in deceit for false assertions as to the ownership of stock,\textsuperscript{35} apparently misinterpreting a statement in an earlier case that such an assertion was not “material.”\textsuperscript{36}

In \textit{Gittings v. Von Dorn}\textsuperscript{37} the Court of Appeals outlined five prerequisites for recovery in deceit: (a) false representation made by the defendant; (b) knowledge of falsity or such reckless indifference to truth as to impute knowledge to the defendant; (c) an intent to defraud the plaintiff by means of the misrepresentation; (d) justified reliance by the plaintiff upon the misrepresentation, and action thereupon; and, (e) damage directly resulting therefrom.\textsuperscript{38} These prerequisites for recovery were repeated some thirty years later in \textit{Appel v. Hupfeld}\textsuperscript{39} and are now firmly established as the rule by which deceit actions are decided in Maryland.\textsuperscript{40}

\textsuperscript{34} Id. Plaintiff had testified that the defendants had not permitted him to open a set of books for the company until well after its operations had commenced, so that plaintiff did not know, and could not easily have ascertained, the financial condition of the company at the time that he sold his stock to the defendants. \textit{Id.} at 554, 60 A. at 611.

\textsuperscript{35} \textit{Id.} at 556, 60 A. at 612.

\textsuperscript{36} In support of this general rule, the court cited Cahill v. Applegarth, 98 Md. 493, 56 A. 794 (1904), discussed in note 31 \textit{supra}. In Cahill, the court had indicated that, under the facts of that case, a false representation by a bank president as to the real ownership of stock that he was trying to sell was not material. \textit{Id.} at 505, 56 A. at 798. In Cahill, the plaintiff had not been induced to buy the stock by the defendant’s statement that he owned it. In Boulden, on the other hand, the misrepresentation concerning ownership of the stock was material, as it was part of the larger conspiracy by the defendants to persuade the plaintiff that the company was going to “fall down,” and that one of the defendants had sold out his interest to the other. Thus in Boulden the court converted the specific finding of immateriality in Cahill into a general rule that no statement concerning the ownership of stock could ever support a deceit action.

\textsuperscript{37} 136 Md. 10, 109 A. 553 (1920).

\textsuperscript{38} The rule in \textit{Gittings} was stated as follows:

To entitle the plaintiff to recover it must be shown: (1) that the representation made is false; (2) that its falsity was either known to the speaker, or the misrepresentation was made with such a reckless indifference to truth as to be equivalent to actual knowledge; (3) that it was made for the purpose of defrauding the person claiming to be injured thereby; (4) that such person not only relied upon the misrepresentation, but had a right to rely upon it in the full belief of its truth, and that he would not have done the thing from which the injury resulted had not such misrepresentation been made; and (5) that he actually suffered damage directly resulting from such fraudulent misrepresentation. \textit{Id.} at 15–16, 109 A. at 554.

\textsuperscript{39} 198 Md. 374, 84 A.2d 94 (1951).

\textsuperscript{40} The rule of \textit{Gittings v. Von Dorn} was stated verbatim in the following cases: Casale v. Dooner Laboratories, Inc., 503 F.2d 303, 306 (4th Cir. 1973) (scienter requirement not satisfied); Canatella v. Davis, 264 Md. 190, 198, 286 A.2d 122, 126 (1972) (scienter requirement not satisfied); James v. Goldberg, 256 Md. 520, 528–29, 261 A.2d 753, 758 (1970) (reliance by plaintiff held to be unreasonable, and falsehood held not actionable); Lambert v. Smith, 235 Md. 284, 287, 201 A.2d 491, 493 (1964) (scienter requirement not satisfied); Lustine Chevrolet v. Cadeux, 19 Md.
By adopting the scienter requirement of *Derry v. Peek*, the Court of Appeals, despite appearances, did not in actuality constrict the scope of liability in deceit actions in Maryland. From a study of the foregoing Maryland cases, it is apparent that no opinion of the court had ever affirmatively held that a defendant could be liable for a statement made with an honest belief in its truth. *Phelps v. George's Creek & Cumberland Railroad Co.* and *Robertson v. Parks* came closest when the court intimated that a defendant might be liable if he made his statement without reasonable grounds for believing its truth. It still remained as a requirement for recovery, however, that the statement be made with a “fraudulent purpose,” that is, a design to defraud the plaintiff through a statement made “without a *bona fide* belief in its truth.” What *Derry v. Peek* and the Maryland cases that have followed it have done is merely to articulate in rigid, mechanistic terms the vague evidentiary standard by which fraud had been determined in earlier cases. Thus while it appeared both in *Robertson* and in *Phelps* that the court had extended liability to all cases where the defendant's asserted belief in his statement was unreasonable, this was but an evidentiary aid: unreasonable belief was merely evidence of the defendant's actual knowledge that his statement was untrue. The common law courts prior to *Derry v. Peek* had been unwilling to set forth a rule delineating the precise requirements for recovery in deceit because they recognized that the articulation of the elements of fraud might enable

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41. 60 Md. 536 (1883).
42. 76 Md. 118, 24 A. 411 (1892).
43. Id. at 131, 24 A. at 412.
44. “[G]ross negligence [does not], in construction of law, amount to fraud, but [is] only evidence to be left to the jury, from which they might infer fraud, or want of *bona fides* . . . .” Wilson v. York & Md. Line R.R., 11 G. & J. 58, 79 (Md. 1839). In Cahill v. Applegarth, 98 Md. 493, 56 A. 794 (1904), it was asserted that those cases that had permitted recovery without proof of actual knowledge of falsity on the part of a defendant were cases where defendant's knowledge had been imputed from evidence of a lesser state of mind than that of actual knowledge. For example, actual knowledge could be inferred from the fact that the defendant had no reasonable grounds for believing that his statement was true. Yet this inference could be avoided by evidence that the defendant honestly, although unreasonably, believed in the truth of his statement. Id. at 502-03, 56 A. at 797. This distinction was most succinctly articulated by Lord Bramwell in *Derry v. Peek*, referring to the ruling of the Court of Appeal below as “a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action.” 14 App. Cas. at 352.
artful swindlers better to avoid the appearance of fraud and thereby escape liability for their fraudulent acts.\textsuperscript{46} Specific states of mind, such as carelessness, recklessness, indifference as to truth or falsity, or disbelief in truth, were not intended to be taken as substantive parameters of culpability. Rather, they were to be considered evidence in determining whether a defendant possessed an intent to deceive the plaintiff, referred to in the cases as “fraudulent intent.”\textsuperscript{46} The adoption of the scienter requirement of \textit{Derry v. Peek} by the Maryland courts, then, has been more a crystallization of evidentiary standards than a substantive alteration of liability in deceit.

The actual scope of liability under the tort of deceit as it exists today is firmly supported by important policy considerations. In England and in many jurisdictions of the United States\textsuperscript{47} including Maryland, judges have been unwilling to broaden the deceit action to reach defendants whose false statements were honestly made due to the negative connotations attendant upon a charge of fraud. A defendant found guilty of deceit is by implication dishonest, perhaps morally deficient, and certainly not to be trusted.\textsuperscript{48} The consequences of a deceit action can be commercially and socially disastrous to the defendant.\textsuperscript{49} Hence, in these jurisdictions, the action for deceit has

\begin{footnotesize}
\begin{enumerate}
\item Thus, in McAleer v. Hörsey, 35 Md. 439 (1872), it was stated: The common law not only gives no definition of fraud, but perhaps wisely asserts as a principle that there shall be no definition of it, for, as it is the very nature and essence of fraud to evade all laws in fact, without appearing to break them in form, a technical definition of fraud . . . would be in effect telling to the crafty how precisely to avoid the grasp of the law. \textit{Id.} at 452.
\item In Pasley v. Freeman, 100 Eng. Rep. 450 (1789), fraudulent intent was generally described as an intent to persuade the plaintiff to undertake a course of action desired by the defendant in reliance upon a statement which the defendant did not believe to be true. \textit{Id.} at 456; \textit{accord} Lickus v. O’Donnell, 321 Ill. App. 144, 52 N.E.2d 271 (1943).
\item See cases at note 18 and accompanying text \textit{supra}.
\item Lord Bramwell indicated in \textit{Derry v. Peek} that the word “fraud” in common parlance was reserved for actions of great turpitude, and thus should not be applied to a lesser breach of moral duty such as negligence. 14 App. Cas. at 351-52. Professor Williston stated that “[t]he use of the words ‘fraud’ and ‘deceit’ have probably exercised an unfortunate influence upon the development of the law on the subject.” Williston, \textit{Liability for Honest Misrepresentation}, 24 \textit{HARV. L. REV.} 415, 434 (1911) [hereinafter cited as Williston].
\item As stated by Stirling, J., the trial judge quoted with approval by Lord Bramwell in \textit{Derry v. Peek}:
\begin{quote}
[M]ercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that these things would come about, and when they did not come about, make them liable in an action of fraud.
\end{quote}
14 App. Cas. at 349; \textit{accord} Donnelly v. Baltimore Trust & Guarantee Co., 102 Md. 1, 61 A. 301 (1905), where the Court of Appeals, referring to an exaggerated statement in the prospectus, stated:
\begin{quote}
[I]f it had been [a cause of the plaintiff’s damages], it would be a very slight foundation for a verdict, which has as its result a stain upon the character of reputable men . . . by branding them as parties to a fraud . . . .
\end{quote}
\textit{Id.} at 17, 61 A. at 307-08.
\end{enumerate}
\end{footnotesize}
been restricted to circumstances where it can be proved that the defendant's behavior was such as could be characterized as morally reprehensible.\textsuperscript{50}

This is reflected by the fact that in a few jurisdictions including Maryland, a higher standard of proof is required in deceit actions than the "preponderance of the evidence" test that is the standard for most other tort actions.\textsuperscript{51}

The need for a remedy in tort for persons who had reasonably relied to their detriment upon negligently made misrepresentations was recognized by courts and commentators alike,\textsuperscript{52} but differences of opinion arose as to the method of providing it. Some jurisdictions, ignoring \textit{Derry v. Peek}, chose to extend the scope of the deceit action to include cases where the defendant honestly though unreasonably believed in the truth of his statement.\textsuperscript{53} A few jurisdictions chose to allow recovery in tort for misrepres-

\textsuperscript{50} As explained by the Maryland Court of Appeals:
\[\text{[N]}\text{either the common law nor any code of human laws seeks to enforce the rule of perfect morality declared by divine authority, which acknowledges as its one principle the duty of doing to others as we would that others should do to us, and which, by consequence, absolutely excludes and prohibits all cunning and craft or astuteness practiced by any one for his own exclusive benefit. And it thence follows that a certain amount of selfish cunning passes unrecognized by courts of justice, and that a man may procure to himself, in his dealings with others, some advantages to which he has no moral right, but to which he may succeed in establishing a perfect legal title. But if anyone carries this too far: if by craft and selfish contrivance he inflicts an injury upon his neighbor and acquires a benefit to himself beyond a certain point, the law steps in [and] ... rectifies the wrong by sustaining an action for the deceit.}
\text{McAleer v. Horsey, 35 Md. 439, 451-52 (1872) quoted in Boulden v. Stilwell, 100 Md. 543, 551-52, 60 A. 609, 610 (1905).}


In \textit{Trenchcraft}, the Court of Special Appeals stated as part of the justification for the higher standard that: "[p]ersonal and business reputations should not be saddled with the stigma of fraud when the conduct complained of is basically a failure to abide by the terms of an agreement or an understanding." 17 Md. App. at 656, 303 A.2d at 438.

\textsuperscript{52} \textit{E.g.}, Seale v. Baker, 70 Tex. 283, 7 S.W. 742, 744-45 (1888); Angus v. Clifford, [1891] 2 Ch. D. 449, 470 (C.A.); Williston, \textit{supra} note 48; Smith, \textit{supra} note 1; 7 L.Q. Rev. 107 (1891), 5 L.Q. Rev. 101 (1889).

\textsuperscript{53} This is generally accomplished either by resort to such fictions as "legal fraud" or "constructive fraud," whereby scienter is presumed when a statement has been made without reasonable grounds for belief in its truth, \textit{see, e.g.}, Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899); Jefferson Standard Life Ins. Co. v. Hendrick,
sentations made neither wilfully nor negligently, but applied in effect a standard of strict liability.\textsuperscript{54} Other jurisdictions, including Maryland, came to permit recovery for certain negligent misrepresentations, not in an action for deceit, but in a separate type of action the gravamen of which was negligence.\textsuperscript{55} In England \textit{Derry v. Peek} was long interpreted to restrict recovery in tort for negligent misrepresentation to cases involving contractual or fiduciary relationships between the parties,\textsuperscript{56} even though the Lords had held in \textit{Derry v. Peek} only that negligent misrepresentation was an insufficient basis for a deceit claim, not precluding the development of a separate negligence action.\textsuperscript{57} By contrast, in the United States courts in New Hampshire and New York quickly recognized that to allow recovery in negligence for misrepresentation would not require abandonment of the rule in \textit{Derry v. Peek}.\textsuperscript{58} In both states the action in negligence was given

\begin{footnotesize}

\textsuperscript{55} See, e.g., Holt v. Kolker, 189 Md. 636, 57 A.2d 287 (1948); Virginia Dare Stores, Inc. v. Schuman, 175 Md. 287, 1 A.2d 897 (1938); Prosser, Misrepresentation, supra note 30, at 235; Smith, supra note 1, at 186-99

\textsuperscript{56} See, e.g., Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164 (C.A.); Nocton v. Lord Ashburton, [1914] A.C. 932; Le Lievre v. Gould, [1893] 1 Q.B. 491 (C.A.). This interpretation remained the law in England until 1961, when it was decided that the same recovery could be had for negligent words as for negligent acts where the damage to the plaintiff was "physical," involving either personal injury or property damage. Clayton v. Woodman & Son, [1962] 2 Q.B. 533, 542-46 (C.A. 1961). Two years later, in Hedley Byrne & Co. v. Heller & Partners, [1964] A.C. 465 (1963), the House of Lords expressed its opinion in dicta that, where only pecuniary loss was involved, there could be recovery for negligent misrepresentation in the absence of a contractual or fiduciary relationship, if "the speaker or writer has undertaken some responsibility" to take reasonable care to speak the truth. \textit{Id.} at 483.

\textsuperscript{57} See Smith, supra note 1, at 185.

\textsuperscript{58} See, e.g., Edwards v. Lamb, 69 N.H. 600, 45 A. 480 (1899); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).\end{footnotesize}
broad scope to permit recovery for both personal injury and pecuniary loss.\textsuperscript{59}

**The Negligence Action in Maryland**

*The Origin of the Action: Virginia Dare Stores, Inc. v. Schuman*

Prior to 1938 there had been no recovery in tort for negligent misrepresentation in Maryland. In that year in *Virginia Dare Stores, Inc. v. Schuman*,\textsuperscript{60} the Court of Appeals allowed recovery in negligence where a plaintiff had been seriously injured as a result of relying upon the defendant's misrepresentation. While employed by a window washing firm hired by the defendant to clean the walls of one of its stores, the plaintiff asked the store manager whether it was safe to stand upon a dress case. The store manager affirmed that it was safe, and upon the plaintiff's further hesitation insisted that the plaintiff stand upon the case. Relying upon the manager's assurance, the plaintiff put his full weight upon the case which immediately collapsed, throwing plaintiff to the floor. These facts did not support an action for deceit as there was no indication whatsoever that the manager was aware that his assurances were false. Still the manager had been careless in affirming that the case would support a man's weight. In permitting the action for negligent misrepresentation to stand, the Court of Appeals stated:

It appears from the declaration . . . that this action is founded upon negligence in misrepresentation. No Maryland case has been found directly upon the subject, but the weight of authority in other jurisdictions seems to be that such action is not necessarily confined to injuries arising out of contractual relations; that the action lies for negligent words, recovery being permitted when one relies on statements of another, negligently volunteering an erroneous opinion intending that it be acted upon and knowing that loss or injury are likely to follow if it is acted upon.\textsuperscript{61}

In formulating its rule the court in *Virginia Dare* relied upon two cases from other jurisdictions: *Cunningham v. C.R. Pease Co.*,\textsuperscript{62} and *International Products Co. v. Erie Railroad Co.*\textsuperscript{63} In *Cunningham* the defendant had negligently assured the plaintiff's mother that it was safe to apply stove blacking purchased from the defendant to a hot stove. The product subsequently exploded during application, injuring the plaintiff. The New Hampshire Supreme Court ruled that the plaintiff could recover in an action for negligence, asserting that:

[A] person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he


\textsuperscript{60} 175 Md. 287, 1 A.2d 897 (1938).

\textsuperscript{61} *Id.* at 291–92, 1 A.2d at 899.

\textsuperscript{62} 74 N.H. 435, 69 A. 120 (1908).

\textsuperscript{63} 244 N.Y. 331, 155 N.E. 662 (1927).
sustains in an action of deceit, when the maker of the statement knew it to be false, and in an action of negligence when he ought to have known it to be so.64

According to the New Hampshire court in Cunningham, the action in negligence for misrepresentation was, in effect, an action for deceit without the requirement of scienter on the part of the defendant and with the added defense of contributory negligence.65

*International Products* involved a warehouseman's false statements as to the location of certain goods, causing them to be uninsured when subsequently destroyed by fire. The New York Court of Appeals, in allowing the owner to recover, asserted: "[I]n a proper case we hold that words negligently spoken may justify the recovery of the proximate damages caused by faith in their accuracy."66

*Virginia Dare* is the leading case respecting negligent misrepresentation in Maryland,67 and the elements of the cause of action, derived from *Virginia Dare*, include: (a) a negligently volunteered erroneous opinion; (b) intent on the part of the defendant that the opinion be relied upon; (c) knowledge on the part of the defendant that plaintiff's reliance would be "likely" to cause loss or injury to him;68 (d) action in reliance upon the opinion by the plaintiff, and, while not explicitly mentioned in the statement of the rule, it is a general principle of negligence that (e) the defendant's careless conduct must have been the proximate cause of the plaintiff's injury. Since *Virginia Dare*, the issue of negligence by misrepresentation has been before the Maryland courts only infrequently. In *Holt v. Kolker*69 recovery in negligence was denied to a housewife who had fallen through the back porch of her house after relying upon statements by her landlord and plumbers who were working on the porch that it was safe to walk upon. In *Piper v. Jenkins*70 a deceit action involving alleged misrepresentations involving a sale of land, the Court of Appeals carefully distinguished the actions of deceit and negligent misrepresentation, relying upon *Holt* and *Virginia Dare*.71 In *Brack v. Evans*72 in which stockbrokers were said to have given advice to the plaintiff concerning the purchase of stock that was "in grossly negligent, reckless and careless disregard for the truth,"73 the Court of Appeals

64. 74 N.H. at 437, 69 A. at 121.
65. Id.
66. 244 N.Y. at 338, 155 N.E. at 664.
67. *Virginia Dare* has been cited in all subsequent Maryland actions involving negligent misrepresentation except Delmarva Drilling Co. v. Tuckahoe Shopping Center, 268 Md. 417, 302 A.2d 37 (1973), discussed in text accompanying notes 131-39 infra.
68. For a discussion of this element, see notes 88-95 and accompanying text.
69. 189 Md. 636, 57 A.2d 287 (1948).
70. 207 Md. 308, 113 A.2d 919 (1955) (dictum).
71. Id. at 313, 113 A.2d at 921.
73. Id. at 553, 187 A.2d at 882.
held that the facts as alleged would not support an action for deceit, but would support recovery in negligence.\(^7\) Subsequently in *St. Paul at Chase Corp. v. Manufacturers Life Insurance Co.*, the Court of Appeals upheld a trial court's finding that a mortgage broker had made an actionable negligent misrepresentation to a developer concerning the withdrawal of a mortgage offer by a prospective mortgagee.\(^5\) And most recently, in *Local 75, United Furniture Workers of America v. Regiec*,\(^6\) the Court of Special Appeals permitted recovery in a negligence action in which an employee of the union misinformed the plaintiff as to his rights under the Union's hospitalization insurance plan, causing the plaintiff to incur unnecessary personal liability for his hospital bills. It is from these cases and from the law of other jurisdictions upon which our courts have relied, that the perimeters of liability for negligent misrepresentation must be established in Maryland. The following sections are addressed to some of the problems that may arise in determining these perimeters.

**Physical Injury and Pecuniary Loss**

It has been suggested that in negligence actions involving misrepresentation the law allows more liberal and comprehensive recovery where tangible physical harm rather than mere pecuniary loss is a factor.\(^7\) The first Maryland cases, *Virginia Dare* and *Holt v. Kolker*,\(^8\) involved personal injury, and while the Court of Appeals did not explicitly limit the action to situations involving personal injury in *Virginia Dare*,\(^9\) that limitation was made a part of the rule in *Holt*,\(^8\) and subsequently confirmed in *Piper v. Jenkins*.\(^8\) Despite this development the court rejected

\(^7\) Id. at 553–54, 187 A.2d at 883.
\(^5\) 262 Md. 192, 278 A.2d 12 (1971).
\(^8\) 189 Md. 636, 57 A.2d 287 (1948).
\(^9\) See text accompanying note 6 supra.
\(^8\) The court paraphrased the *Virginia Dare* rule as follows:

> In Maryland there can be no recovery in an action for deceit on the ground of negligent misrepresentation. . . . But this Court has held that *in an action for personal injury* recovery may be had for negligent words where one relies on the statements of another who negligently volunteers an erroneous opinion, intending that he be acted upon and knowing that loss or injury are likely to follow if it is acted upon.

189 Md. at 639, 57 A.2d at 288 (emphasis added).
\(^8\) 207 Md. 308, 313, 113 A.2d 919, 921 (1955). The *Piper* dictum, unlike the statement of the rule in *Holt*, implied that recovery could never be had for negligent misrepresentation absent a showing of personal injury:

> The Maryland Court of Appeals, following the decision in *Derry v. Peek*, has held that a false statement of fact made by a person honestly with a belief in its truth, and relied upon by the person to whom it is made, does not constitute such fraud as will support an action for deceit. . . . It has been held, however, that *an action will lie for personal injury* resulting from reliance upon statements
the personal injury limitation in *Brack v. Evans*,\(^8\) in which only pecuniary loss was involved. Since the subsequent Maryland cases in which actionable negligent misrepresentation was found to exist also involved only pecuniary loss,\(^8\) this rejection was apparently permanent. The distinction between physical harm and pecuniary loss may have developed in this context from an understanding by the courts that the defendant in a negligence action must be held to a higher standard of care where one of the consequences of his activity might be serious personal injury.\(^8\)

Regardless of the origin of the physical harm/pecuniary loss distinction, it has been rejected in New Hampshire\(^8\) and New York,\(^8\) at least to the extent that a showing of physical harm is no longer a prerequisite for recovery in an action for negligent misrepresentation in those jurisdictions. The type of damage suffered by a plaintiff may, however, remain relevant as a factor in determining the degree of care required of the defendant in determining the scope of his duty to ascertain the truth of his representations.\(^8\)

*Knowledge that Injury is Likely to Follow*

One of the elements of a cause of action for negligent misrepresentation, as articulated in *Virginia Dare* and its progeny, is that the defendant "kno[w] that loss or injury [is] likely to follow if [his statement] is acted upon."\(^8\) This seems to indicate that the defendant must have had actual knowledge of the danger of loss or injury to the plaintiff. Other language in *Virginia Dare* indicates that this was not the intent of the court: "If one invites another into danger of which the former ought to be aware, and of which the latter is ignorant, and is under no duty to inquire, and injury follows, responsibility follows."\(^8\) Indeed, if this element of the rule is to be understood as requiring that the defendant be which negligently volunteer an erroneous opinion made with intention that it be acted upon and with knowledge that injury would likely result if acted upon.


\(84\) *See Prosser, supra* note 4, at 146-47.

\(85\) In Weston v. Brown, 82 N.H. 157, 131 A. 141 (1925), the New Hampshire Supreme Court stated:

But it is urged that the Cunningham case was an action for personal injuries, and is therefore distinguishable from the case at hand. Once granting, however, that damage has resulted from reasonable reliance upon a negligent misstatement, it is difficult to perceive why liability should be made to depend upon the nature of the injury sustained.

\(86\) *See, e.g.,* Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922).

\(87\) *See text accompanying note 108 infra.*

\(88\) 175 Md. at 292, 1 A.2d at 899. *See text accompanying notes 61-68 supra.*

\(89\) *Id.* at 297-98, 1 A.2d at 901 (emphasis added), *quoting* Liebold v. Green, 69 Ill. App. 527 (1897).
aware of the potential danger to the plaintiff, then in *Virginia Dare* itself recovery should have been denied since there was no evidence in that case that the store manager was aware that the plaintiff was "likely" to be injured if he stood upon the dress case. Had this been so, the manager would have been guilty of fraud rather than mere negligence. A sensible interpretation of this element is that for the defendant to be liable, he must realize that *if his statement is false*, loss or injury will likely follow if it is acted upon.

This interpretation of the element is supported by the results in subsequent Maryland cases. In *Brack v. Evans* the plaintiff had asked one of the defendants, a stockbroker, to purchase certain shares of stock to be offered for sale following a twenty-five to one split. The defendant advised the plaintiff to purchase the company's stock prior to the split, stating that the new stock would probably be oversubscribed and that the plaintiff would get dividends and other rights and privileges only by purchasing the old stock. The plaintiff relied upon this advice and purchased the old stock, but paid considerably more than the new stock purchase price. Finding the arranged deal to be much less advantageous than the defendants had represented it to be, plaintiff sued. Since the plaintiff had not alleged facts from which defendants' knowledge of falsity could be inferred, the Court of Appeals upheld the trial court's dismissal of his count charging fraud; however, the court reversed the trial court's dismissal of plaintiff's negligence count, holding that the allegations contained in the declaration were sufficient to warrant trial on the issue of negligence, citing *Virginia Dare* and *Holt*. The plaintiff did not allege that his stockbroker *knew* that the plaintiff was likely to lose money as a result of relying upon the broker's advice. Had this allegation been raised, the Court of Appeals could not have rejected the plaintiff's count charging fraud — knowledge that the plaintiff was likely to lose money because of reliance upon the defendant's advice was equivalent in this situation to knowledge that the representations contained in the advice were false. If the defendant stockbroker was honestly unaware that his advice contained misrepresentations, he could hardly have known that loss would be the likely result from reliance upon it. Similarly in *Local 75, United Furniture Workers of America v. Regiec*, the plaintiff, who was about to enter a hospital for surgery, inquired of his union whether he was presently covered under its hospitalization insurance program. The union employee who handled the program informed the hospital that plaintiff's insurance was still effective. In fact, the plaintiff was actually ineligible for benefits at the time of his hospitalization, and as a consequence he suffered financial loss. The plaintiff was allowed to recover

91. Id. at 553, 187 A.2d at 882.
92. Id. at 553, 187 A.2d at 883.
93. Id. at 554, 187 A.2d at 883.
because "the [defendant] chose to establish procedures whereby inquiry was invited and answers given with the clear knowledge that such advice would be acted upon to sway the conduct of the inquirer."98 Undoubtedly the defendant's employee was aware that pecuniary loss would likely follow a mistaken assurance that the plaintiff was covered by the insurance program. There was no indication in the case, however, that the employee actually knew that the plaintiff was likely to incur this loss.

The Relationship Between Plaintiff and Defendant

It is generally true that in a deceit action, if fraudulent misrepresentation has been proved, the scope of the defendant's liability may be very broad, as long as the plaintiff's reliance is reasonable and he has suffered actual damage.96 In a case of negligent misrepresentation, however, the court must carefully evaluate the relationship between the plaintiff and the defendant, and if that relationship is only tenuous in nature, recovery will be denied even where the elements of a cause of action are otherwise proved. Thus in Ultramares v. Touche, Niven & Co.,97 considered to be one of the leading cases in the field of negligent misrepresentation, Judge Cardozo refused to find accountants, who, it was alleged, had carelessly certified a balance sheet, liable in negligence to a third party who had relied upon the certification in advancing a loan to the corporation whose balance sheet had been so certified. To find negligence in such a case, it was suggested, would extend the scope of liability much too far:

"Everyone making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together." H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 168, 159 N.E. 896, 899 (1928). "The law does not spread its protection so far."98 This reluctance on the part of the judiciary to permit a broad recovery in negligence to the victims of careless but honest misrepresentation reflects the following general principles: (a) in terms of fault a person who makes a negligent misstatement, believing in its truth, is morally less culpable than a person who tells a deliberate lie intending that another will rely upon it to his detriment;99 and, (b) liability for negligent use of words should not be as strictly enforced as for the negligent operation of a machine, keeping of a dangerous animal, or construction of a building.100 Taking these con-

95. Id. at 413, 311 A.2d at 460.
96. See Prosser, Misrepresentation, supra note 30 passim.
97. 255 N.Y. 170, 174 N.E. 441 (1931).
98. Id. at 173, 174 N.E. at 448.
99. See Bohlen, Negligence or Fraud, supra note 53 at 706.
100. See Smith, supra note 1 at 190.
siderations into account, specific cases have been resolved on a facts-and-circumstances basis.

In dealing with the relationship between the parties in cases of negligent misrepresentation, the Court of Appeals seems to have relied principally upon New York case law. In *Holt v. Kolker*\(^\text{101}\) the plaintiff asked both her landlord and plumbers who were installing a toilet on her back porch whether the porch was strong enough to support her weight. All replied that it was, one of the plumbers volunteering, “Well, if it holds a man like me, it will hold a little woman like you.”\(^\text{102}\) In fact, the porch was not strong enough and the plaintiff fell through, breaking her ankle. The court divided equally on the question of whether the landlord was liable, but held that the plumbers were not liable because they were under no duty to the plaintiff arising from any previous special relationship with her or from any special knowledge concerning the porch and because their statements “were such casual expressions of opinion as plaintiff was not entitled to rely upon under the circumstances.”\(^\text{103}\) The court cited with approval the opinion of Judge Cardozo in *Glanzer v. Shepard*,\(^\text{104}\) in which a vendor of beans had employed the defendant, a public weigher, to determine the weight of a quantity to be sold to the plaintiff. The defendant negligently certified the weight to be substantially greater than it actually was. Although there was no privity of contract between plaintiff and defendant and the certification had not been made at the plaintiff’s request, the plaintiff was allowed to recover damages from the defendant because the defendant had held himself out to the public as being skilled in his trade and because the defendant had known that the plaintiff would rely upon the certificate in making the purchase. *Glanzer* supports the proposition that even where the defendant does not speak directly to the plaintiff, he may be liable for his negligent misrepresentation where he knows that the plaintiff will act in reliance upon it and where the plaintiff’s reliance is reasonable. Judge Cardozo stated the test for reasonable reliance as follows:

We must view the act in its setting, which will include the implications and the promptings of usage and fair dealing. The casual response, made in mere friendliness or courtesy . . . may not stand on the same

\(^{101}\) 189 Md. 636, 57 A.2d 287 (1948).

\(^{102}\) Id. at 639, 57 A.2d at 288.

\(^{103}\) Id. at 640, 57 A.2d at 289. It is arguable that neither rationale is satisfying. A “casual” affirmative response to a question concerning whether a second-story porch is safe to walk upon would certainly seem to be a negligent response if the speaker did not have reason to believe that the porch was in fact safe; when such great physical danger is involved, reason demands that an answer be more than “casual.” As to the special relationship, the plumbers were in a better position than the plaintiff to know whether the porch was safe since they had been working on it prior to the accident. The only satisfactory explanation for the court’s decision is that the plumbers were not careless at all when they told the plaintiff that the porch was safe: since neither of them had fallen through, it was reasonable under the circumstances to assume that the plaintiff would not.

\(^{104}\) 233 N.Y. 236, 135 N.E. 275 (1922).
plane, when we come to consider who is to assume the risk of negligence or error, as the deliberate certificate, indisputably an "act in the law"... intended to sway conduct.\textsuperscript{105}

\textit{Glanzer} was followed by \textit{International Products Co. v. Erie Railroad Co.},\textsuperscript{106} cited by the Maryland Court of Appeals to support the rule of \textit{Virginia Dare}. Concerning the question of the relationship between the parties, the Court of Appeals of New York expressed these guidelines:

Not every casual response, not every idle word, however damaging the result, gives rise to a cause of action... Liability in such cases arises only when there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.\textsuperscript{107}

Thus the approach apparently adopted by Maryland from the New York cases permits recovery for negligent words only if there is some business or personal relationship between the plaintiff and the defendant which causes the plaintiff to rely upon the defendant's statement, and which by its nature, creates a duty on the part of the defendant to speak truthfully. This somewhat vague requirement is complicated by whatever significance remains in the distinction between physical damage and pecuniary loss to the plaintiff. While the element of physical harm seems to have been abandoned as an absolute bar to recovery, it is reasonable to suppose that the type of harm suffered by the plaintiff remains relevant as a factor in determining the scope of the defendant's duty to use care. Where a person's conduct creates the risk of serious personal injury, he is under a higher duty to exercise care than where only the risk of pecuniary loss is present.\textsuperscript{108} Furthermore, situations involving the risk of physical harm may include, in the aggregate, smaller classes of potential victims than situations where only the risk of pecuniary loss is present. To the extent that the fear of vast potential liability is the principal reason for the requirement of a special relationship,\textsuperscript{109} the diminution of the scope of potential liability in cases involving personal injury may reduce the need for the special relationship in those cases.

In each of the four Maryland appellate decisions where recovery for negligent misrepresentation has been allowed, the requisite special relation-
ship existed between the parties. In *Virginia Dare* the plaintiff had been sent by his employers to clean the walls of defendant's store under the direction of the store manager. In this situation he was under the "control and direction" of the manager and this relationship of control created a duty on the part of the manager to employ reasonable care in ascertaining the truth of his statements, particularly since the risk of serious personal injury to the plaintiff was evident. The defendants in *Brack v. Evans* and *St. Paul at Chase Corp. v. Manufacturer's Life Insurance Co.* held themselves out to the public as having expert knowledge in special fields, respectively as stockbroker and mortgage broker. It was assumed that the plaintiffs would rely upon the expertise of these defendants and the defendants, as experts in their chosen fields, were under a duty to competently advise their clients. The trial court in *St. Paul at Chase* quoted from *L.B. Laboratories, Inc. v. Mitchell* as to the duty of care on the part of the defendant:

"The Courts have uniformly based recovery upon principles of negligence where there is failure to employ the knowledge, skill and judgment which is engaged to be rendered in professional employment, or other employment of a highly specialized nature. A member of the learned professions, and for that matter any one who undertakes employment because of his possession of exceptional skill, impliedly represents that he possesses and will employ the degree of learning and skill usually possessed by those in good standing practicing their specialties in the same location." 

The special relationship in *Local 75, United Furniture Workers of America v. Regiec* was not as obvious as those in the other cases, but it was present nonetheless. The union, having established the insurance program, had ready access to the requested information. The union was, in effect, in the business of providing this information to members such as the plaintiff. The plaintiff had every reason to rely upon the union's informa-
tion, and the union, knowing the importance of the information, was under a duty to use care in ascertaining its accuracy. The question remaining unanswered by the cases is what precise degree of relationship must exist before recovery will be allowed. For example, it is not yet certain whether in Maryland a plaintiff can recover in negligence for misrepresentations made by a defendant with whom the plaintiff has entered into a contract following arms-length bargaining when the misrepresentations are part of the basis of the bargain. Such recovery has been allowed in New Hampshire and New York, and there seems to be nothing on the face of the rule in Virginia Dare that would require denial of recovery in this situation. But the fact that no Maryland case has thus far allowed recovery presents a question as to the viability of a negligence action under such a circumstance.

**Contributory Negligence**

In Cunningham v. C.R. Pease, Inc., cited by the Court of Appeals in support of the Virginia Dare rule, the New Hampshire Supreme Court indicated that in that state, contributory negligence existed as a defense to an action for negligent misrepresentation, but not to an action for deceit. Maryland apparently differs from New Hampshire in this respect in that contributory negligence is a defense to both actions here: The requirement of plaintiff's reasonable reliance in a deceit action has been strictly applied in the past to preclude recovery where the plaintiff carelessly allowed himself to be victimized by the defendant.

In negligent misrepresentation actions the standard of care required of the plaintiff by Maryland courts does not appear to differ from that required in other negligence actions. The issue of contributory negligence was specifically addressed in two cases and in both the jury's findings in favor of the plaintiff were upheld. The defendant in Virginia Dare sought on appeal a ruling that the plaintiff had been contributorily negligent as a matter of law. The court rejected this contention, stating that "the servant

118. In Weston v. Brown, 82 N.H. 157, 131 A. 141 (1925), plaintiff and defendant had been parties to an arms-length bargain concerning the purchase and sale of a farm.


   An inquiry made of a stranger is one thing; of a person with whom the inquirer has entered, or is about to enter, a contract concerning the goods which are, or are to be, its subject, is another. Even here the inquiry must be made as to the basis of independent action.

120. See text accompanying notes 61 & 68 supra.

121. 74 N.H. 435, 69 A. 120 (1908).

122. See text accompanying notes 62-65 supra.

123. 74 N.H. at 437, 69 A. at 121.

who sustained injuries, because relying on the supposed superior knowledge of a party who assumed control over his labor was not guilty of contributory negligence as a matter of law."

Finally, it held that the issue of contributory negligence was properly before the jury because the danger had not been "obvious" to the plaintiff considering all the circumstances surrounding the case. In Local 75, United Furniture Workers of America v. Regiec, the court briefly considered whether the plaintiff's loss of the pamphlet explaining his insurance program and his failure to examine its provisions amounted to contributory negligence as a matter of law. Rejecting this contention, the court pointed out that had plaintiff read the pamphlet, he would have been no better informed concerning his own coverage. It is worth comment that contributory negligence was at issue neither in Brack v. Evans nor in St. Paul at Chase Corp. v. Manufacturer's Life Insurance Co. In situations of the sort presented by those cases, where the plaintiff proves reliance upon the special knowledge or expertise of the defendant, contributory negligence will seldom be a valid defense. By holding himself out to have special knowledge and skill, the defendant effectively releases the plaintiff from any duty to ascertain the accuracy of the defendant's representation.

Confusion: The Problem of Delmarva Drilling Co. v. Tuckahoe Shopping Center

The development in Maryland of the tort of negligent misrepresentation has not proceeded without setback. The Court of Appeals recently issued an opinion in which this remedy was held, in effect, not to exist. In Delmarva Drilling Co. v. Tuckahoe Shopping Center the court heard an appeal by a well drilling company held liable as a third party defendant at a bench trial for negligence and breach of contract. Delmarva Drilling Company had assured the owner of the Tuckahoe Shopping Center, the third party plaintiff, that it could produce useable water for the shopping center. The basis of Tuckahoe's declaration was that the water was so filthy that it was unfit for use. The amended third party complaint alleged that Delmarva Drilling Company had "negligently and recklessly" misrepresented to Tuckahoe "that it would be all right to connect the building water system to the well drilled by . . . [Delmarva] and have the tenants

125. 175 Md. at 296, 1 A.2d at 901.
126. Id. at 298, 1 A.2d at 902.
128. Id. at 413-14, 311 A.2d at 460.
130. 262 Md. 192, 278 A.2d 12 (1971).
132. Tuckahoe had been the defendant in the action brought by one of its lessees, a laundromat operator, for breach of the lease agreement by Tuckahoe to supply water to the lessee.
take occupancy.” The trial court found that certain statements by Delmarva, to the effect that it “could and would produce useable water,” amounted to negligent misrepresentations and awarded judgment to Tuckahoe on the basis of negligence. Apparently in the erroneous belief that the basis of Tuckahoe’s third party complaint and the trial court’s judgment had been deceit, the Court of Appeals reversed. The court reiterated the traditional scienter requirement for a deceit action:

As we have noted, [the trial judge] was also of the view that Delmarva was liable to Tuckahoe in tort for what he termed a “negligent misrepresentation.” Our predecessors held, in accordance with what continues to be the prevailing weight of authority, that there can be no recovery in an action for deceit on the ground of negligent misrepresentation.

This accurate statement of the rule to be applied in a deceit action did not belong in an action for negligent misrepresentation. Recovery in negligence for false statements had been developed precisely because the deceit action was inadequate to provide a remedy in situations where scienter could not be proven. It may be advisable to consider Delmarva Drilling Co. as an aberration in the otherwise consistent development of this tort, especially because the opinion contained no citation to any of the earlier negligent misrepresentation cases. The Delmarva decision seems to have been ignored by the Court of Special Appeals when it issued its opinion in


134. Id. at E. 50-52 (emphasis in original).

135. 268 Md. at 425, 302 A.2d at 40-41. It is obvious from a reading of Tuckahoe’s third party complaint that no theory of fraud or deceit had ever been advanced. The words “fraud” and “fraudulent” are mentioned nowhere in the complaint. The charges are confined to breach of contract (paragraphs 1, 2, 5 and 7) and reckless and negligent misrepresentations (paragraphs 3, 4, 6 and 7). Appendix to Brief for Appellant at E. 28-29. Furthermore, the order of the trial court implies that the trial judge did not consider the claim to be one for deceit:

Tuckahoe in its very able brief called the attention of the Court to the case of Fowler, et al. v. Benton, et al. . . . [That] suit was for fraud and deceit rather than negligent misrepresentation. However, the Court agrees that the principles discussed . . . are applicable to the case at bar.

Id. at E. 49-50 (emphasis added). Nowhere else in the trial court’s opinion are the words “fraud” or “deceit” mentioned.

136. 268 Md. at 427, 302 A.2d at 41. The court also mentioned, quite properly, that Delmarva’s statements could not support an action for deceit because they were “mere promises”; a necessary element of actionable fraud is the misrepresentation of a past or present fact. Id. at 427, 302 A.2d at 41-42. See also Boulden v. Stilwell, 100 Md. 543, 60 A. 609 (1905). Whether the statements could have supported a negligence action, as held by the trial judge, is perhaps a much closer question. The misrepresentations in Brack v. Evans, 230 Md. 548, 187 A.2d 880 (1963), discussed in text accompanying notes 90-93 supra, were statements of neither past nor present fact, yet they were held to be actionable.
Local 75, United Furniture Workers of America v. Regiec\textsuperscript{137} later the same year. While the Court of Special Appeals' analysis was not without serious inaccuracies,\textsuperscript{138} the court was careful to distinguish between the torts of deceit and of negligent misrepresentation following the line of decisions from \textit{Virginia Dare} through \textit{Brack v. Evans}.\textsuperscript{139} Until the issue is once again before the Court of Appeals, however, \textit{Delmarva Drilling Co.} will remain as an element of uncertainty in the development of the law.

\section*{Conclusion}

Considering the uncertain status of the action for negligent misrepresentation in Maryland, it seems most desirable that our courts reaffirm the rule in \textit{Virginia Dare} and apply it without tacking on special restrictions or qualifications, paying particular heed to the traditional negligence concepts of proximate cause and contributory negligence to avoid excessively sweeping applications of the rule. The action for negligent misrepresentation was created to provide a tort remedy for the plaintiff who had acted reasonably in reliance upon the false statement of a defendant whose conduct in uttering the statement was culpably careless, but not deliberately fraudulent, and who was aware that the plaintiff would reasonably act in reliance upon the statement. This purpose should be broadly effectuated, for in a legal system that predicates tort liability upon fault it is reasonable that a defendant whose careless words have caused injury should bear the burden of loss. Injustices that may arise from a broad application of the \textit{Virginia Dare} rule are few and can be easily avoided.\textsuperscript{140} It is to be hoped that the decision


\textsuperscript{138} In analyzing the case law, the court asserted that the original rule, as set forth in \textit{Virginia Dare}, had been successively broadened by statements in Holt v. Kolker, 189 Md. 636, 57 A.2d 287 (1949), and Piper v. Jenkins, 207 Md. 308, 113 A.2d 919 (1955). Actually, as previously noted, the court in \textit{Holt} had restricted the rule to actions involving personal injury. See note 80 and accompanying text supra. The Court of Special Appeals' analysis of \textit{Piper} was also confusing, as the court indicated that \textit{Piper} had materially expanded the scope of the action for negligent misrepresentation, 19 Md. App. at 411-12, 311 A.2d at 459, yet \textit{Piper} was an action for deceit arising out of misrepresentations relating to a sale of land in an arms-length bargaining situation. At the time of the decision in \textit{Piper}, recovery in negligence might not have been available under such circumstances because only pecuniary loss had been involved. The statements in \textit{Piper} pertaining to negligent misrepresentation were thus no more than a tangential recapitulation of the law on that subject, not pertinent to the facts in \textit{Piper}. The court in \textit{Regiec} also stated that this supposed extension of the \textit{Virginia Dare} rule was followed in \textit{Brack v. Evans}, 230 Md. 548, 187 A.2d 880 (1963), but in fact, it was in \textit{Brack} that the actual extension of the prior rule took place in order to cover circumstances of pecuniary loss as well as circumstances of personal injury.

\textsuperscript{139} 130 Md. 548, 187 A.2d 880 (1963).

\textsuperscript{140} Apart from the dangers described so vividly in \textit{Ultramares v. Touche}, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931), discussed in text accompanying notes 97-98 supra, one other serious possibility of injustice comes readily to mind: If an individual (X) asks a third person (Z) whether a second person (Y) is a good
of the Court of Special Appeals in *Local 75, United Furniture Workers v. Regiec* is an indication that the Maryland courts will now treat negligent misrepresentation as a bona fide cause of action and permit it a liberal scope.

credit risk, and if $X$ then enters into a contract with $Y$ on the strength of $Z$'s negligent affirmation, and $Y$ intentionally breaches the contract with $X$, $X$ could conceivably recover double damages, from $Y$ in contract and from $Z$ for negligence. Even if the court were to refuse to permit a double recovery, $X$ would be more likely to sue $Z$, the less culpable party, because the tort remedy is not confined by the rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854). This problem was discussed in the context of deceit by Justice Grose in his dissent to *Pasley v. Freeman*, 100 Eng. Rep. 450 (K.B. 1789). The answer is simply not to allow recovery for negligent misrepresentation under these circumstances unless the contract remedy is unavailable or insufficient.