

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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SILENCE SPEAKS VOLUMES: DO WE NEED TO INTRODUCE A GENERAL DUTY OF DISCLOSURE?

AUTHORED BY - RUDRA SINSINWAR

Introduction

In the realm of common law, it's widely accepted that, in most cases, there's no general duty for parties in a contract to share information unless specific circumstances, like having a fiduciary relationship, require it.¹ The essay digs into the complexities of misrepresentation in contract law, including fraudulent actions and associated duties. It scrutinizes the distinction that while mere silence is not construed as fraudulent, the deliberate suppression of material facts, particularly by individuals possessing expertise, may incur legal consequences. The conversation highlights situations where trade customs or fiduciary connections might make it necessary to disclose information. It's crucial to note that there isn't a blanket obligation for parties to reveal facts they both know. Against this backdrop, there are several cases and commentaries that become the key focus, emphasizing the nuanced and case-specific determination of duties in contracts. The essay underscores the balance between transparency and individual responsibility, shaping the implications of not having a general duty to disclose in transactions.

MISREPRESENTATION AND DUTIES IN CONTRACTS

Fraudulent misrepresentation occurs when a party hides or actively suppresses crucial information to entice another party into a contract, making the transaction voidable.² When an individual, claiming specialized knowledge or skill makes a representation, they must exercise reasonable care in ensuring the accuracy and reliability of their representation.³ Section 17(5) addresses situations where laws expressly mandate disclosure, with non-compliance deemed fraudulent.⁴ However, there's no general duty to disclose facts known to both parties, emphasizing

¹ Sir Jack Beatson and Andrew Burrows and John Cartwright, *Anson's Law of Contract* (31st edn, Oxford University Press 2010) 299.

² The Indian Contract Act 1872, s 19.

³ *Esso Petroleum v. Mardon* [1976] QB 801.

⁴ The Indian Contract Act 1872, s 17.

individual responsibility for acquiring necessary information.⁵

The representations may encompass affirmations, descriptions, or statements about facts, and conduct can also be constituted as a representation.⁶ In situations where there is no intentional deception, but circumstances make it appear as if the benefiting party is motivated by fraud, such situations are termed as constructive fraud.⁷ Every concealment does not warrant equitable intervention; it must involve the suppression of facts that the party is obligated to disclose.⁸ The crucial distinction lies between intrinsic and extrinsic circumstances. Intrinsic aspects, connected to the subject's nature, follow the *caveat emptor* principle (let the buyer beware) unless there exists fraudulent misrepresentation.⁹ As pointed in *Smith v. Hughes*, staying silent about discoverable things isn't fraudulent unless there's a special trust or confidence.¹⁰ There is generally no obligation for extrinsic factors, but hiding a problem requires a careful, passive and non-participatory approach.¹¹ In the Indian context, section 18(3) holds a party accountable for innocent misrepresentation causing a substantive mistake about the agreement's subject matter, ensuring fairness in contracts.¹²

EVALUATING THE ABSENCE OF A GENERAL DUTY OF DISCLOSURE

The *Walters v. Morgan* case sets the stage for examining the implications of the absence of a general duty of disclosure in contractual relationships.¹³ Lord Campbell, asserts that in the absence of a fiduciary relationship, the purchaser is not obliged to disclose exclusive knowledge impacting the sale price.¹⁴ This provides a foundation for the argument against a general duty of disclosure. The court establishes that reticence alone does not constitute legal fraud, but any conduct aimed at inducing false beliefs about a non-existing fact can warrant refusal of specific

⁵ R Yashod Vardhan, Chitra Narayan, *Pollock & Mulla, The Indian Contract and Specific Relief Acts: Sections 1 to 72* (16th edn, Vol. 1, LexisNexis 2019) 412-457.

⁶ *Walters v Morgan* (1861) 3 DF & J 718.

⁷ TVS Row, D Gupta and PN Kumar, *Sanjiva Row's Commentary on Law Relating to Contract Act, 1872 and Tenders (Act No. IX of 1872): Section 1 to 30* (11th edn., Delhi Law House 2011) 556-559.

⁸ *Ibid* (n 5).

⁹ *Gordon v Selico* (1986) 18 H.L.R. 219.

¹⁰ *Smith v Hughes* (1871) LR 6 QB 597.

¹¹ *Ibid* (n 11).

¹² The Indian Contract Act 1872, s 18.

¹³ *Ibid* (n 7).

¹⁴ *Ibid* (n 7).

performance.¹⁵ In a mineral property lease, the case reveals the purchaser, exploiting superior knowledge to induce the vendor, into an agreement without proper negotiation. The court's emphasis on preventing unfair surprises aligns with the notion that specific duties hinge on the circumstances, particularly when one party possesses superior knowledge.

Walters v. Morgan demonstrates how, in the absence of a general duty of disclosure, the law relies on specific circumstances to define duties. It underscores the importance of good faith, transparency, and fairness in contractual dealings. While the absence of a general duty allows flexibility, the case implies limits to permissible behaviour, emphasizing the delicate balance needed to prevent exploitation and ensure equity.

In the contrary case of *Derry v Peek* (1889), due to a genuine belief in a statement, a company stated its authority to use steam-powered engines instead of horses in their prospectus.¹⁶ The court ruled that a false statement, resulting from carelessness without reasonable grounds to believe it's true, may serve as evidence of fraud but doesn't automatically constitute fraud. If the statement is made in an honest belief of its truth, it is not considered fraudulent, and the person making it is not held liable for an action of deceit.¹⁷

The case of *Gordon and Teixeira v. Selico Ltd. and Select Managements Ltd.* challenges the *caveat emptor* principle in property transactions, emphasizing purchasers' responsibility for a property's actual state.¹⁸ The case implies that intentional concealment can alter disclosure responsibilities, advocating for a nuanced, case-by-case analysis to ensure fairness and equity, especially when fraudulent misrepresentations are involved.¹⁹ The case acknowledges the difficulty in establishing a general duty, cautioning against categorizing every act enhancing marketability as fraudulent.²⁰ The absence of a general duty prompts a closer examination of specific duties. The judgment emphasizes a nuanced, case-specific approach, preventing the law from stigmatizing routine actions as fraudulent.²¹

¹⁵ *Ibid* (n 7).

¹⁶ *Derry v. Peek* (1889) LR 14 AC 337.

¹⁷ *Ibid* (n 17).

¹⁸ *Gordon v Selico* (1986) 18 H.L.R. 219.

¹⁹ *Ibid* (n 19).

²⁰ *Ibid* (n 19).

²¹ *Ibid* (n 19).

To sum up, both *Walters v. Morgan* and *Gordon v. Selico* contribute to the ongoing debate about the absence of a general duty of disclosure. Emphasizing fairness and equity, these cases caution against hasty generalizations, advocating for a context-specific analysis to determine specific duties. Together, they highlight the delicate balance required to prevent exploitation while allowing flexibility in contractual dealings.

BALANCING ACT: ENHANCING MARKETABILITY VS. FRAUDULENT MISREPRESENTATION

Justice Goulding's pivotal insight lies in recognizing the delicate balance between actions that enhance marketability and those constituting fraudulent misrepresentation.²² This equilibrium is essential for the efficiency of commercial transactions while upholding legal standards. The court's acknowledgement aligns with the broader goals of contract law, seeking to facilitate fair and transparent dealings. Contract law has always been supposed to be a facilitative law more than a command law.²³ Facilitative law does not compel specific actions but enforces agreements and provides a framework for transactions.²⁴ Justice Goulding's perspective resonates with the classical perspective highlighted in the work of Robert B. Seidman, wherein the classical perspective asserts that facilitative law fosters individual freedom and allows parties to set their own norms.²⁵

In commercial transactions, where presentation and marketing are significant, striking this balance becomes vital. The alignment of legal standards with popular morality is a key theme in Goulding J.'s commentary.²⁶ This alignment is crucial for maintaining public trust in the legal system. Cautioning against the law outrunning popular morality, the court recognizes the evolving dynamics between legal principles and societal values. This responsiveness ensures legal judgments resonate with collective notions of fairness and justice.

This distinction prevents legal overreach and ensures equitable treatment in transactions, contributing to the reliability and predictability of contract law outcomes. In the evolving

²² *Ibid* (n 19).

²³ Robert B. Seidman, 'Contract Law, the Free Market, and State Intervention: A Jurisprudential Perspective,' (1973) 4(7) *Journal of Economic Issues* 553-575.

²⁴ *Ibid* (n 24).

²⁵ *Ibid* (n 24).

²⁶ *Ibid* (n 19).

landscape of contract law, Goulding J.'s insights underscore the importance of maintaining equilibrium without compromising the core principles of fairness, transparency, and honesty. This nuanced understanding serves as a guide for future cases, ensuring legal judgments remain responsive to the complexities of commercial transactions.

ASSESSING THE NEED FOR A GENERAL DUTY OF DISCLOSURE IN LAW AND THE ASSOCIATED CHALLENGES

The question of whether the law should establish a general duty of disclosure is a complex and multifaceted issue that touches upon fundamental principles of fairness, autonomy, and contractual relationships. While some argue that a general duty of disclosure would enhance transparency and protect vulnerable parties, others contend that such a duty could lead to unintended consequences and impede the efficiency of transactions. This part explores the reasons behind rejecting the establishment of a general duty of disclosure, focusing on the challenges involved in formulating such a duty.

Autonomy and Freedom of Contract

As elaborated by Brian Bix in their work, Autonomy theories emphasize the importance of choice in contract law.²⁷ They highlight the concept of freedom of contract, where individuals have the power to choose which duties will bind them through contracts.²⁸ Parties entering into contracts are generally considered competent and capable of protecting their own interests. Imposing a general duty of disclosure could be perceived as undermining this autonomy, as it assumes that parties are unable to negotiate and agree on the terms that suit their needs without external interference.

Unintended Consequences and Overregulation

The diversity of contractual relationships, ranging from simple consumer transactions to complex commercial agreements, makes it challenging to craft a general duty that fits all circumstances. A blanket duty may lead to excessive paperwork, increased transaction costs, and potential legal disputes over what constitutes material information. A general duty of disclosure may also

²⁷ Bix, Brian H., 'Theories of contract law' [2017] 7 Edward Elgar Publishing 11-12.

²⁸ *Ibid* (n 28).

disproportionately burden small businesses and individuals who lack the resources and could become bogged down by onerous disclosure obligations. This could deter participation in the market, especially by those who cannot afford the time and expense associated with exhaustive due diligence. Overregulation may stifle innovation and hinder the fluidity of contractual negotiations.²⁹

Practical Challenges in Defining Materiality

One of the most significant challenges in formulating a general duty of disclosure lies in defining the threshold for materiality. What information should be considered significant enough to trigger the duty? Different transactions may involve varying levels of risk and importance. Attempting to create a standard that applies universally could result in ambiguity and subjective interpretation, making it difficult for parties to determine their obligations and exposing them to potential legal repercussions. In an English case, determining what information qualifies as 'material' proved challenging, given the subjective nature of parties' views on the significance of attributes.³⁰

Encouraging Good Faith and Fair Dealing

The law could encourage good faith and fair dealing between parties, promoting trust and reliability in contractual relationships. The principle of good faith already plays a significant role in contract law, requiring parties to act honestly and with a reasonable degree of fairness. Emphasizing and reinforcing this principle may offer a more flexible and contextual approach, allowing courts to address instances of bad faith without imposing a rigid general duty of disclosure.

CONCLUSION

The essay delves into the complexities of misrepresentation and contract duties, navigating key cases and legal insights. The rejection of a general duty of disclosure is underpinned by concerns for autonomy, potential unintended consequences, and the challenge of defining materiality. The argument favors a specific context-specific approach, preserving parties' autonomy and promoting good faith offering a more pragmatic and adaptable approach. The conclusion asserts

²⁹ Lewis Klar, 'Duty of Care for Negligent Misrepresentation - and beyond,' (2018) *Advocates' Quarterly* 48, no. 3: 235-252.

³⁰ *Ibid* (n 11).

that the absence of a blanket duty aligns with the diverse nature of contracts, providing a flexible and fair framework. It advocates for a careful balance, emphasizing that this approach better facilitates efficient transactions while upholding the interests of all parties involved in the ever-evolving landscape of contract law.

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