

Restatement (Second) of Torts § 310. Conscious Misrepresentation Involving Risk Of Physical Harm

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and

(b) knows

(i) that the statement is false, or

(ii) that he has not the knowledge which he professes.

Comment:

a. If the actor makes a misrepresentation for the purpose of causing, or believing that action in reliance upon it will cause, physical harm, he is liable because he intended the resulting harm. The rule stated in this Section relates to misrepresentations which, though intended to mislead another, are not intended to cause him the physical harm, where, however, the actor should realize that the harm is likely to result from the action which his misrepresentation is likely to induce. His liability is based upon the unreasonable risk of physical harm which is involved in the misrepresentations, and not upon the fact that the misrepresentations are intended to mislead.

b. The representation to which this Section applies may be one of fact, opinion, or law. Where the representation is one of opinion, prediction, or law, the other's reliance upon it may be less reasonable, and so less justified. (Compare §§ 542, 544, and 545.) Where the reliance is justified, however, the rule here stated applies to representations of both opinion and law.

The situation to which the rule stated in this Section is most usually applied is where the misrepresentation is made concerning the physical condition of a thing, either land, structures, or a chattel, and induces the other to believe that the thing is in safe condition for his entry or use, or induces a third person to hold the land or chattel open to the entry or use of the other in the belief that it is safe for the purpose. The rule is, however, equally applicable to misrepresentation of other matters upon which the safety of the person or property of another depends.

Illustrations:

1. A tells B that he has tried the ice on a certain pond and found it thick enough for safe skating. A knows that he has not tried it and knows nothing of the condition of the ice, which in fact is dangerously thin, although it appears to be safe. B, in reliance upon A's statements, attempts to skate upon the pond and falls in, catching a severe cold. A is negligent toward B. 2. A offers B a drink from a bottle of whiskey, telling him that he has himself imported it from Canada, although he knows that he has bought it for a very cheap price from an unidentified bootlegger. B drinks the whiskey, which turns out to be compounded

of denatured alcohol, from which the poison has not been completely eliminated. B becomes ill. A is negligent toward B.³ A police officer comes to A's house to arrest him upon reasonable suspicion of felony. B, A's uncle, who is present, tells A that the officer has no legal authority to arrest him, and advises him to resist arrest. B knows that he has no knowledge of the law as to the arrest, which is in fact valid. A, in reliance upon the representation, resists arrest, and is injured when the officer overpowers him. B is negligent toward A.

c. Liability to third persons. A misrepresentation may be negligent not only toward a person whose conduct it is intended to influence but also toward all others whom the maker should recognize as likely to be imperiled by action taken in reliance upon his misrepresentation. Thus, as stated in § 388, one who, by actively concealing a defect, misrepresents the condition of a chattel which he furnishes to another for use is liable not only (1) to the person to whom he furnishes the chattel and who, in the belief that it is safe, is injured while using it in a way for which it appears safe, but also (2) to such others as the actor permits to use or share in the use of the chattel and, in addition, (3) to others in the vicinity of its expected use who are harmed in person or property by such use. It is immaterial how the actor furnishes the chattel for use. His liability is the same irrespective of whether he sells it, leases it, sup-plies it for a use in which he has a business interest, or permits its use as a mere gratuity. The same is true of a lessor of land or a possessor of land who invites or permits others to enter the land for his own business purposes, or gratuitously. On the same basis a seller of an automobile who paints over a defective wheel or axle and so conceals its dangerously defective character is liable not only to his immediate buyer who is harmed by the collapse of the wheel or axle, but also to any person to whom the immediate buyer by sale, lease, or license transfers the use of the car, and to other travelers who sustain bodily harm or whose cars are damaged when the defective car gets out of control through the collapse of the wheel or axle.

d. The liability stated in this Section is not confined to those persons whose conduct the misrepresentation is intended to influence, or to harm received in the particular transaction which the misrepresentation was intended to induce. Thus a misrepresentation of the physical condition of a chattel or of land or a structure, whether by express words or concealment, may make a vendor liable not only to his vendee to whom it was addressed and who is thereby induced to purchase it, but also to any person whom the vendee invites or permits to enter or use it. In addition, such a misrepresentation may make the maker liable to travelers on a highway upon which the land or structure abuts, or persons who are likely to be in the neighborhood of the place where the chattel is used, and who are injured by reason of the vendee's failure to repair the defect in the structure because of his ignorance of its existence, or by reason of his use of the chattel in ignorance of its dangerously defective condition.

Restatement (Second) of Torts § 311. Negligent Misrepresentation Involving Risk Of Physical Harm

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

Comment:

a. The rule stated in this Section represents a somewhat broader liability than the rules stated as to liability for pecuniary loss resulting from negligent misrepresentation, stated in § 552, to which reference should be made for comparison.

b. The rule stated in this Section finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends. Thus it is as much a part of the professional duty of a physician to give correct information as to the character of the disease from which his patient is suffering, where such knowledge is necessary to the safety of the patient or others, as it is to make a correct diagnosis or to prescribe the appropriate medicine. The rule is not, however, limited to information given in a business or professional capacity, or to those engaged in a business or profession. It extends to any person who, in the course of an activity which is in furtherance of his own interests, undertakes to give information to another, and knows or should realize that the safety of the person or others may depend upon the accuracy of the information.

Illustrations:

1. A train of the A Railroad is approaching a grade crossing. An employee of the Railroad negligently raises the crossing gates, and so informs approaching automobile drivers that no train is coming. B sees the gates raised, drives onto the crossing, and is struck by the train. A Railroad is subject to liability to B.

2. The A Company is conducting blasting operations near a railroad. B, an employee of the railroad, comes to inquire as to the progress of the work. As he arrives a blast is being set off, and he is advised to take cover. Immediately after the blast the foreman of A Company negligently informs B that all danger is over and he can safely come into the open. A delayed explosion occurs, and B is struck and injured by a rock. A Company is subject to liability to B.

3. A has charge of B, a lunatic of violent tendencies. A advertises for a servant, and C applies for the employment. A in-forms C that B is insane, but negligently gives C the impression that B is not violent or dangerous. C accepts the employment, and is attacked and injured by B. A is subject to liability to C.

c. The rule stated in this Section may also apply where the information given is purely gratuitous, and entirely un-related to any interest of the actor, or any activity from which he derives any benefit. In this respect the rule stated here differs from that stated in § 552, which is concerned only with pecuniary loss suffered as the result of a negligent misrepresentation. Where only such pecuniary loss is sustained, the gratuitous character of the information pre-vents any liability for negligence in giving it. Where, as under the rule stated in this Section, the harm which results is bodily harm to the person, or physical harm to the property of the one affected, there may be liability for the negligence even though the information is given gratuitously and the actor derives no benefit from giving it.

The fact that the information is gratuitous may, however, affect the reasonableness of the other's reliance upon it in taking action. There may be no reasonable justification for taking the word of a casual bystander, who does not purport to have any special information or any interest in the matter, as to the safety of a bridge or a scaffold, where the plaintiff would be fully justified in accepting the statement of one who purports to have special knowledge of the matter, or special reliability, even though the plaintiff knows that he is receiving gratuitous advice.

Illustrations:

4. A buys a tombstone from B, a dealer in tombstones. A is in doubt as to how to transport it. C, a casual by-stander, volunteers the information that the tombstone weighs only 50 pounds, and that A can easily and safely pick it up and carry it to his car. Relying on C's statement, A attempts to do so. In fact the tombstone weighs 150 pounds, and A suffers a hernia as the result of his efforts. C is not liable to A.

5. The same facts as in Illustration 4, except that the statement is made by B. B is subject to liability to A.

6. A large trailer truck of the A Company is being driven on a winding highway. B is following it in his automobile, and seeking to pass it, but has not done so because his view is obstructed. At a particular point the driver of the truck signals to B to pass it, thereby representing to B that the highway ahead is clear. In reliance upon the signal B attempts to pass the truck, and is injured by a collision with an approaching car. A Company is subject to liability to B.

7. The same facts as in Illustration 6, except that the driver calls verbal assurance to B that he can safely pass. The same result.

Comment on Clause (a) of Subsection (2):

d. Care in ascertaining facts and forming judgment. Where the actor furnishes information upon which he knows or should realize that the security of others depends, he is required to exercise the care of a reasonable man under the circumstances to ascertain the facts, and the judgment of a reasonable man in determining whether, in the light of the discovered facts, the information is accurate. His negligence may consist of failure to make proper inspection or inquiry, or of failure after proper inquiry to recognize that the information given is not accurate.

Illustration:

8. The A Boiler Insurance Company undertakes as part of its services to inspect the boiler of B. It issues a certificate that the boiler is in good condition for use. In reliance upon this certificate, B uses the boiler. The boiler bursts, owing to a defect which a reasonably careful inspection would have disclosed. Explosion of the boiler wrecks the adjacent building of C and causes bodily harm to him. The A Company is subject to liability to C for his bodily harm and the wrecking of his building caused by the explosion of the boiler.

Comment on Clause (b) of Subsection (2):

e. Care in use of language. The negligence for which the actor is liable under the statement in this Subsection consists in the lack of reasonable care to furnish accurate information. It is, therefore, not enough that the actor has correctly ascertained the facts on which his information is to be based and has exercised reasonable competence in judging the effect of such facts. He must also exercise reasonable care to bring to the understanding of the recipient of the information the knowledge which he has so acquired.

Illustration:

9. The A Boiler Insurance Company undertakes as part of its service to inspect the boiler of B. The A Company makes a careful inspection, and correctly concludes that the boiler is unsafe. Through the negligence of its clerk, it issues a certificate which, while correctly stating all the defects in the boiler, gives the misleading impression that the boiler is nevertheless safe. In reliance on the certificate, B continues to use the boiler, which bursts because of the defects and wrecks the adjacent building of C, causing bodily harm to C. The A Company is subject to liability to C for his bodily harm and the wrecking of his building.

f. Comments c and d on § 310 are applicable to this Section.