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THE APPLICATION OF MISREPRESENTATION UNDER SECTION 18 OF THE CONTRACTS ACT 1950 IN MALAYSIAN CASE LAW

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Abstract:

Section 18 of the Contracts Act 1950 identifies misrepresentation as a factor that may vitiate free consent and undermine the validity of a contract. However, the statutory provision is broadly worded and lacks clear categorisation, resulting in continued reliance on Common Law distinctions which classify misrepresentation into three namely fraudulent, negligent, and innocent misrepresentation. This classification is not expressly provided in the Act. The ambiguity surrounding the scope and interpretation of Section 18 of the CA1950 has led to inconsistent judicial reasoning and uncertainty in the remedies granted. Despite its significant impact on contractual disputes, there is limited scholarly analysis on how Malaysian courts have interpreted and applied this provision. This study adopts a qualitative legal research methodology, drawing on literature review and descriptive legal analysis. It examines judicial decisions and academic commentary relating to misrepresentation under Malaysian law. The analysis reveals that Malaysian courts employ divergent approaches in determining the presence and effect of misrepresentation. These inconsistencies highlight conceptual ambiguity and the judiciary's dependence on Common Law principles in the absence of clear statutory guidance. The study concludes that the interpretation of misrepresentation under Section 18 of the CA1950 remains unclear, fragmented, and heavily dependent on judicial discretion. These issues highlight the need for statutory reform to clarify the categories and elements of misrepresentation, the development of judicial guidelines to promote consistent application, and doctrinal clarification to strengthen predictability and coherence in contractual adjudication.

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Contract; Contracts Act 1950; Free Consent; Law; Malaysia; Misrepresentation



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Introduction

Misrepresentation typically occurs during the pre-contractual stage, when one party, in the course of negotiations, makes a false statement that influences the other party's decision to enter into the contract (Manap, Ghani, & Adnan, 2021). Generally, it is defined as a false or misleading statement of fact made by one party to another before the formation of a contract, which induces the other party to enter into that contract (Yusoff & Aziz, 2003). In Malaysia, contracts are primarily governed by the Contracts Act 1950 (hereinafter "CA1950") (Cheong, 2009). Section 10(1) of the CA1950 provides that an agreement becomes a contract only when it is made with the free and voluntary consent of parties who are competent to contract, for lawful consideration and a lawful object. This highlights that where consent is not freely given, the validity of the agreement is called into question.

Section 14 of the CA1950 further explains that consent is free when it is not caused by coercion, undue influence, fraud, misrepresentation, or mistake. Consent is deemed to be improperly obtained when it would not have been given but for the presence of any of these vitiating factors. This statutory framework thus recognises that misrepresentation under Section 18 of the CA1950 plays a central role in determining whether consent is defective and, consequently, whether the contract is voidable (Mahmod, 2017).

Section 18 of the CA1950 provides that misrepresentation includes—

- (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it by misleading another to his prejudice; and
- (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the subject matter.

While these three clauses outline the statutory meaning, the provision has been criticised for its ambiguity and lack of definitional precision. The language used particularly in clauses (a) and (c) offers limited guidance on how misrepresentation under Section 18 of the CA1950 should be characterised or applied in practice. As a result, judicial interpretation becomes essential for determining the scope and operational effect of this provision in contractual disputes.

According to Pollock & Mulla, the drafting of Section 18 of the CA1950 is unsatisfactory due to unclear terminology and conceptual overlap between situations where consent is vitiated and situations involving an absence of real consent. Given that Malaysian contract law is *pari materia* with Indian contract law (Wahlgren, 2007), such criticisms remain relevant and applicable within the Malaysian context.

The classification of misrepresentation under Section 18 of the CA1950 is particularly significant because different types of misrepresentation attract different remedies under Section 19 of the CA1950. For instance, an innocent party may rescind or affirm the contract and may claim compensation in cases involving fraudulent or negligent misrepresentation. In contrast, where the misrepresentation is innocent, remedies are limited to rescission or affirmation without a right to damages. Therefore, the ability to clearly identify and classify misrepresentation is crucial for ensuring fairness, predictability, and consistency in contractual adjudication.

Classification of Misrepresentation under Common Law

Misrepresentation is classified into three types, namely fraudulent misrepresentation, negligent misrepresentation and innocent misrepresentation (Yusoff & Aziz, 2003) and this classification continues to guide Malaysian courts in the absence of clear statutory categories under Section 18 of the CA1950.

Fraudulent Misrepresentation

The first classification derived from the case of *Derry v Peek* (1889) 14 App Cas 337. In this case, the directors of a tramway company issued a prospectus stating that they had the right to use steam-powered trams. In truth, this right was conditional upon approval by the Board of Trade, which was later refused. Investors who relied on the statement and suffered loss brought an action for deceit. The House of Lords held that the directors were not liable because they honestly believed their statement to be true, even though it turned out to be false. Lord Herschell, in his judgment, defined fraudulent misrepresentation as a false statement made knowingly, without belief in its truth, or recklessly without caring whether it is true or false and this definition remains the authoritative common law position adopted in Malaysian courts.

Negligent Misrepresentation

The ruling in *Derry v Peek* (1889) 14 App Cas 337 drew a clear distinction between fraudulent and innocent misrepresentation and laid the foundation for the recognition of negligent misrepresentation in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. In this case, the defendants (the bank) made a careless statement about a client's financial position which the plaintiffs relied on and subsequently suffered loss. Although the bank escaped liability because of a disclaimer, the House of Lords recognised for the first time that:

A person who makes a statement negligently, and where a special relationship exists (creating a duty of care), can be liable for the financial loss suffered by the person who relied on it.

This established the principle of negligent misrepresentation in common law and Malaysian courts frequently refer to *Hedley Byrne* when analysing misrepresentation claims, even though Section 18 of the CA1950 does not expressly recognise negligence as a category.

Innocent Misrepresentation

Innocent misrepresentation occurs when the representor honestly believes the false statement to be true and is not negligent in making it. The representor acts with reasonable care and without intent to deceive. Innocent misrepresentation refers to a false statement made without scienter—meaning without intent to deceive or defraud. It occurs when a person makes a representation that they genuinely believe to be true, and such belief is held honestly and reasonably. The distinguishing factor between innocent misrepresentation and fraud lies in the absence of guilty knowledge or intention to mislead (Hunter, Shannon, & Amoroso, 2023).

By contrast, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465*, the misrepresentation arose because the statement was made without sufficient care, even though there was no fraudulent intent. This demonstrates that the boundary between negligent and innocent misrepresentation is determined by whether reasonable care was exercised in making the statement.

Reported Case Law Involving Misrepresentation in Malaysia

Section 18 of the CA1950 has been criticised by Pollock & Mulla (Manap et al., 2018) for its ambiguity, particularly in its classification of misrepresentation. Upon closer examination, Section 18(a) of the CA1950 appears to reflect innocent misrepresentation, Section 18(b) of the CA1950 is unclear in its terminology and serves limited practical purpose, and Section 18(c) of the CA1950 is conceptually confusing. This is due to the fact that the statute does not expressly distinguish between fraudulent, negligent, and innocent misrepresentation, Malaysian courts have often turned to common law classifications instead of relying directly on Section 18 of the CA1950. Therefore, court decisions relating to misrepresentation should be examined to understand how the Malaysian judiciary has applied Section 18 of the CA1950.

Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd [1998] 6 MLJ 448

This case concerns an advertisement describing a resort as the first golf resort equipped with water sports facilities and various other amenities. The plaintiff relied on these statements, which were found to be untrue. The court held that the misrepresentation fell under both Section 18(a) and Section 18(b) of the CA1950.

The judgment illustrates the difficulty courts face in applying the statutory wording of Section 18 of the CA1950, leading to overlapping reliance on more than one subsection.

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd & Anor Appeal [1999] 2 MLJ 500

This case demonstrates that Malaysian courts recognise the three common law categories of misrepresentation—fraudulent, negligent, and innocent. However, the court did not refer to Section 18 of the CA1950.

This non-reference indicates that courts sometimes prefer common law principles over the statutory provision due to the ambiguity of Section 18 of the CA1950.

Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor [1999] 1 MLJ 193

The Federal Court held that negligent misrepresentation existed but, once again, did not refer to Section 18 of the CA1950. Instead, the court applied the test from the case of *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] All ER 65*.

This reinforces the trend that Malaysian courts rely on English common law tests when the statutory provision is unclear or insufficiently detailed.

Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd [2007] 7 MLJ 216

The court held that the misrepresentation was innocent and that the plaintiff was not entitled to damages. Similar to earlier cases, the court relied on case law rather than Section 18 of the CA1950.

This pattern demonstrates the judiciary's consistent reluctance to categorise misrepresentation strictly within the statutory framework of Section 18 of the CA1950.

Universiti Teknikal (M) Melaka v Mars Telecommunication Sdn Bhd [2014] 9 MLJ 660

The court noted that the plaintiff failed to show which category of misrepresentation under Section 18 of the CA1950 is being applied. The judge also had to refer to Section 17 of the CA1950 to define fraud.

The case highlights a recurring judicial challenge: Section 18 of the CA1950 lacks precise categories, forcing courts to rely on Section 17 of the CA1950 or common law instead of the statutory provision itself.

Sim Thong Realty Sdn Bhd v Teh Kim Dar [2003] 3 MLJ 460

This judgment emphasises that Section 18 of the CA1950 is drafted inclusively rather than exhaustively and mirrors the language of the Indian Contract Act 1872. Thus, courts must determine whether the facts fall within the broad wording of the provision.

This structural feature contributes to inconsistent judicial interpretation and underscores the need for statutory clarification.

Thematic Analysis of Judicial Approaches to Misrepresentation Under Section 18 CA1950

The analysis of Malaysian case law reveals several recurring themes in the judicial interpretation of misrepresentation under Section 18 of the CA1950. A thematic examination of the decisions shows that courts tend to rely more heavily on common law principles than on the statutory text itself, due to the conceptual ambiguity and lack of clear classification within Section 18 of the CA1950. The themes below synthesise how Malaysian courts approach misrepresentation disputes and highlight the gaps that persist in statutory and judicial interpretation.

THEME 1: Judicial Reliance on Common Law Classifications Instead of Section 18 of the CA1950

A significant trend emerging from the cases is the judiciary's continued reliance on common law categories—fraudulent, negligent, and innocent misrepresentation—rather than the statutory language of Section 18 of the CA1950. In *Abdul Razak v Shah Alam Properties* and *Kluang Wood Products*, the courts categorised misrepresentation purely through common law principles without referring to Section 18 of the CA1950.

This suggests that the statutory provision lacks sufficient clarity to guide courts in distinguishing between different types of misrepresentation. As a result, judicial decision-making is anchored in English case law, which offers clearer doctrinal structure and established tests.

THEME 2: Ambiguity in the Statutory Wording Leads to Overlapping or Dual Categorisation

Cases such as *Low Kon Fatt v Port Klang Golf Resort* illustrate how courts sometimes classify the same misrepresentation under two separate subsections, namely Section 18(a) and Section 18(b) of the CA1950. This dual application reflects the uncertainty surrounding the statutory terminology, particularly in Section 18(b) of the CA1950, which is criticised as being unclear in scope and purpose. The overlapping categorisation observed in these cases highlights the difficulty faced by courts in aligning factual circumstances with the statutory language.

THEME 3: Courts Avoid Applying Section 18 of the CA1950 in Cases Involving Negligence or Fraud

The case analysis shows an observable judicial trend: where allegations of fraudulent or negligent misrepresentation arise, courts prefer referring to Section 17 of the CA1950 (fraud) and common law negligence rather than Section 18 of the CA1950.

This trend is evident in *Universiti Teknikal Melaka v Mars Telecommunication*, where the court turned to Section 17 of the CA1950 to resolve issues of fraud, even though the dispute involved misrepresentation. The court's reluctance to use Section 18 of the CA1950 suggests that the provision does not adequately distinguish fraudulent misrepresentation from fraud, resulting in judicial uncertainty.

THEME 4: Remedies Under Section 19 of the CA1950 Cannot Be Effectively Applied Without Clear Classification

The cases demonstrate inconsistent application of remedies under Section 19 of the CA1950. For instance, *Low Keang Guan* confirmed that damages were unavailable for innocent misrepresentation, while *Abdul Razak* allowed rescission for fraud without referencing Section 18 of the CA1950.

The inconsistency arises because courts must determine whether a misrepresentation is fraudulent, negligent, or innocent before applying Section 19 of the CA1950. Without clear statutory guidance, judicial classifications vary, contributing to unpredictability in remedies.

THEME 5: Judicial Hesitation Reflects the Need for Statutory Reform

Across all cases, a clear pattern emerges: Section 18 of the CA1950 is insufficiently precise and courts frequently disregard it or interpret it inconsistently. The judiciary often draws on common law and related provisions (e.g., Section 17 of the CA1950) to fill interpretive gaps.

Table 1: Summary of Judicial Themes in the Application of Section 18 of the CA1950

Theme	Key Cases	Judicial Practice Identified	Implication
Reliance on common law	<i>Abdul Razak;</i> <i>Kluang Wood Products</i>	Courts categorise misrepresentation using common law (fraudulent/negligent/innocent), not Section 18	Section 18 of the CA1950 lacks functional classification
Ambiguity in statutory wording	<i>Low Kon Fatt</i>	Court applied both 18(a) & 18(b) of the CA1950, showing overlap	Statutory language unclear; courts struggle with interpretation
Avoidance of Section 18 of CA1950 in negligence/fraud	<i>UTeM v Mars;</i> <i>Kluang Wood Products</i>	Courts rely on Section 17 of the CA1950 or common law negligence	Confusion between fraud and fraudulent misrepresentation
Inconsistent remedies	<i>Low Keang Guan;</i> <i>Abdul Razak</i>	Different remedies granted without consistent use of Section 19 of the CA1950	Remedies depend on judicial categorisation, not statutory criteria
Need for doctrinal guidance	All cases	Courts repeatedly bypass Section 18 of the CA1950	Indicates need for legislative reform or judicial guidelines

Conclusion

There is a clear lack of consistency in Malaysian judicial decisions concerning misrepresentation (Manap et al., 2018), as reflected in the case law discussed above. The courts' reluctance or hesitation to rely on *misrepresentation under Section 18 of the CA1950* and their frequent preference for common law principles demonstrates that the current statutory framework does not provide sufficient doctrinal clarity. This inconsistency largely stems from the ambiguous classification of misrepresentation within the provision.

A significant source of difficulty lies in the interpretation of Section 18(b) of the CA1950. The subsection, which includes "any breach of duty" that misleads another without intent to deceive, has long been criticised for its vagueness. Pollock and Mulla (1909) described it as "unclear and useless," primarily because the provision does not define the nature or scope of the "duty" referred to, nor does it clearly distinguish itself from Section 17 of the CA1950 (fraud) and Section 18(a) of the CA1950, which already cover fraudulent and innocent

misrepresentation. This structural overlap has rendered Section 18(b) of the CA1950 conceptually redundant.

As a result, Malaysian courts rarely invoke Section 18(b) of the CA1950, relying instead on the more coherent common law doctrines established in *Derry v Peek* (1889) and *Hedley Byrne v Heller* [1964]. Cases such as *Low Kon Fatt v Port Klang Golf Resort* [1998] and *Abdul Razak v Shah Alam Properties* [1999] illustrate this trend, where judges interpret misrepresentation through common law reasoning rather than the statutory framework.

Collectively, these patterns indicate that Section 18 of the CA1950—particularly Section 18(b) of the CA1950—fails to provide adequate interpretive guidance. The judicial inconsistencies observed underscore the need for statutory reform, clearer legislative categorisation of misrepresentation, and judicial guidelines to ensure consistent application of misrepresentation under the CA1950. Strengthening the statutory language would enhance doctrinal coherence and improve predictability in contractual adjudication.

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