

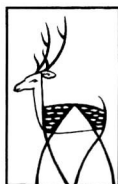
CATHARINE MACMILLAN

MISTAKES IN CONTRACT LAW



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Catharine MacMillan



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Dedicated to my mother, Mavis,
and in memory of my father, Ian

PREFACE

This book is a biography of an idea. It addresses the question of how English contract law came to contain the doctrine of mistake that it does. This is a matter of not only antiquarian interest but also current concern. I hope that I have addressed the question in such a way as to not only provide some insight into the development of the modern law of contract but also to provide a basis upon which others can undertake a reform of the law in this area.

How to explain mistakes in contract law? I have argued that the English doctrine of contractual mistake is itself a mistake. The doctrine arose as a result of the efforts of the scientific treatise writers of the late-nineteenth century who borrowed civilian inspired forms of mistake. They blended these theories of mistake with those cases in which courts of equity had provided relief where a mistake had occurred. As the common law slowly moved towards an unwitting acceptance of sorts of the theories of mistake proposed by the treatise writers, little concern was given as to how this new doctrine would fit within the existing structure of the common law of contract. Further mistakes were made at this point in the formation of the law. When mistake was given recognition by the House of Lords in *Bell v Lever Brothers*, it was thought of as forms of mistake which either negated or nullified consent. The area has been one which has presented conceptual and practical problems ever since; yet another mistake. For all of these reasons, the doctrine of contractual mistake is best thought of as a series of ‘mistakes in contract law’.

I have incurred many debts of gratitude in preparing this work and I am delighted to be able to thank the people and institutions who have helped me. I first discussed how best to approach the problem of mistake in contract law with my friend, the late John Yelland. His comments and insights led me to think of a project with an historical approach; I think he would have found the final result interesting. Many other colleagues gave me helpful comments and support at various points in the preparation of this work: Victor Tunkel, Stephen Waddams, Ian Yeats, Margot Horspool and Wayne Morrison. JoAnne Sweeny has helped me to tidy up certain of the chapters. Jo Murkens provided me not only with invaluable translations into English of various parts of Savigny’s *System of Modern Roman Law* but also with his insights into Savigny’s scholarship. Andrew Lewis kindly read a draft chapter on Roman law and gently corrected more than one error. I am particularly grateful to Michael Lobban who has not only listened to more than one tentative hypothesis but has also read several draft chapters and commented thoroughly upon them. My tutorial students have rendered invaluable assistance in commenting on various arguments. I have also benefitted from the comments given by audience members following the presentation of mistake papers at the

Preface

Current Legal Issues Session (University College London, 2002), the Society of Legal Scholars Conference (Oxford, 2003), the Second Biennial Conference on the Law of Obligations (Melbourne, 2004), and the Institute for Advanced Legal Studies (London, 2007). All remaining mistakes in this work are my responsibility alone.

A number of institutions and libraries have greatly assisted me with searches. I would like to thank Unilever for allowing me access to their historical archives and for the assistance of their staff, the staff at the Parliamentary Archives for their help and also the staff at the Beckenham Public Library and the archives at Kingston upon Thames. I am particularly grateful to the librarians at the Institute for Advanced Legal Studies library for their help and their unfailing assistance in retrieving volume after volume for me.

Last, but by no means least, I must thank my family for their patience, understanding and encouragement as this work was prepared. My family has, so to speak, had to live with the mistakes of others for some time. My initial suspicion that this research had formed a part of family life when my daughter Margaret wrote a school assignment on the topic 'what I did on my holidays' by explaining that she had spent them looking for Mr Bell was confirmed when my son Henry, having been asked to prepare a project on his local neighbourhood, explained (having spent a week in Beckenham researching war damage) where the bombs had landed in our neighbourhood during the war and the ensuing shortage of housing.

I dedicate this book to my mother and in memory of my father. Without their optimism and support none of this would have been possible.

Catharine MacMillan
London
December 2009

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