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# II. Excluding and Limiting Liability and Standard Form Contracts (Chapter 8)

## Contract Interpretation Principles - Essay

Deeper principles

* Meeting of the minds
* Fairness
* Justice

Forward movement is constantly testing the rules against the deeper principles.

Ex. Privity, where the rule wasn’t giving effect to the deliberate intentions and agreements of the parties.

Contract law is more about process than product. The final paper is meaningless within the traditional ideals of contract law.

It is all about voluntarism.

Internet – do we even care about contracts and agreements anymore?

### Some General Principles of Contract Interpretation

### Scott v Wawanesa

* Use plain meaning unless there is another meaning associated with it.

## Unsigned Documents

Document contains various conditions. The party receiving the document didn’t read it.

* Assuming that it is part of the contract - the court will say it sets the terms UNLESS THE COURT IS OF THE OPINION THAT IT WOULD BE UNREASONABLE TO EXPECT THE PERSON RECEIVING THE DOCUMENT TO READ IT/UNDERSTAND IT/KNOW THAT IT IS PART OF THE CONTRACT/CONSENTED then the court won't enforce that term.

Internet – there are different types of internet contracts.

### Thornton v Shoe Lane Parking

Test

1. Nature of the transaction
	1. Hurried?
	2. Lots of time to read before where you can reasonably presume that the issue will read and understand it.
2. Nature of the document
	1. Hidden, lots of conditions, small print
	2. Explicit explanation of terms with big print?
3. Nature of the clause itself?
	1. Very onerous? Broad?
	2. Simple? Not intense limitation of liability

The customer is bound by the exempting condition if he knows that the ticket is issued subject to it (subjective test- Mr. Parker says that he knew then he loses)

OR if the company did what was reasonable sufficient to give him notice to it. - OBJECTIVE TEST

Use this 3 criteria throughout the cases involving these types of situations.

* Facts = Parking garage, no human attendant. The plaintiff was injured in an accident. The ticket says that it is subject to certain conditions that are displayed in the premises
* "All CARS PARKED AT OWNERS RISK"
* Mr. Thornton gets the ticket, on the ticket there is information.
* Please present the ticket to the cashier to reclaim your car.
* This ticket is issued subject to the conditions of issue as displayed on the premises.
* If the plaintiff had read those words on the ticket and had looked around the premises to see where the conditions were displayed, he would have had to have driven his car into the garage and walked around. It would have taken him a very considerable time.

He can’t refuse or get his money back. The offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The customer is bound by those terms as long as they are sufficiently brought to his notice.

The test is that of reasonable sufficiency. In the absence of reasonable sufficiency, the defendant could try and argue that the plaintiff actually knew about the condition. That is difficult.

1. Nature of the transaction
	1. Had already paid the money before the ticket came out
2. Nature of the document
	1. Disposable ticket
3. Nature of the clause
	1. Too onerous – requires more effort to have someone be aware. Need notice.
4. Nature of the parties

### Interfoto v Stiletto Visual

* Business to business transaction
* Even though you have 2 commercial actors, the court is still prepared to say “what is reasonable in the context of those 2 commercial actors”
* Facts = advertising business is looking for stock photos. Interfoto sends 47 photos to have a look at. In the package, there is a delivery note that has certain onerous conditions. There was a late charge of 5 pounds / day – the court changed it to 3.50 pounds/week.
* If you are going to have a clause that is that outrageous – you need to put it in flashing lights and make absolutely sure they are aware of it.
* There is an important relationship between how reasonable the condition is and how much effort the person has to make to make it visible.
* The more onerous the clause, the less likely the receiver is going to expect it. And the less likely that the receiver is going to expect it, the more that the person has to bring it to the attention of the receiver.

In the present case

1. Nothing was done to bring attention, it was just thrown into the bag (nature of the transaction)
2. It is merely 1 of 4 columns printed along the foot of the delivery note, set up small, no bold (nature of the document)
3. This never became part of the contract in the party.

It doesn’t matter that it is not an exclusion clause.

### McCutcheon v MacBrayne – no signature means no consent (L’Estrange in reverse)

Facts = McCutcheon is shipping a car, by ferry, the car is damaged. Damaged as a result of the ferry hitting a rock. The ferry hit the rock because it was being negligently operated.

* Despite the fact that we were negligent and ruined your car - clause 19 in the standard form agreement that is generally signed by customers, will absolve us. The standard form agreement is long. Is divided into 27 paragraphs.

In this situation, he didn’t sign it.

Presented with the document.

Customers are presented it, small print. Beneath them there is a space for the sender’s signature - agrees to ship on the conditions stated above.

At trial, Mr. McCuthcehon described the "negotiations" which preceded the making of this formidable. Sign your name.

Did you know what was in them?

No.

Despite everything, if he had signed it he would have been out of luck.

## Signed Documents – does the signature really mean consent?

Look at the same 3 variables.

A signature gives an objective indication that a party is agreeing.

Traditionally the signature was a full answer. Now, there a lots of factors that are considered to put the person into the circumstances that they are in.

Essay Questions

* Objective indicator of consent.
* Discuss objective theory of contract law and the relationship between signature and consent.
* Objective theory = is there objective evidence on the basis of behaviour of the parties that suggests the signature does equal consent, or doesn’t? Look at 3 areas of concern (document, parties, circumstances that it signed, nature of the clause itself)
* How paternalistic courts should be? The more conservatively we can frame the argument and still get to where we need to get, the better off we’re going to be.

### Tilden Rent-a-Car v Clendenning

* First time that signature does not equal consent. Clause 7A is the one in dissent.
* Characteristics = small type, so faint, did not read it, hurried, informal, in faint copy, hardly legible, on the back of the document, not pointed to by the clerk, inconsistent with the over-all purpose for which the contract is entered into by the hirer, the party signing is unaware of the stringent and onerous provisions. No reasonable measures to draw attention.
* There was an exclusion clause if they did anything illegal or was drunk.
* Clerk testified that if asked, the clerk will say that the coverage will not extend to a situation where the driver is intoxicated (i.e. lie)
* Mr. Clendenning stated that if he had known the full terms, he would not have entered into such a contract.
* Signature to a contract is only one way of manifesting assent to contractual terms.

5 Criteria from Tilden

1. Whether the clerk that was employed by Tilden knew - knowledge
2. The condition that the company is relying on that is I completely inconsistent with the contract
3. Would the person have entered it if they knew the full terms?
4. Contract is entered in haste - time for formal negotiation
5. Clerk/issuer for the company took no steps to alert the defendant to the onerous provisions.
6. The fact that this is a consumer transaction rather than commercial.

### Karroll v Silver Star Mountain Resorts

L’Estrange v Grauco – misrepresentation can happen through omission. This is how McLachlin gets out of the rule in L’Estrange that signature = consent. Which then reconciles Tilden with L’Estrange.

* Not prepared to get rid of L’Estrange v F Graucob and therefore narrows Tilden to exceptional circumstances.
* There is no general requirement that a party tendering a document for signature, to take reasonable steps - to ensure that he reads/understands - it is only when the circumstances are so that the reasonable person should have known that the person should have known that the person signing was not aware - this is a misrepresentation by omission.
* She pulls Tilden into this idea of misrepresentation. If a reasonable person knows that the other party is not consenting because of all the circumstances, IF a reasonable person then that party needed to take some steps to draw the attention. It becomes misrepresentation for the clerk in Tilden Rent-A-Car because that clerk should have known (a reasonable person) that Mr. K was not agreeing to clause 7A.
* Clarified L’Estrange rule – signature = consent unless Fraud or misrepresentation -> Tilden is really misrepresentation (reconcile both)

Facts = signs a ski competition waiver. Got hurt.

Characteristics

* Large
* Said RELEASE AND INDEMNITY - PLEASE READ CAREFULLY
* Knew that the document affected her legal rights.

3 exceptions to the signing principle

1. Where the document is signed by the plaintiff in circumstances which made it not her act
2. Where the agreement has been induced by fraud or misrepresentation
3. Where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, those terms should not be enforced.

The second exception is about active misrepresentation. the test they establish in Karroll is a kind of misrep by omission. In any event what matters most is the test the Court establishes in Karroll regardless of the precise fit with L'Estrange.

Miss Karroll is bound by the release unless she can establish – it seems as if it is not exceptional enough to bring her within the scope of these criteria.

1. In the circumstances a reasonable person would have known that she did not intend to agree to the release she signed
2. That in these circumstances, the defendants failed to take reasonable steps to bring the content of the release to her attention

The Two Part Test

1. Would a reasonable person known what they were signing? Was the clause so onerous and the circumstance so exceptional that the issuer had an obligation to point out the clause even if there was a signature? (use the Tilden factors) If yes
2. In the exceptional circumstances, did the issuer take reasonable and sufficient steps to bring the exceptional terms to the person’s attention to make sure they were aware of what they were signing?

It seems as if Miss Karroll did agree

1. Release was consistent with the purpose of the contract
2. Release was short, easy to read and heading in capital letters. There was no fine print - nature of the document
3. Signing of such releases is common - not an unusual term

It was not necessary to have them make her aware. And even if it was, the judge thinks they did. With the way the document was set up. Miss Karroll’s situation is not exceptional enough to bring her within the scope of these criteria.

Misrepresentation can happen through omission.

Tilden is an exception. This case reconciles Tilden with L’Estrange.

Both T/K look at the same factors (DCP) but Karoll is more concerned with ensuring that we only depart from signature = consent in exceptional circumstance where in Tilden, the bar might be lower. BUT McLachlin did say that the Tilden facts were exceptional.

Essay

* Individual responsibility and the protection of the consumer.
* Standard form is problematic. They aren’t real contracts because there is no real agreement.

## Fundamental Breach

Denning in Karesale – If a contract is entered and there is some gross negligence that is an absolute breach of the contract and the contract is dissolved (including the limitation of liability clause)

* If a breach goes to the root of the contract, it destroys the foundation of the contract, its very reason for existence.
* Signed agreements where it seems like there’s good reason not to enforce a clause.

Signed documents = look at what happened at the time the contract was formed, what their intentions were

Fundamental breach =what happened when the contract was breached because at that point, the consideration was breached. Question is “what to do given the circumstances of the breach”. Most concerned with what is reasonable to do in light of the nature of the breach.

### Karsale v Wallis – creates doctrine via the rule of law approach

* When the person agreed to buy the car, it was in excellent condition – but then when he saw it was in a deplorable state. This was a fundamental breach because it goes to the root of the contract. Once it is destroyed, the exclusion clause is destroyed. This is the rule of law approach to fundamental breach.

### Photo Production v Securicor – rejects rule of law and uses the rule of construction approach

This does away with the doctrine of fundamental breach. (It is enough that consumers are protected)

House of Lords reject the rule of law approach to fundamental breach. It is a rule of construction.

Rule of construction (Dickson – because he doesn’t believe it should matter, always follow the contract) = if anything happens, look towards how the contract was constructed. What did the parties agree to? Ask of the contract -> what did the parties intend? You must interpret the contract therefore look at all the circumstances.

Facts = photo productions agrees that Securicor employees make periodic visits at a cost of 26 pence/visit.

There’s an exclusion clause that purports to cover this kind of scenario.

Therefore, look at the language, see if this situation is covered. The House of Lords doesn’t rule out applying the exclusion clause just because there was a fundamental breach.

On a true construction, the exclusion clause is applicable. It does include deliberate action.

Rejecting the rule of law approach is that these are commercial actors. Parliament has passed “unfair contract terms act” which addresses the problems that used to be addressed by fundamental breach doctrine. Commercial actors can apportion risk as they see fit.

This is an example of capitalism doing some things really well; but there are market imperfections (inequality)

### Hunter Engineering v Syncrude Canada – do both analysis on an exam

Facts = Syncrude sues for the gearboxes because they were broken. This comprised 4 conveyor systems of the 14. There was an exclusion clause where 12 months from the date of operation or 24 from shipment they’d fix it. (400 thousand of 4 million contract)

Dickson = Rejected fundamental breach. Use the doctrine of unconscionability instead. Follow “it says what it says” unless **unequal bargaining power** that was taken advantage of OR Tilden/Karroll criteria are met which is unlikely with businesses. Wants to abolish F.B.

Wilson = Fundamental breach should still be an option when it would be unfair or unreasonable to enforce the exclusion clause despite construction intent. Focus on what happens at the time of the breach NOT when they enter the agreement. Goes beyond the limits of unconscionability.

* Doesn’t matter whether consumer or commercial
* Hybrid of rule of law and rule of construction approach.

Don’t be rigid in your approach of commercial/consumer.

Process

* Is there a fundamental breach (or is it unconscionable)
	+ A fundamental breach occurs where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of **substantially the whole benefit (a complete failure of the other side’s performance) which it was the intention of the parties that he should obtain from the contract – goes to the “root of the contract”**
	+ There is a continuum within the fundamental breach category.
* What is the construction of the contract? (Photo production)
* General fairness and reasonable test (added by Wilson)
	+ Bargaining power
	+ Behaviour of parties
	+ BUT it is about the way that the breach happened NOT about how the contract was formed.
	+ What Justice Wilson seems to be contemplating is that in addition to whether there is bargaining power inequality, or sharp dealing on the part of one of the parties, if a breach has been deemed 'fundamental' it still remains to ask 'how fundamental and how bad?' That is implied by the fact she still asks that question even though at the stage of the analysis she is presuming there was a fundamental breach.

### Fraser Jewellers v Dominion Electric Protection

You get what you pay for.

There is a higher standard on commercial actors -> but doesn’t close the door to potential inequality in a commercial sense.

* Mixture of Wilson and Dickson
* Exclusionary clause of ADT against the Jewellery store should be enforced
	+ Small fee
	+ Jewellery store should have gotten insurance
	+ Mr. Gorden wasn’t under pressure of time; clause was not obscure, hard to find or read, clause wasn’t unusual.
	+ Look at the same factors (nature of the document/clause/circumstance/parties)
* Mere inequality of bargaining power is not sufficient. The question is whether there was an abuse of bargaining power.
* You can distinguish between business people and consumers. They took sufficient steps given that there’s a business person sitting on the other side.
* Deals with Dickson’s concerns about bargaining power and Wilson’s concern that there is a fundamental breach.

Possible Approaches Thus Far

* Tilden/Karroll
* Unconscionability
* Fundamental breach – if not all factors for unconscionability are present, but it would be unfair/unreasonable.

Therefore how we approach this

1. Do an unconscionability analysis
2. Do a fundamental breach analysis and if yes
	1. Decide whether it is reasonable/fair to apply the exclusions clause which means considering
		1. Whether one party took advantage of the other
		2. How bad the breach was

### Solway v Davis Moving – Limitations clauses implied by statute can be overridden by unconscionability

Paternalistic (pro consumer) vs. freedom of contract. This decision is very paternalistic.

* Seems to show that FB can be involved lots -> really bad breach, to allow the exclusion clause.

Facts -they were moving. Davis moves trailer containing valuable goods onto Public Street to plow the parking lot.

The contract has statutory limitation of liability (legislature have tried to create consumer protection regimes – *Truck Transportation Act*). Consumers are not that savvy BUT moving companies need a cap on how much they could be liable for. Then consumer should insure for the rest. In the standard form contract, there is a limitation of liability of 60 cents per pound. Not specific to the goods being transported, just to the weight. Plaintiff was aware of the limitation clause AND had bought additional insurance. BUT Defendant gave false assurances that the goods would be secured and this induced in part the plaintiff to agree to the limitation clause.

Court takes the Hunter/Fraser approach smushed – An exclusion clause will not be applied if it’s

* 1. Unconscionable (Dickson – i.e. unreasonable which is where they combine the 2)
	2. Unfair (Wilson)
	3. Unreasonable (Wilson)

In not addressing fundamental breach, seems to be using a Dickson approach. BUT a weird decision because it doesn’t have any of the factors that have been used.

1. Bargaining power = MAYBE because consumer.
2. Abuse of power? There was misrepresentation so maybe. BUT otherwise the contract was clear.

BUT the problem is that this is a statutorily imposed clause therefore the court is undermining a statutory regime by not enforcing it. This case is very paternalistic because it gives a remedy to a party that hasn’t really been taken advantage of.

What happens when there is equal bargaining power (two large companies)? This case says that even if that occurs, it may be possible that one of them will act in a way that makes the parties unequal.

How? Holding back key facts so they miss important information.

### Plas-Tex v Dow Chemical

Facts = Dow Chemical is selling resin to a company called plastex. Plastex is making pipe carrying natural gas. The resin is defective and Dow knows. Pipes go out of service because of an explosion. There’s an exclusion clause in the contract that excludes all liability (even negligence)

Court finds there is a (1) fundamental breach and (2) that the clause is unconscionable and therefore will intervene.

* 1. Completely unsuitable (FB)
		1. Definitely not fair or reasonable
	2. Unconscionable – should be used sparingly to avoid an exclusionary clause.
		1. Inequality of bargaining power – complete knowledge of the product
		2. Failure to disclose risk they knew about and therefore the other party couldn’t measure the risk and consequences. Deliberately withheld and induced claimant to enter agreement.

On an exam – separate the approaches out. Don’t confuse them and mix them up like this case.

Unconscionability may still factor in between two large business. Don’t presume equal just because they look equal. Hidden information by one party could be enough.

Unconscionability is fact based.

# III. Protection of Weaker Parties (Chapter 11)

There is a tension between freedom of contract/no contract judgment versus social reality (don’t assume they are equal – look at what is fair/just)

## Duress – common law doctrine

### Greater Fredericton Airport Authority v Nav Canada

A finding of economic duress is dependent initially on two conditions precedent

1. The promise must be **extracted** (hard to say extracted if it is offered) as a result of the exercise of "pressure, whether characterized as a demand or a threat
2. The exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer's demand to vary the terms of the underlying contract

If yes to both. Economic duress is not automatic. Both necessary but neither is sufficient.

Then go to

1. Whether the coerced party consented to the variation through examining three factors (broader consideration)
	1. Whether the promise was supported by consideration (least important)
	2. Whether the coerced party made the promise under protest or without prejudice
	3. If not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable.
	4. Whether the coercer was acting in bad faith (exploiting)

Duress = a coercion of the will so as to vitiate consent. Commercial pressure is not enough, a party must be deprived of his freedom of exercising his will so that the act did not amount to a voluntary act. Coercion is so bad that it takes away consent.

Factors used in this case

* G.F. needed the runway built.
* NavCan had a monopoly so no other alternative
* No fresh consideration
* Victim refused to pay from the very outset
* Never deviated from their position
* Independent legal advice
* Good faith (reasons or motives of the promisee for demanding the contractual variation) - this can be good (Williams v Roffey) - may help rebut the presumption.
	+ Moral judgment. Implicitly in Roffey.
* Variation did not come at the promisee’s request.
* More so, if the price increase is critical to the perpetrator’s survival as a commercial enterprise – may not be duress be good faith.
	+ Party may consent for good reasons tied to the financial crisis that the demanding party faces.
	+ The good faith of the supposed coercer may be a reason the supposed victim consents to the variation. (IT MAY)
* None of these criteria are determinative but can help
* Never had a failure to object to the variation is not necessarily fatal – there can be a bit of a time lag, because once the threat of breaching the contract has lost its persuasiveness.

It is not the legitimacy of the pressure that is important but its impact on the victim.

Therefore, there is the extreme situation where it is clearly duress and no consent (gun to your head) but there are less extreme situations where it may make sense for the alleged victim to say yes to the demand because they have made a calculated decision that is in their best interest to go along with. Sometimes, the alleged duress does not vitiate consent because there are good reasons for them to have done what they had done.

In this case

* No reason for NavCan to demand the money. They are using the power they have as a result of the monopoly.

## Unconscionability – use Hunter/Plastex in this case so we have more material. See how they fit in here.

* Higher threshold than unfair/unreasonable – how do we define exceptional?
* Two key element
	+ An improvident bargain(powerful takes advantage of weaker party) – substantially disadvantageous, manifestly unfair.
	+ Inequality in the positions of the parties. (even if there is equality, there may be a situation where two equal parties become unequal because of inequality of known information – Plastex.. i.e. have 2 business you are not automatically out of the realm of unconscionability)

Difference between this and duress? Duress vitiates consent. In unconscionability, there can still be consent

Difference between this and undue influence? A “special relationship” isn’t required.

Two views (start with traditional and then go to less traditional – can’t bring the cases together in one coherent chunk)

* Traditional (Morrison) – exceptional circumstances
	+ High bar. The perpetrator is acting in some wrongful way (fraudulent)
	+ (Hunter) SCC favors the traditional approach which is founded on inequality of bargaining power. Vulnerability was very substantial – exceptional inequality.
	+ Pressure in wrong way – bad faith, quasi-fraud.
* Less traditional (Lloyd Bank v Bundy)
	+ There doesn’t have to be wrongdoing. Socialistic approach.

### Morrison v Coast finance

Facts

* Old woman (79) – almost fraudulent. She mortgaged her home in order to borrow money which she automatically gave to these men.
* Evidence of gross overreaching by the respondent companies. They received the application for the loan from the con men and without having seen the appellant, Crawford obtained valuation of her home and instructed the company’s solicitor to prepare the mortgage.
* He must have heard the appellant say to Lowe, “this is more than I agreed to lend you” – showing that she felt the need for advice.
* The finance company was in on it. Had its own interests to be advanced by going along with this deal. Were more than wilfully blind and actually participating. The case focused on the finance company because it was clear that the con men were in the wrong.

On such a claim, the material ingredients are

1. Proof of inequality in the position of the parties arising out of ignorance
2. Need or distress of the weaker, which left him in the power of the stronger
3. Proof of substantial unfairness of the bargain obtained by the stronger.

It creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable or perhaps by showing that no advantage was taken.

Factual important factors

* She was old
* She didn’t know them
* She got nothing out of it (interest/ wasn’t an investment)
* No independent legal advice.

### Lloyds Bank v Bundy

Extraordinary pressure because of the fact that love blinds

Can’t be rational or act in his interests – love for his son.

There does need to be something that gets you out of the “normal”/ordinary forces of commercial transactions and operation of market economy – winner/loser is normal (homeless)

Extraordinary thing? Relationship with son made him brainless.

Important to do the analyses in less extreme circumstances.

Facts = old Herbert Bundy was a farmer. It was his only asset. His son had a company that was in trouble. Mr. Bundy had already lent him money but then they need more so he increased his exposure. They have foreclosed.

* Didn’t under the mortgage
* Very agreeable person
* No suggestion of improper behaviour on the part of the bank – he was straightforward and genuine.
* BUT he doesn’t appear as vulnerable as Ms. Morrison (he is a small business owner etc.)

General rule is that a customer who signs a bank guarantee cannot get out of it. BUT there are exceptions to the rule. When the parties have not met on equal terms. Therefore the exceptions rest on inequality of bargaining power.

Unconscionability may be possible when the person enters into an improvident deal

* + 1. Without independent advice
		2. Upon VERY unfair terms OR
		3. Transfers property for a consideration which is GROSSLY inadequate where they gain nothing
		4. When his bargaining power is GRIEVOUSLY impaired by reasons of his own
			1. Needs
			2. Desires
			3. Ignorance
			4. Infirmity
		5. Coupled with
			1. Undue influence (BUT does not depend on any wrongdoing) or
			2. Pressures brought to bear on him by or for the benefit

The factors that were considered in this case (Bundy)

1. Consideration – was it grossly inadequate so as to have an improvident deal where nothing is gained?
2. What is the relationship between the parties, was it trust and confidence where potential undue influence could occur. Was it unequal?
3. Was there independent advice?
4. Was there other pressures like the love of a father towards his son? Find the source of the pressure that makes someone do something that is radically against their interests to the point that we will call it foolish.
5. Is there a conflict of interest? In this case, it was the bank who should have suggested the father get independent legal advice.

“Folly”

This case turns on the pressures brought to bear. Need to find something that takes it out of the ordinary circumstances and in Bundy, it appears that it doesn’t have to be coming from the perpetrator.

Types of pressure

1. External – the person who was part of the deal didn’t do anything wrong.
2. Internal
	1. Morrison – bank and con was involved in making the deal happen.

In this case, Bundy is working in a distorted framework where he is blinded by love for his son and can’t see where his own interest lies, where the rational thing to do. This is what takes it out of the homeless/landlord rent situation. This situation is out of the ordinary play of forces because of the emotional forces that are at work causing the foolish actions.

It’s more about the circumstances than the parties.

### Harry v Kreutziger

What makes it traditional is the fact that the pressure comes from the perpetrator.

The person enters into a contract

1. Without independent advice
2. Upon VERY unfair terms OR
* **In this case the man sold a boat for 2,000 that was worth 16,000.**
1. Transfers property for a consideration which is GROSSLY inadequate
2. When his bargaining power is GRIEVOUSLY impared by reasons of his own
	* + 1. Needs (economic etc.)
			2. Desires
			3. Ignorance

**He was told he could get another boat license easily – not true.**

* + - 1. Infirmity
1. Coupled with
	* + 1. Undue influence (BUT does not depend on any wrongdoing) or
			2. Pressures brought to bear on him by or for the benefit

**Pressure comes from the perpetrator of the unconscionaiblity (traditional). Stronger party deliberately took advantage of the weaker party.**

Unconscionability rests on the deliberate manipulation and wrongdoing.

McIntyre judgment

* Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

Lambert judgment

* Community standards?

# IV Mistake and Frustration – Chapter 9 and 10 – factors beyond control

Two approaches

1. Paternalistic approach (equitable courts)
	1. Not fair that mutual mistake should not rescind the contract
2. Caveat emptor (common law)
	1. The responsibility is on the buyer. A contract is a contract. Must have a condition/warranty to have it enforced.

## Mistake

Before you sign it (frustration is the event occurs after you signed)

### Smith v Hughes

A buyer thinks he’s buying old oats for his horse, but the seller sells him new oats. But he wanted old oats. The contract just said oats.

Unless there is a warranty specifying some particular quality, he must accept it despite its not having that quality.

In the Bell case, the House of Lords say “if the contract expressly or impliedly contains a term that the particular assumption is part of the contract” When will a court imply a condition in the absence of an express condition? (Paternalistic) – The court says if you want it, write it down.

Court doesn’t want to go there – need to maintain the idea that contracts are made by the parties.

BUT a difference in kind, as opposed to a difference in quality, will nullify a contract. “We may do that” if the mistake makes the contract something entirely different than what it was.

The rule of law applicable to such a case is a corollary from the rule of morality… that a promise is to be performed "in that sense in which the promisor apprehended at the time promisee received it" and may be thus expressed: The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it

### Bell v Lever Brothers Ltd – difference in quality, not kind.

Lever brothers wanted to buy Bell and Snelling out – the company had undergone restructuring and there was no room left on the board. Unknown to Lever brothers, they were already legally entitled to get rid of Bell and Snelling for free because they had committed some conflict of interest.

Mistake does not allow them to get the money back. The identity of the subject matter was not destroyed by the mistake (they wanted to get rid of them, they did and they just paid more)

The courts’ reluctance to find mistake is even stronger when the party wishing to nullify the contract on the basis of the mistake is actually at fault for making the mistake.

A party cannot rely on mutual mistake where the mistake consisted of belief that is

1. Relied on him without reasonable ground and
2. Deliberately induced by him on the mind of the other party.

In these cases, we’re talking about compensation for reliance; which is why the person at fault wants to say here was no contract. (Plaintiff gets money back, not recovering losses occurred in reliance on the contract)

A mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.

The true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of consideration.

### McRae v Commonwealth Disposals Commission (Australian) – Party at fault can’t rely on mistake

* Commission sells to McRae a wrecked oil tanker that is lying on a reef (or so they think)
* McRae puts together a salvage operation BUT there’s no tanker.
* Commission says the agreement is void for mistake – they didn’t know the tanker wasn’t there.
* The court said that the mistake was a result of the commission’s own negligence so they can’t rely on the doctrine to void the contract.
	+ They were at fault = key point.
	+ It was not an innocent mistake – result of lack of diligence/inquiry
* There is no real reason for them to believe there is a tanker there.
* The plaintiffs did not make an assumption – they relied. They simply accepted the commission’s assurance.
* Since there was no such tanker, there has been a breach of contract – and the plaintiffs are entitled to damage for that breach.

Couturier v Hastie

* Distinguished because there was no fault.
* Carrier brings corn to a different port than anticipated
* Goes rotten because of extra time & bad weather. (wasn’t corn anymore)

Common law doctrine of mistake

* Rigid view.
* Good example of how freedom of contract works. (standard form and unconscionability are 2 others)
* They are giving effect to what the agreement says, not justice (Bell v Lever)

### Solle v Butcher – equitable doctrine of mistake

It is not a different in kind – but unfair. (in the alternative argument)

Facts = Solle is a real estate agent for leasing these flats and then decides he wants one. He enters a lease agreement for 250/7 years. Solle becomes aware of the fact that there’s been a change in the legislation and Butcher had no idea. There has been a change and Butcher’s apartments will now be rent controlled and the maximum Solle has to pay is 140.

If Boucher had known that his flats were subject to rent control – he could have done a procedure to avoid it. But now it is too late, because he was already in the lease with Solle. He could not have known because he was relying on Solle.

Butcher says that the doctrine of mistake should relieve him for having to be in this lease.

**Analysis**

* **The doctrine of common law mistake is not engaged (contract was not void at initium)**
* It is a difference in quality not a difference in kind.
* He says there are mistakes of 2 kinds
	+ Mistake which renders the contract void, that is , a nullity from the beginning, which is the kind of mistake which was dealt with by the courts of common law
	+ Mistake which renders the contract not void, but voidable that is liable to be set aside on such terms as the court thinks fit, which is the kind of mistake which was dealt with by the courts of equity.
* **The doctrine of equitable mistake is created – makes contracts not void, but voidable.**
* **Test =** would it be unjust in light of the mistake, which doesn’t meet the common law doctrine of mistake, to enforce the contract in light of the mistake?
* A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative an respective rights, provided that the misapprehension either as to facts or as to their relative and respective rights, p was fundamental (really important - not be as fundamental as used in Bell v Lever) and that the party seeking to set it aside was not himself at fault.
* These judgments about whether something is unfair/unequitable are very fact specific. They depend on someone getting a crappy deal. This wouldn't have been a bad deal if the rent controls were exactly the same/slightly different than what the market would have placed them at.

**Judgment =** I think the court should impose terms which will enable the tenant to choose either to stay on at the proper rent or to go out.

Elements of equitable mistake

1. Not at fault
2. Fundamental (not same as common law )
3. Evidence of unfairness. .

### Great Peace Shipping v Tsavliris – doctrine of equity trashed here (not binding in Canada but can be used)

* Salvage company needed to have a tug boat come and deal with the crisis that the vessel finds itself in
* Mistake? Both mistaken of where the distressed vessel is. Thought 35 miles but actually 410 miles.
* They found another tug that was passing the GPS on its way to GPS.
* GPS sues Tsavliris.

|  |  |  |
| --- | --- | --- |
| Salvage company | Pay you to go to distressed vessel | Tug - GPS |
| Tug - GPS | We'll go | salvage |

* No one is at fault. This is a difference in quality not kind.
* A telling point is the reaction of the defendants on learning the true positions of the vessels. They did not want to cancel the agreement until they knew if they could find a nearer vessel to assist. Evidently, the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once.
* Then they completely reject the equitable doctrine of mistake.

### Miller Paving v Gottardo

|  |  |  |
| --- | --- | --- |
| Gottardo | We'll pay you to supply materials | Miller Paving |
| Miller Paving | Supply materials & we acknowledge that we've been paid in full once final payment made. | Gottardo  |
| Mistake | Didn't know no previous payments were made. |   |

Miller is now suing Gottardo for those previous payments.

Decision

* The contract should stand at it is. Look at the true construction – allocates the risk of any mistake to Miller.

The following elements must be present if common mistake is to avoid a contract

1. There must be a common assumption as to the existence of a state of affairs
2. There must be no warranty by either party that the state of affairs exists
3. The non-existence of the state of affairs must not be attributable to the fault of either party
4. The non-existence of the state of affairs must render performance of the contract impossible
5. The state of affairs may be the existence or a vital attribute of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

It is that in considering whether to apply the doctrine of common mistake either at common law or in equity, the court should look to the contract itself to see if the parties have provided for who bears the risk of the relevant mistake, because if they have, that will govern.

Why can’t Miller succeed in setting aside the agreement? (If he can use the doctrine of common mistake – if you ignore the courts argument that it should be looking at contract construction)

In common law – (Bell) Miller must show that as a result of the common mistake, the subject matter of the contract has become something essentially different from what it was believed to be.

In equity – Miller must show that he was not at fault. The findings were that it was errors in his own procedures. Unconscientious.

Miller here was at fault. You can’t draw an analogy with Butcher where there was no fault.

Always make an alternative argument for getting rid of the doctrine of equity (for following Solle v Butcher and GPS – neither is binding.)

Summary

1. Look a construction
2. Apply the common law doctrine of mistake
3. Apply the equitable doctrine of mistake

## Frustration – if they couldn’t have anticipated it.

Frustration is when a contract becomes impossible to perform (it is frustrated)

As opposed to mistake – there never was a contract. You CANNOT be mistaken about something that hasn’t happened yet.

Test = whether something has become entirely, radically (at the root of the contract – radish/ fundamentally) different than what the parties could have reasonable anticipated when they entered the agreement. If they could have known – should have put it in the contract.

This is a nod to freedom of contract.

* Obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from which was undertaken by the contract.
* Objective standard
* Situation that couldn’t have been known/anticipated

Frustration/mistake are controversial – clashes with the sanctity of contract. (Freedom of contract)

### Paradine v Jane

Facts = Prince Rupert kept him and his cattle out of his land (expelled him) so that he could not enjoy them so he didn’t want to pay the lease.

* When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

### Taylor v Caldwell

Facts = the plaintiff rented the Surrey Gardens and Music Hall for a concert. BUT then it burns down. They don’t want to pay.

Decision? We think therefore that the Music Hall having ceased to exist, without fault of either party, both parties are excused.

Court doesn’t want to venture too far from the sanctity of contract therefore they create a legal fiction that there was an implied term that says we will not carry forward with this if it becomes impossible.

* The parties didn’t have this possibility in their mind when framing the agreement.
* If it is impossible and there is no fault – then the parties are excused.
* Don’t’ care what the parties presumed – it is an objective test. What 2 reasonable people would have done?

Frustration factors

* Performance impossible
* No fault of the parties
* Can’t reasonable have expected that the two parties to have known that the situation would have occurred.

Frustration Factors

1. Very unexpected
2. Turn the contract into something radically different from what the parties could have reasonably anticipated.

### Can Govt Merchant Marine v Can Trading

MM agrees with Can Trading to transport lumber from Vancouver to Australia in two vessels.

BUT the vessels are still under construction at the time of the contract because of a dispute between the appellants and the shipbuilders. Therefore, the MM is unable to fulfill the contract because the ships aren’t completed on time. They want the contract to be deemed frustrated so not to be liable to Can Trading company.

Why this is not a “frustration situation”

* The delay was not due to any extraordinary occurrence.
* Real impossibility of performance arising from destruction of the ships by fire (for example) would have been different.
	+ Therefore – it is not about the result BUT HOW/the manner that the impossibility occurred.
* The court thinks that the appellants COULD have done something about this. To some extent, they have a bit of fault in this situation.
	+ Relates the reasonableness of assumption that is in the ordinary course of events. They could have foreseen that something might occur in the ship yard (in these days of labour troubles).
	+ It was caused by a dispute of the appellants and the shipbuilders.
* This is not an unforeseen event.
* If the event which causes the impossibility could have been anticipated and guarded against in the contract, the party in default cannot claim relief because it has happened.

### Davis Contractors Ltd

This case rejects the search for an implied term – just look at the reasonable person.

You can’t assume that the parties impliedly turned their minds to something that they could have foresaw. Just own up to what the court is doing “applying an objective rule of the law of contract to the contractual obligation that the parties have imposed upon themselves”

Plaintiff agrees to build 78 houses within a period of 8 months. It took 22 months because it was right after the war.

This is not a radically different situation. (Need something more than a delay because of post war labour?)

Two things seem to prevent the application of the principle of frustration in this case

1. The cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen.
2. Though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay was having the same significance for each.

Frustration occurs when

* No fault
* Obligation incapable of being performed
* Circumstances would create something radically different than what was in the contract.

It is not what the parties reasonable thought. It is what the court think people in this position could have foreseen.

### Claude Neon General Advertising v Sing – Legal/ regulatory Change

Facts = plaintiff rents a neon sign during WW2 then a law is passed that says you can’t have it lit in the night.

The court says that this is not radically different. It is still a sign shows how narrowly the court interprets it.

### Capital Quality Homes Ltd – Opposite Claude Neon

* Plaintiff purchaser agreed to buy 26 building lots each comprising parts of lots within a registered plan of subdivision (Jan 15, 1969)
	+ both knew the purchaser’s intention was to buy building lots and erect a home on each with the intention of selling by separate conveyances
		- purchaser entitled to conveyance of a building lot upon payment of 6000 and, upon payment of full amount, to 26 separate deeds
	+ when the sale was made, the land was not in an area of subdivision control
* June 27, 1970 (30 days prior to closing date) - amendments came into effect that brought the land under the *Planning Act*, restricting an owner’s right to convey and requiring consent of a committee to convey. Therefore instead of buying 26 lots, he was buying 1.
* They made no arrangements to postpone closing. There was some discussion of it.
* So between the sale and the closing, the previously unregulated land is brought within a situation where each lot must apply and get permission to build; and the whole idea of these things is to build a bunch of houses. Running the risk of not getting that permission makes this land close to worthless from the perspective of the purchaser – short 33 days made it impossible to obtain the necessary consents.
* Doctrine of frustration
	+ New legislation made it impossible to fulfil the terms of the contract. Failure of consideration. The change made the land worthless.

Frustration

1. The event was not contemplated by the parties. It wasn’t reasonably contemplated it by the parties. It shouldn’t have been expected. “whether they should have provided for it” – OBJECTIVE APPROACH
2. Did it fundamentally change the character of the agreement? Yes.
	1. Something different in kind
	2. Destroyed the very foundation

### Victoria Wood Development Corp

* Technically this has to follow the *Capital Homes* case because it was decided by the court of appeal. The judge has to believe the facts are distinguishable.
* Facts
	+ Plaintiff, VW, contract on April 6, 1973 to purchase 90 acres from the defendant bordering on QE Way in Oakville; completion 31 October, 1973 (same as *Capital*)
	+ Defendant knew plaintiff intended to subdivide and develop the land (same as *Capital*)
	+ amendments to Ontario planning legislation, passed on 22 June 1973 + regulations filed under the new legislation 4 August 1973 brought the property within an area that precluded subdivision and development (same as *Capital*)
	+ Relying on *Capital Quality Homes*, plaintiff sought a return of deposit.
* OSLER distinguishes this from *Capital Quality Homes*
	+ “very foundations” have not been destroyed - the agreement was not made conditional on the purchaser’s ability to carry out the intention to subdivide
		- Even though the vender knew the intention – more than mere knowledge is required.
		- The foundation was just to buy/sell the property.
		- Nothing in the supervening legislation affects the parties’ abilities to carry out these obligations.
		- Developer is always under risk of zoning changes. Developer is not impossible, 4 years later it is clear that you can apply.

Difference between Capital Quality

* In that case, there was already some subdivision that had occurred.
* In Victoria – it was sold as an undivided plot. (you bought a piece of land, you get a piece of land)

Victoria and Claude neon both suggest a high bar.

* Even if the quality of the use is substantially diminished, that’s not enough for frustration.
* Capital = court is willing to be a little more supportive of the buyer’s position.

### KBK No 138 Ventures Ltd

* Safeway sold land on Victoria Street as “prime re-development opportunity”
* KBK wanted to develop mixed commercial and residential. Paid the first 150 k of the instalment.
* Supervening event Director of planning submitted an application to have the property rezoned. Neither had contemplated this possibility – both objected but it was passed.
* This case is distinct from Davis BECAUSE
	+ It was not just the sale of property BUT the prime-redevelopment opportunity advertised in the ad.
	+ Clauses in the contract specifically refer to the condo development/non-competition
* More like Capital Quality than Victoria Wood because Safeway had “more than mere knowledge” of KBK’s plan.
* Can look to implicit agreement of sale being contingent on something as being part of the contract. – only “reasonable source”
* Not foreseeable change in zoning.
* Fundamental change. (not a mere inconvenience)
* Look at a broad range of factors.

Factors

* Unforeseeable change – reasonable actors wouldn’t know.
* Fundamental change
	+ Look at reasonable construction of the contract. (rice clause, non-competition clause, the advertising)

### Kesmat Invt Inc

* Complicated sale of land contract where it became apparent that one of the parties would have to conduct an environmental assessment.
* The cost of the study has not been shown to be so onerous or unreasonable so as to render performance of the contract impractical.
* The requirement of such study or report was not an unheard of request.
* The costs wasn’t’ that great. A change in the price doesn’t change the entire nature of the transaction.
* The parties could have been expected to expect this.

# V Representations and Terms – Chapter 7

Spectrum

Mistake-misrepresentation-fraud

No way either person could have known (both innocent) – seller is not entirely innocent – there was malicious intent to lie to the buyer (guilty)

## Misrepresentation and Rescission

Three categories of representations

1. Mere puffs - sales talks
2. Mere representation - which are not terms of the contract, but which can lead to the limited legal consequences indicated in section 2 of this chapter. A pre-contractual representation.
3. A statement construed as a term of the contract - leading to more serious legal liabilities in the event that it is broken.

Misrepresentation and consequent rescission

* Assumption is that the statement has no contractual force. It induces a party to enter a contract but it is not part of the contract.
* If it is (1) false and (2) does induce them – then equity will provide a remedy and will rescind the contract.
* BUT as a matter of strategy – sometimes you want damages. So you want to try and argue that it was a statement that was part of the contract.
	+ Collateral warranties that are actual terms of the contract.

### Redgrave v Hurd

Equity is worried about the buyer. BUT remember you can’t get damages for equity (so even though YS sued for damages, you aren’t allowed to get that)

An old solicitor was selling his house/practice. A young man agrees to buy it. He asks about the income of the practice and the old man says we make 300-400 pounds. But the account says 200. YS asks where the other 100-200 comes from and the OS shows him a bunch of papers. The YS accepts that and realizes after that it was “utterly worthless”

* Negligence is not enough to negate misrepresentation.
* Presumption that a misrepresentative fact that is fundamental to the contract induced the person to enter it and he relied on it.
* Equity is very protective over the buyer.
* What is the responsibility of the buyer? Once you've shown it is a misrepresentation - there is no responsibility on the part of the victim of the misrepresentation to find out the truth.

### Smith v Land and House – opinion

In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion.

BUT if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

In this case, the seller said that the tenant was a “desirable tenant” – when clearly he was. Court holds in favour of the buyer

Opinion can be used as misrepresentation statement.

An opinion carries with it a set of presumptions about facts. (Assume they haven’t had any problems with the tenant at the time of that assertion)

### Bank of British Columbia v Wren – silence as misrepresentation

Allan is a majority shareholder in Wren. Company takes a loan from the bank for 30,000 and provides collateral via shares. The bank releases the shares at the request of the managing director (Smith). In the absence of this collateral, Allan will be personally liable.

Allan is then asked to sign another guarantee. He asks the bank manager who doesn’t know whether the collateral is still there but he signs anyways. In the absence of the collateral, Allan is personally responsible for the loan.

* He had no reason to believe that it wasn’t still there.

I find that the defendant Allan, when he signed the second guarantee, was misled by the words, act and conduct of the plaintiff into believing that there had been no change in the collateral securities held by the plaintiff, and otherwise he would not have signed it. In short, there was a unilateral mistake on the part of the defendant Allan which was induced by the misrepresentation of the plaintiff in failing to disclose material facts to him.

Therefore, silence is not necessarily an answer to a misrepresentation claim. Must look at all the evidence and see what should have been said by the parties that had all the knowledge.

## Representations and Terms

### Heilbut, Symons and Co v Buckleton

* The burden rests on the one alleging the collateral term. Need evidence (words, behaviour, something) – it is a high standard.
* It is conceptually possible but high bar to have pre-contract have contractual force.
* It is only in exceptional situation where it is clear that they intended it to be binding.

Respondent is a broker and buys a large number of shares, believing that the company is a rubber company which is important because at that time – rubber is very important.

In actuality, they are not a rubber company. Once this fact become known, the broker suffers a considerable loss.

It appears as if not being fraud.

In this case, there was no collateral warranty or any intention to create one. To call the statement that this is a rubber company, made prior to entering would open the floodgates. And ignore the doctrine of classical contract. You may have paid less for not specifying that it was a rubber company – you didn’t get the certainty.

A person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case, the statement was made in answer to an inquiry for information. There is nothing which can be taken as evidence of an intention on the party of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more.

This case is wholly distinct from the question which arises when goods are sold by description and their answering to that description becomes a condition of the contract.

Having collateral statements to the main contract is very rare, exceptional and viewed with suspicion.

### Dick Bentley Productions v Smith

* This is a consumer (rather than commercial situation) because buyer is less knowledgeable.
* Objective inquiry.
* Damages for breach of warranty on the sale of a car.
* Factors that it depends on
	+ Conduct of the parties
	+ Words and behaviour rather than their thoughts (behaviourist rather than subjective)
	+ If an intelligent bystander (reasonable person) would reasonably infer that a warranty was intended, that will suffice.
		- If yes, when a statement was said to induce a party to enter a contract -> reverses the burden to prove that it was not contractual.

Mr. Bentley buys a Bentley from Harold Smith.

Smith tells Bentley that the Bentley had had its engine and transmission replaced. There was only 2000 miles on the new engine. Then Mr. Bentley repeat what Mr. Smith says. He doesn't dispute the facts. The relationship between the two parties - they are at idem at this issue that there is a new transmission and engine which only has 20000. It turns out that they have lots more miles. The car is a disaster.

The buyer will be protected if the seller is not innocent. False statement.

False things = inducing. Therefore seller wont’ be able to prove that it wasn’t collateral if the statement is false.

What does “not innocent” include?

* Negligent
* Reckless
* Careless

There is an information imbalance (plastex)

This is coming very close to saying that an innocent misrepresentation that induces a person to enter a contract is a warranty and is a way of applying contractual liability.

If a person makes a statement that isn't true that induces a person to enter an agreement and that that person made the untrue statement because he was careless about the facts - then that person will be held to contractual liability for that statement. That is not that different of the case for OS/YS in Redgrave. The doctrine may do exactly what the court was concerned about in that case.

Denning is trying to protect buyers. He wants less carelessness on the part of sellers.

Principle

If a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty.

The maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation – he was innocent in fault in making it and it would not be reasonable in the circumstances for him to be bound by it.

If it is false representation – there’s no way to rebut the presumption.