Try not to waste too much time laying out the law.

Incorporate facts in your description of the law.

Don’t just copy out of your notes.

Do it on a “need to describe” basis.

Expose the law as you are using it in your analysis.

It’s all about analogies and distinctions. Show why the facts are similar or different.

**COMMERCIAL VS CONSUMER TRANSACTION**

*Fraser:* general statements about treating business people.

In reality there is no bright line.

Issues of bargaining power.

One can be taken advantage of.

Consent is not as real.

Inexperience/power.

You can refer back to an earlier description of this when laying out your law. Then apply it.

Dissimilar? Analagous?

Consumer vs Commercial is important. Both *Tilden* and *Karroll* are consumer transactions.

* There are different expectations if it is a commercial or a consumer context.
* High expectations for knowledge/comprehensions of a commercial business.
* Less power imbalance.
* Unequal bargaining powers.
* These factors may be dependent on the circumstances: for example a multi-national corporation or a painting business run by students.

**STANDARD FORM CONTRACTS**

This issue here is whether [X]’s signature should be taken as conclusive proof that [she] consented to [the clause] in the standard form contract provided by [Y].

In contract law there is a strong presumption that a signature equals consent. The court in *L’Estrange* held that a party is bound by their signature on a contract (except in a case of fraud or misrepresentation) even though the party may not have read or understood the document.

There is a line of authority supporting the proposition that a party seeking to rely on an exclusion of liability clause, which the signing party has not read, must show that they have made a reasonable attempt to bring the signing party’s attention to that clause (*Tilden*).

The leading decision in BC follows *L’Estrange* and notes that *Tilden* is not a general principle of contract law that must be satisfied in every case. It has limited applicability as an exception to *L’Estrange* where the circumstances effectively give rise to a form of misrepresentation by omission: 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. [X] can bring [herself] within this exception if [she] establishes two things: 1) in these circumstances a reasonable person would have known that [she] did not intend to agree to [the clause]; and 2) [Y] failed to take reasonable steps to bring the content of [the clause] to her attention.

These two elements are inherently circular in that they both involve an assessment of the nature of the transaction, the nature of the document, and the nature of [the clause]. Here….

Essentially: would [Y] have reasonably understood that [X] intended to be bound by [the clause]?

*Nature of the transaction*

* Was this a consumer or commercial transaction?
* Rushed/hurried?
* Full reading and deliberation?
* Consensus ad idem?
* Take it or leave it?
* Pressure not to read it?
* Was the transaction hurried? Pressure? Full deliberation and reading?
* *Tilden:* The transaction was carried out in a hurried, informal manner. In fact, the speed with which the transaction is completed is said to be one of the attractive features of the services provided.
* *Karroll:* She could not recall if she had an opportunity to read through it.

*Nature of the Document*

* Where is the clause located? How is it situated in the contract?
* *Tilden:*
* The conditions were of particularly small type and so faint as to be hardly legible.
* Next to the space provided for a signature, the contract states that a signature is taken to mean that you agree to all terms of provisions of the agreement.The conditions are provided in the back of the contract.
* The conditions were at the back of contract.
* The conditions were in series.
* *Karroll:*
* Identifiable on a casual glance: no fine print; printing entirely contained within the page signed; only three clauses
* Proclaimed its purpose in bold letters
* Heading at the top of the document with capitalized admonition to read it carefully: “Release and indemnity – please read carefully”
* Read it in one or two minutes

*Nature of the Clause*

* How consistent is it with what a reasonable person would expect?
* In relation to the rest of the contract.
* More understood/common knowledge/not surprising?
* Unexpected/extreme/unusual? Severe? The rights it takes away?
* Does it completely undermines what she thinks she is getting based on the other evidence?
* *Tilden:* 
  + - The clause was so unexpected and onerous that it denies the very thing he expects he is getting.
    - It was “completely inconsistent with the express terms which purport to provide complete coverage for damage to the vehicle in exchange for the additional premium”.
    - i.e. exceed speed limit by one mile per hour, just one glass of wine or beer, off a federal, provincial or municipal highway (i.e. a shopping plaza) then he was responsible for all damage.
    - He knew that he should not be intoxicated (this is standard in insurance) but did not know that any amount of alcohol was bad.
    - “The clauses…are inconsistent with the overall purpose for which the contract is entered into by the hirer. Under such circumstances, something more should be done by the party submitting the contract for signature than merely handing it over to be signed.”
    - Insurance is incorporated into the contract.
    - *Karroll*:
    - There is nothing unusual or unexpected of the clause.
    - Signing these release forms is a common feature of ski races.
    - Signed these on previous occasions.

Note the switching of the burden. *Tilden* as a stand-alone principle with broader application. Comment on limited application. Consensus ad idem etc. (see essay).

The two questions are very similar to those in Thorton.

A standard form agreement is identified by the fact that it was drafted by one of the parties and signed by the other party with no negotiation.

This is all about whether a signature is proof of consent.

In *McCutcheon,* the lack of a consumer’s signature on an agreement prevented a shipping company from relying on their exclusion of liability conditions. The court held that the signature would have bound the consumer to the conditions despite the fact that they were very onerous and were presented in a lengthy document during a rushed transaction.

The court in *Karroll* took a more relaxed approach

Consumer vs Commercial is important.

This is about whether the signature is proof of consent.

General Rule: consequences of unequal bargaining power vis-à-vis consent of the party. Is one party vulnerable in the way Clendenning was?

Compare *Tilden* and *Karroll:* dependent on the players involved; different language used; dependant on circumstances and how a signature is put on the document

The key is to find out when a signature = consent

Add them all together.

*Karroll*: if she did not know about the exclusion, she should have (first question).

“…unless she can establish…” – burden is on her.

Use the more in depth analysis in *Karroll*, but use the factors *Tilden* articulates. Note if the approach in Tilden would lead to a different result.

**UNCONSCIONABILITY**

The issue here is whether [X] can rely on the doctrine of unconscionability [in her defense].

Unconscionability generally has two key elements: a relationship of unequal bargaining power; and an improvident deal in favour of the stronger party. Here…

[Note *Fraser*; analyze the two elements with *Harry, Morrison* and *Bundy*]

However, the satisfaction of these two elements only raises a presumption of unconscionability. Also required is a further assessment of whether [Y] was acting in some wrongful way. In *Harry* and *Morrison*, the actions of the stronger party were tantamount to fraud. Here…

[Analyze the transaction with *Harry* and *Morrison*]

These circumstances [are/are not] likely to be found to be on the same level of wrongdoing as that in *Harry* and *Morrison.*

However, in *Bundy*,Denning applied the doctrine of unconscionability in circumstances where the stronger party was acting genuinely and without malevolence. In that case, the stronger party failed to recognize their own conflict of interest, as well as the pressure on the weaker party caused by his affection for his son, and subsequently failed to advise him to seek independent advice. Here…

[Try and bring the fact pattern into the scope of *Bundy*]

These circumstances [are/are not] likely to be found to be on the same level of wrongdoing as that in *Bundy.*

-------

Two factors:

* The relationship is one of unequal bargaining power.
  + - One party is in a position where they are more powerful.
    - May be unequal in a particular relationship; i.e. disclosing information.
    - Not just in the abstract.
    - Elements of the interactions between the two parties.
    - Notion that the weaker party is not really intending; even with consent
    - Ignorance, need or distress, which left in in the power of the stronger
    - *Morrison: old; naïve; ignorance; inexperience; the bank were experienced in business and financing.*
    - *Bundy: the relationship was one of trust and confidence; he is somewhat experienced; property owner; farmer; dealt with banks previously; most people don’t understand mortgages.*
    - *P was not particularly vulnerable; not uncommon to be uneducated; had some experience in business; but the other party was particularly nasty; knew boat was worth more; led P to believe it would be easy to get another license (it was impossible*); *“by education, physical infirmary; and economic circumstances, was clearly not the equal”;*
* Improvident deal (the deal struck is substantially disadvantageous to the weaker party)
* Proof of substantial unfairness in the bargain obtained by the stronger.
* In the traditional cases, there is a strong link with fraud.
* *Morrison: the act of persuading her to mortgage him home was a con; she got nothing out of the deal; no expectation of reward or security; amount to be paid back was equal to the amount she lent.*
* *Bundy: consideration was grossly inadequate: all the company gained was a short respite from doom; it was clearly going to fail, Bundy was going to lose his home, yet the bank mortgages it anyways.*
* *Harry: the boat was sold well below its value.*
* The stronger party acts in some wrongful way.
* *The bank was aware of the essential facts and still prepared the transaction; for them to take advantage of her obvious ignorance and inexperience in order to further their respective businesses raises a presumption of fraud; “gross overreaching”; the bank was knowledgeable or wilfully blind.*
* *Bundy: this wasn’t evident; the bank representative was genuine. See the four factors: the bank simply failed to realize their conflict of interest and the pressure on Bundy; should have advised him to seek advice; omission not commission; bank didn’t con him*
* *Harry: deceit and fraud; aggressive – P was trying to not engage in the deal; and with full knowledge of the value of the license; similar to Plas-tex – one of the parties lying about critical information; “assured falsely or recklessly that he would be able to get another license…P admitted he knew little or nothing of the matter”; domination; manipulation; “within the power of the respondent”;*

*Morrison v Coast Finance*

* P is persuaded by two men to take out a mortgage on her home and lend them the money for a car; the bank oversees the whole transaction; the men never paid her and she defaults on the mortgage.
* “On proof of these circumstances, it creates a presumption of fraud which the stronger party must repel by showing the deal was fair, just and reasonable.”
* This is the traditional approach: something amounting to fraud; pressure and wrongdoing are tantamount to fraud; one party acting in a fraudulent way.
* Note: Denning suggests you don’t need to find any wrong doing.

*Lloyd’s Bank v Bundy*

* D’s son’s business is failing; on multiple occasions the bank oversaw the pledging of D’s house as security for loans to his son; the loans add up to more than the value of the house; the business failed and the bank foreclosed on D.
* Denning admits that in the vast majority of cases, a customer who signs a bank guarantee cannot get out of it. This is in the ordinary course of business.
* “When I use the word undue, I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other; i.e. he suggests you you can have a situation where the stronger party is acting normally, the weaker party consents, and there is still unconscionability.
* Four factors:
* Consideration was grossly inadequate: all the company gained was a short respite from doom; it was clearly going to fail, Bundy was going to lose his home, yet the bank mortgages it anyways.
* Inequality of bargaining power: the relationship was one of trust and confidence.
* The father is under pressure, that not imposed by the bank; his affection for his son had great influence over him; caused him to act irrationally and unreasonably.
* Conflict of interest: they should’ve given him better advice or told him to seek it (a responsibility on the bank?); any competent solicitor would say “do not go ahead with this deal”.

**MISTAKE AND FRUSTRATION**

The doctrines are the same, except for the distinguishing element of timing.

Mistake: the contract becomes impossible to perform before it has been is signed.

Frustration: the contract becomes impossible to perform after it has been signed.

*Smith v Hughes*

* Buyer thinks he is buying old oats but they turn out to be new; the seller knew they were new; there was no misrepresentation; the contract does not distinguish between the two.
* The onus is on the buyer to put the stipulation in the contract.
* Policy: the buyer is taking a risk in being ambiguous, but is getting a better price. The cost may go up if he requests a stipulation.

When do you imply a term? This is what the doctrine of mistake is all about.

* To reflect the intentions of the parties?
* It must reflect the entire identity or existence of the subject matter (“something different in kind”), rather than the quality or description.

*Bell v Lever Bros*

* P pays D to leave their job due to company restructuring; later it is found out that D had done things which made them liable to be fired; D had not misled P; had P known, they wouldn’t have had to pay D.
* The subject matter of the contract is the dismissal of D.
* P got what they wanted, it just cost more. This speaks to the quality of the subject matter. Not the identity or existence.
* The onus is on P to be more aware or vigilant: research; patience.

“Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just….a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of the facts.”

What if the party wishing to nullify the contract is the one who should’ve known? i.e. if they are at fault. Caveat emptor only applies if they are innocent.

*McRae v Commonwealth Disposals Commission*

* Contract to salvage a tanker; P spent a lot of money to get there; D is to blame for not knowing the tanker is not there
* There was no due diligence or steps taken to ensure the tanker was there.
* “A party cannot rely on a mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party.”
* Even if they had a real belief in the existence of the tanker, they were guilty of gross negligence. (Reckless).
* It is impossible to say they had any reasonable grounds for such a belief. Yet they asserted their advertisement to the world at large and specified the locality to P.
* Since D was at fault, they cannot rely on mistake and the contract is valid, P gets damages for breach.
* *Couturier: a ship was caught in bad weather and went to port; the corn was going bad so it was sold immediately; the original buyer of the corn didn’t know and went on to make contracts to sell the corn; he couldn’t have investigated (no phone/internet); the contracts were void.*
* Key: this comes down to a matter of judgement. What were the intentions or reasonable expectations of the parties? Was this reasonably foreseeable? What sort of due diligence was required?

What about circumstances where it would be unfair to enforce when there has been a major mistake as to quality?

*Solle v Butcher*

* D owned a flat; P was in charge of arranging financing, negotiating rateable values, and renting out the flats; P advised D that the flat was not under rent control legislation and P relied on this; P leased the flat from D for $250; the rent control legislation actually applied and the rent could not exceed $140.
* 1) Look at the legal doctrine of mistake (“void *ab initio*”).

2) If the threshold for legal mistake has not been met, look to equitable doctrine (“voidable”).

* Where it would be unfair to enforce the contract.
* “The court had the power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained…It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material representation of the other, even though it was not fraudulent or fundamental, or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out his mistake.”
* P was the one who said there was no rent control, and it was reasonable for D to rely on him. The price was normal. P was guiding D. D could’ve taken steps to exempt the flats from rent control.
* D was relying on the very person who screwed up and received the benefit of the mistake.

*Great Peace Shipping v Tsavliris Salvage*

* D had a damaged ship; thought P was 35 miles away and contracted with them to go and assist; turns out P was 410 miles away; D found another ship that was closer and contracted with them instead; the contract allowed P a cancellation fee of 5-days hire; there was evidence that P still could’ve saved D despite the distance.
* The court said mistake did not apply, and overruled *Solle.* There is no equitable doctrine of mistake.
* “The fact that the vessels were further apart than both parties had appreciated did not mean that it was impossible to perform the contractual adventure.”
* It was merely opportunistic for D to find a new ship. There is no injustice here.
* Comments on *Solle*: the effect of the mistake has been to make the contract a particularly bad bargain for one of the parties; the common law is seen to work an injustice; “it is difficult to see how that can apply here”.
* It is impossible to reconcile *Solle* with *Bell*: “It has been a fertile source of academic debate, but in practice it has given rise to a handful of cases that have merely emphasized the confusion of this area of our jurisprudence.”

*Miller Paving v Gottardo Construction*

* P is in a contract to supply materials to D for construction; they sign an agreement acknowledging that P has received payment in full; P later discovers some unbilled invoices; D claims that agreement bars any further billing.
* Three forms of analysis:

1. Look at the words of the contract and determine if the parties have provided for who bears the risk of the relevant mistake and if they have, that will govern.

* It required Miller to bear the risk.

1. Look at the common law doctrine. The subject matter of the contract must be something essentially different from what it was believed to be.

* Due to the mistake, they still got paid, just less.
* Also the element of fault.

1. Look at the equitable doctrine.

* P was at fault, not D.
* The benefit of D is offset by the fact they may have relied on the position of D and altered their position as a result of their overpayment.
* Note: reliance was incidental to the fault issue. It is not on D to tell P that they are wrong. This is all a matter of judgement.

“*Great Peace* appears not yet to have been adopted in Canada and, in my view, there is good reason for not doing so. The loss of the flexibility needed to correct unjust results in widely diverse circumstances that would come from eliminating the equitable doctrine of common mistake would, I think, be a step backward.”

**Frustration**

*Davis:* Frustration occurs whenever the law recognized that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

*Paradine*

* P leased land to D; civil war occurred; D was ousted from the land; P wishes to enforce the lease.
* When a party contracts a duty upon himself, he is bound to make it good, notwithstanding any accident or inevitable necessity.
* D could have put the term in the contract; the court won’t put the term in for him.

*Taylor v Caldwell*

* D agreed to let P use a music hall for concerts; the hall was destroyed by fire w/o the fault of either party.
* “Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time came for fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering the contract, they must have contemplated such continued existence as the foundation of what was said to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.”
* Court keeps it narrow: unanticipated; no fault; destroys subject matter.
* It is rooted in intention.
* It is objective: what reasonable people would have intended.

*Canadian Government Merchant Marine v Canada Trading*

* P contracted with D to transport lumber; the ships were under construction and both parties knew this; because of a labour dispute between P and the builders, the ships were not ready in time and transport could not be done.
* The court says no: a term should not be implied when reasonable people could have contemplated the risk of the circumstances being what they in fact proved to be when the time for performance arrived.
* There was no evidence to indicate that the delay was due to an extraordinary occurrence. It was foreseeable that construction could be delayed. The risk should be on the defaulting party.
* D was assuming that P took into account their labour relations when estimating a price, schedule, etc. This was in the ordinary course of business.
* An extraordinary occurrence would include a tsunami, fire, etc.

*Davis Contractors v Fareham UDC*

* P contracted to build homes for D; adequate supplies of labour were not available to complete the contract for the time and price stipulated; the labour shortage was common knowledge – “notorious facts”.
* Court: we can’t open the door to these types of scenarios; have to maintain the exceptionality of the doctrine.
* The cause of the delay was not any new state of things which the parties could not reasonably have been thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of a special contractual stipulation.
* These are matters of negotiation: will change the nature of the deal regarding pricing, bids, etc.
* Removes “reasonable foreseeable” and “implied term” inquiries; simply ask “is it radically different”.

*Claude Neon General Advertising v Sing*

* D rented a neon sign from P; lighting restrictions were enacted due to WWII.
* The sign was constructed for the purpose of D; erected on D’s premises and was operated for some time; the monthly rental was for the purpose of paying the cost of construction and erection as well as maintenance over a period of 60 months.
* No part of the contract became impossible (not radically different).

*Capital Quality Homes v Colwyn Construction*

* P entered a contract to purchase from D 26 lots within a registered plan of a subdivision; there were to be 26 separate deeds of conveyance each representing one building lot; a new law was passed which made this impossible; P paid the purchase price but wants his money back.
* The legislation was not contemplated by the parties, not provided for in the agreement, and not brought about through a voluntary act. (Take an objective approach here)
* The fundamental character of the agreement was altered as to no longer reflect the original basis of the agreement. The purpose was known to the vendor.
* Therefore, all the factors necessary to constitute impossibility of performance have been established (it radically different).
* Note: if there was talk of the law changing, this case may have turned out differently.

*Victoria Wood Develoment Corp v Ondrey*

* P entered a contract to buy land from D; D knew P planned to subdivide and develop; new zoning laws were passed that made subdivision impossible; P wants out of the contract.
* Two different questions:

1. Should the parties have been able to anticipate the change?

* Objective; look at evidence

1. Is the difference radical?

* This is similar to *Capital Quality Homes*, in that D knew what P’s intentions were and the change in law was unforeseeable.
* However the key distinguishing feature is that it was not radically different.
* “The agreement is in no sense conditional upon the ability of the purchaser to carry out its intention. The ‘very foundation of the agreement’ was that the vendor would sell and the purchaser would buy the property therein described upon the terms therein set out…nothing in the supervening legislation affects, in the slightest degree, the abilities of the parties to carry out their respective obligations.”
* The risk is always present: P may guard against it in a contract.
* In *Capital Homes*, the land was already subdivided. Here, he was just buying a plot of land. It was “in his mind”.
* Look at the evidence.

*KBK No 138 Ventures v Canada Safeway*

* D advertised land for sale with a specific floor space ratio (FSR); P agreed to buy land from D and put down $150,000 deposit intending to develop a condo; the city rezoned the land prior to completion and lowered the FSR; the land decreased in value significantly and D sold it to someone else; P wants the deposit back.
* The key is that the contract was for the purchase of the land for a specific purpose.
* Safeway had more than “mere knowledge”, which wasn’t sufficient in *Victoria Wood* – there must be something more. In *Capital Homes*, the lots had been defined.
* Key evidence:

1. The advertisement

* This was evidence of the buyer/intentions.

1. The contract

* The price per square foot is based on a promise that it will be developed as a condo.
* There was a clause that it must be something other than a retail store.
* Key point: the court is going to look at all the evidence and can infer what the purpose of the contract is, i.e. if it is something radically different.

*Kesmat*

* D obtained an easement from P in exchange for an undertaking to obtain a rezoning and subdivision of P’s lands. D put up a bond of $50,000 as a guarantee; D had difficulty obtaining the rezoning and had to undergo an expensive environmental assessment.
* This did not make the contract radically different.
* It is something they could have foreseen.
* The contract was not impossible to perform, just more difficult (in KBK it was impossible). The intervening event was not so catastrophic as to justify invocation of frustration.

**MISREPRESENTATION**

Inaccurate statements that induce someone into entering a contract.

The remedy is rescission: put the party back in the position they were in before entering the contract.

*Redgrave*

* P placed an ad selling his house and partnership in his firm; D entered into negotiations with P; P said the practice yields $300-400 a year; D reviews the receipts and sees it only makes $200 a year; P said there was additional business and showed D further papers; D did not examine these papers; he bought the house and practice; found out the practice was “utterly worthless”.
* The court establishes two criteria:

1. The fact a party could have found out the statement was false does not negate a claim for rescission.

* Even if the victim’s behaviour amounted to negligence.
* *Caveat emptor* does not apply.
* Due diligence is not required

1. There is a presumption that a material representation induces a party to enter a contract.

* The onus is on P to show that: either D knew the representation was untrue; or that D was not induced by the representation.

But what is a material representation?

* Statement of fact; or
* Statement of opinion; or both?

*Smith v Land and House*

* P offered a hotel for sale; told D it was leased by a “most desirable tenant”; in reality the tenant had recently struggled to make lease payments; D bought the hotel; the tenant went bankrupt shortly thereafter.
* Key: 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 well known to both parties, then a statement of opinion by the one who knows the facts best involves very often a statement of fact, for he impliedly states that he knows facts which justify his opinion.
* In other words, if the facts are not equally well known to both parties, a statement of opinion from one party, who knows the facts best, impliedly states that he knows facts which justify his opinion.
* Here, the opinion implies a fact that nothing has happened to make the tenant unsatisfactory.

What about a situation where circumstances allow for silence to be representation?

* i.e. when one party, knowing that an assumption is wrong, allows the other party to continue that assumption.

*Bank of BC v Wren Developments*

* D is a director of Wren; Wren had a loan with P with shares as collateral; the president of Wren released some of these shares without D’s knowledge; P asked for D’s signature for a new guarantee; D assumes those shares are still collateral but is actually putting his own assets on the line.
* P never made any statements to D, but allowed him to continue in the assumption that the shares were still collateral for the loan.
* The court finds this to be misrepresentation.
* The bank should have been more careful. It was implied the shares were still there.
* Key: how much does the representor need to say? What is implied?

*Kupchak v Dayson Holdings*

**Collateral Warranties**

Collateral warranties are not part of the contract itself, but form a new contractual obligation altogether. The victim is suing to hold the representor to those statements. This means the victim can claim damages and compensation, rather than just rescission. To what extent are courts willing to go beyond the actual terms of the contract?

*Heilbut, Symons & Co v Buckleton*

* This was at the time of a rubber boom; D were the underwriters on a company’s shares; one of their managers was taking applications for shares; P inquired about the shares and the manager said it is a “rubber company”; in reality the company didn’t have many rubber trees and the share value plummeted.
* There may be a contract in which the consideration is the making of some other contract.
* “If you make such and such a contract I will give you $100.”
* The court doesn’t want to create this kind of contractual liability: the onus should be on P to put that stipulation in the original contract; the stipulation may actually increase the value of the contract; laxity on this issue could enable parties to escape from the full performance of the original contract, and lessen the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject matter; already the doctrine of misrepresentation; an innocent misrepresentation gives no right to damages; why create damages for forgetfulness, mistakes, etc.; damages should come from fraud, not recklessness.

In other words, the written contract should not be altered and its integrity should be protected. This could be a slippery slope.

* The terms of the contract and the existence of *animus contrahendi* (intention of the parties) must be clearly shown.
* The burden of proof is on the person alleging the collateral warranty.
* Here, P could not prove it was the intention of D for this statement to have contractual force.

*Dick Bentley v Harold Smith Motors*

* P bought a car from D; D said the car had a new engine and transmission and only $20,000km since these were installed; this turned out not to be true and the car ended up requiring significant repairs.
* It is impossible to know the intention of D, all we know is the surrounding evidence.

1. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.

* Objective approach.
* Look to the conduct of the parties, their words and behaviour.

1. 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 the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty.

* The onus has switched to the party who is defending the allegation of collateral warranty.

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

* He cannot rebut the inference if he is at fault; not necessary fraudulent, but recklessness or negligence could be sufficient; even if the statement was innocent.
* Here, D was in a position to know, or at least find out, the history of the car. He “ought to have known better”. His statements were without foundation.
* *Heilbut* set the bar high, this significantly lowers it.
* Policy: this protects buyers from statements; seller should be more careful rather than careless or reckless; otherwise they are taking advantage of complicity; the buyer has to trust the seller; power imbalance – one party has knowledge and expertise; law should not perpetuate injustice;

*Leaf v International Galleries*

* Purchaser found out a painting wasn’t authentic more than 5 years later; the statement was a condition but it is too late.