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# A. CONSIDERATION

* Why should a promise be enforced?
	+ Reliance
	+ Reciprocity
	+ Accountability
	+ Predictability
	+ Morality
		- Keeping promises is an inherently right thing to do
* Doctrine of Consideration
	+ A promise will not be enforced unless something is given in exchange for that promise
		- Reliance gets ruled out by this doctrine
	+ This creates a number of problems:
		- If you are already in a contract, then you are already required to do something under law
* Doctrine of Privity
	+ If I make a promise to you, then I’ll give your sister something, then you give me something in exchange for that
		- The problem is that the sister hasn’t given anything, so she is given the benefit but she didn’t pay anything for the promise
		- The sister doesn’t have the right to sue, because she didn’t give anything
			* She has third party beneficiary
* There is a consensus ad item
	+ Means meeting of the minds
	+ The whole idea of contract law is that two individuals get together and decide the terms of the relationship
	+ Standard form contract completely contract this presumptions
	+ One party knows what they are getting because they set the terms and the other party hasn’t even read it, often can’t read it (because of time constraints or whatever --- rental car contract)

History of contract law with the aim of understanding the detailed law

* The question of when you should enforce a contract, where to draw the boundary between contractual promises and non contractual promises was answered very differently with this new reality in place than under the old system
	+ The contracts should be enforced if they form the basis of the free market system
	+ Promises should be enforced when they take the form of bargain
	+ Keeping with this idea that the market is free of state interference, the notion was that the courts as state bodies should not question the substance of exchanges
		- It was not for the courts to decide if the deal was good or bad, or if the deal was unequal
		- Individuals were free to enter whatever agreements they wanted
* The courts start to change the way that they interpret consideration
	+ The idea of consideration (before the rise of industrial capitalism) was:
		- Was the reason for the promisor making the promise a morally acceptable and respectable reason?
	+ You could not separate contract from the realm of religious morality
	+ Thomas and Thomas says that we used to do things this way, but not anymore
* Now we don’t care about the moral considerations
* The late 19th and early 20th centuries were the major stage of this shift
	+ The fall of contract law starts to happen in the 1930s in the US and Britain
	+ The horrors of WWII awakened a new concern for human rights, and we begin to see concern about equality, concern about justice

## 1. Nature of Consideration

Consideration

* It doesn’t have to have any real value, but must be something that can be recognized by the law
	+ It can be a grain of sand; it’s formal rather than substantial
* The contract is made by the exchange of promises, not the exchange of goods
* Legal detriments that constitute consideration:
	+ Give something away that you are legally entitled to
	+ Do something that you are not legally required to do
	+ Refraining from doing something that you are legally entitled to do

### \* Thomas v Thomas

1. Facts:
	* John Thomas declared orally, in the presence of two witnesses that it was his wish that his wife should have either the house and all that it contained or 100£ instead
	* S Thomas and D consented to carry out the intentions of the testator so expressed into effect
	* P was left in possession of the house
	* D, after the death of S. Thomas refused to execute a conveyance and turned P out of possession
2. Patteson J:
	* Consideration is something which is of some value in the eye of the law, moving from P
	* A pious respect for the wishes of the testator does not move from P, it moves from testator, and is not part of consideration
	* Judgment for P

Class notes:

* Various players: John Thomas, the sons (the executors -- Benjamin and Samuel)
* The whole problem here is that the promise at issue was not contained in the will – it was a deathbed statement
	+ John realizes he forgot a provision for his wife, and orally discovers a way to solve this
	+ This is all meaningless for the law; the courts don’t care about morality
* The promisor is Ben, because in order to give effect to father John’s wishes, Ben promises Ellen (the promisee) that she can live in the house
	+ What motivated Ben to make the promise was the pious respect for his father
	+ If a court is concerned with morals in enforcing contracts, then dealing with this case is fairly simple: it is the morally right thing to enforce this promise
* Respect for your father is not worth anything on this emerging view of consideration
	+ Consideration must move from the promisee to the promisor
* The court construes it:
	+ Ben makes a promise that she can stay in the house for life, or get 100 pounds for moving out
	+ She agrees to pay 1 pound/year to stay in the house
* If Ellen didn’t make these promises, then she would have had no defence
* From another perspective Ellen benefits from the formalism of contract law
	+ 1 pound per year for a house is a very uneven deal
	+ The courts are not willing to look at the substance of the deal

## 2. Past Consideration

Past consideration

* An act done before the giving of a promise to make a payment or confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisors request. -- pg 174

### \* Eastwood v Kenyon

1. An express promise can only revive a precedent in good consideration, which might have been enforced at law through the medium of an implied promise
	* It can give no original cause of action if the obligation never could have been enforced at law
2. P, acting as Sarah's guardian spent money on her education etc and for this purpose borrowed money from Blackburn
3. Sarah married D, who promised P that he would pay back the amount
4. D failed to pay and P sued
5. Consideration for this promise was past and executed long before
6. This declaration is bad because it states no consideration, but a past benefit not conferred at the request of D

Class notes:

* P: Eastwood -- promisee
* D: Kenyon (the husband of Sarah) -- promisor
* Consideration: the money Eastwood spent on Sarah’s education
* Eastwood argues that there was sufficient moral consideration to support the promise
	+ That Kenyon was motivated by moral consideration because paying back Eastwood was the right thing to do
	+ The court only cares that the formal requirements of the case are met, not morality
		- Kenyon has to have requested that Eastwood spend that money on Sarah’s education in exchange for which he would pay it back
		- This request was not made; the alleged consideration happened in the past
* The court says that it would not be a good idea to start as a policy matter, enforcing promises when people like Eastwood out of the goodness of their heart do things for other people
	+ There would be an incentive for people to volunteer nice deeds with an expectation of payment with interest

### *\** Lampleigh v Brathwait

1. P brought assumpsit against D for labouring to obtain the King's pardon for D
2. Afterwards, in consideration of the premisses D did promise P 100 pounds, but did not pay
3. Judgment in favour of P

Class notes:

* Brathwait requested Lampleigh to get him a pardon from the king for a murder
* The promise for payment occurred after the consideration (gaining the pardon)
	+ Lampleigh had already put the effort by riding to obtain the pardon
		- This is an act of doing something that you are otherwise not obliged to do
			* A legal detriment
			* Third criteria is easily met
		- First criteria: was there a request?
			* Yes; this distinguishes this case from Eastwood and Kenyon
		- What we don’t have at this time is a promise
			* There was an understanding between the parties that there would be remuneration after
			* This later promise becomes a ratification

## 3. Pre-existing Legal Duty

* Widgets: a legal term to describe things
* Changes in contract
	+ Prices change, and people are always wanting to change the terms of the contract in order to get a better deal
	+ As long as both parties agree to the changes, then you are covered
	+ Generally you won’t be able to change the contract mid-way as a consequence of the doctrine of consideration
* Promising to stay in the contract does not constitute consideration
* Ex: relationship between prof and research assistant
	+ They enter into an agreement whereby the prof agrees to pay $12 an hour, and in consideration, the student agrees to work for 3 months
	+ Another prof offers a raise, and the student needs the money
	+ The first prof offers the same wage increase, and the student agrees to continue working
	+ The prof then argues that the second agreement with the wage increase is invalid as a consequence of there being no consideration
		- This is because she is not legally entitled to the breach of the original contract
			* However both parties can agree to breach the contract
			* In this case, the prof would have to pay the wage increase, since they would have mutually agreed to end their contract
			* When they enter a new contract, everything is fresh, including the consideration
		- Didn’t the prof get a benefit by retaining the prof, and didn’t the student suffer a detriment by not working for the other prof?
			* How can there be a legal detriment if she is already contractually obliged to do what she is doing?

### \* Stilk v. Myrick

* An action for seaman's wages from London to Baltic and back
* By agreement, before the voyage, P was to be paid £5/month
* Issue: was he entitled to higher wages?
* In *Harris v Watson* the Judge held that no action would like at the suit of a sailor on a promise of a captain to pay him extra wages, in consideration of his doing more than the ordinary share of duty
	+ If such a promise could be enforced, sailors would suffer a ship to sink unless the captain would accede to extravagant demand they might think proper to make
* Lord Ellenborough:
	+ *Harris and Watson* was rightly decided
	+ The agreement here is void for want of consideration
		- There was no consideration for the ulterior pay promised to the mariners who remained with the ship
		- They had already undertaken to do all they could, under all the emergencies of the voyage
		- Desertion of part of the crew is considered an emergency
		- Those who remain are bound by the terms of their original contract
* Judgment: P can only recover at the rate of £5/month

Class notes:

* 2 sailors desert, and the captain can’t replace them
* The other sailors demand dividing the wages saved
* Real world: they worked 18% harder; Legal world: they had already agreed to do this

### \* Gilbert Steel v University Constr

* Facts:
	+ P's action for damages for breach of an oral agreement for the supply of fabricated steel bars to be incorporated into apartment buildings being constructed by D
	+ P entered into contract with D to supply steel bars
	+ During construction of building P alleges they entered into a binding oral agreement regarding a price increase
		- D did agree to this
* Issue:
	+ Whether that agreement was legally binding upon D or whether it failed for want of consideration
* At appeal it was submitted that this was not a variation of the original contract, but a rescission of the written contract and the creation of a whole new contract
	+ Consideration was mutual agreement to abandon the previous written contract and assume the obligations under the new oral one
* Wilson JA:
	+ It is clear that the sole reason for discussions was the increase in price
	+ The new contract was the agreement to pay an increase in price
	+ Finding: the oral agreement was an agreement to vary the written contract and therefore must fail for want of consideration

Class notes:

* The court accepts the defendant’s argument that a pre-existing duty cannot constitute consideration
* Justice Wilson agreed that the consideration that had already been used could not be the consideration for the March agreement
* There was no evidence that they intended to abandon the old contract and establish a new one
	+ If the parties really want to end a contract and start a new one, they should be explicit about it

### *\** Williams v Roffey Bros. & Nicholls

* Facts:
	+ D hired P as a subcontractor to carry out carpentry work
	+ P encountered financial difficulties
	+ D agreed to pay P an extra fee as motivation for completion of the project
	+ D failed to make further payment and P stopped work
* Glidewell LJ:
	+ D's promise to pay extra funds was part of an oral agreement by way of variation to the original contract
* Issue: was there consideration?
* Trial judge:
	+ Where the original sub-contract price is too low, and the parties agree that additional moneys should be paid, this agreement is in the interests of both parties
* Glidwell LJ:
	+ Economic duress is relevant here
		- There is no evidence that the promise was given as a result of economic fraud or duress
	+ The terms on which P was to carry out the work had varied, and this was supported by consideration which reflects the true relationship between the parties
		- The promise was given so D would gain an advantage arising from the continuing relationship
* Purchas LJ:
	+ This agreement was beneficial to both sides
	+ If both parties benefit from an agreement it is not necessary that each also suffers a detriment
	+ Consideration existed



* Despite Stilk and Myrick, in this case, the court feels that how business actually works is important
	+ Sometimes through no fault of the sub-contractor, things don’t work out
	+ Now the sub-contractor may not be able get a job done in time
	+ He may go to the head contractor and ask for more resources
* In practical terms, this all makes sense
* But for the doctrine of consideration, this promise is not enforceable, because the sub-contractor is continuing to do what he originally promised to do (see Stilk and Myrick
	+ No consideration for the promise of extra money
* The court says that the contractor should comply with the promise to give extra money
	+ If the sub-contractor hadn’t gotten the extra money, the houses wouldn’t have been done on time, which would have brought a penalty on the contractor
	+ The contractor saved a penalty by promising more money to the sub-contractor
* But this is an *actual* benefit, which we have been told doesn’t matter
* The court decides that here, the actual benefit can be consideration
	+ They are changing the doctrine!
1. The court allows William to get past Stilk and Myrick in cases where the promisee has not acted in dishonest ways, and has not put the promisor under duress
	* Stilk and Myrick does protect one party from being put under duress
2. Since the high point of the doctrine of consideration in the mid-19th century, the world has become far more complex
	* We are sped up by technology
	* Everything is faster, and bigger
	* Our markets are much more interdependent
	* Everything is less predictable
	* Contract law is based on the principle that two people can sit down and predict their future
		+ This requires that people actually can predict the future
	* In reality, the predictability of the future is become less and less stable
	* The court says that the rigidity of consideration of Stilk and Myrick doesn’t make sense now

### *\** Greater Fredericton Airport Authority v. Nav Canada

* Facts:
	+ Nav Canada assumed responsibility for air navigation service at airports across Canada
	+ In 2001 Greater Fredericton Airport Authority (GFAA) and assumed government's responsibilities of ASF agreement
	+ Nav Canada refused to relocate ILS unless GFAA agree to pay for the new equipment
	+ GFAA agreed by letter (signed under protest) to pay the costs of equipment
	+ Nav Canada is seeking to enforce the post-contractual modification
* Issue: did Nav Canada agree to do more than originally promised in the ASF agreement in return for agreement to modify contract?
* JT Robertson JA:
	+ Promisee (Nav Canada) must suffer a legal detriment
	+ Nav Canada promised nothing in return for GFAA's promise to pay for a navigational aid that it was not contractually bound to pay for under ASF
	+ P cannot argue that the consideration was not to exercise a legal right to breach the contract by refusing to deliver promised goods or by withholding promised services
	+ Method to avoid *Stilks and Myrick*
		- Finding that P promised to do more than originally obliged
		- Circumstances have changed since original contract was formed
		- Accepting the plea of detrimental reliance on the basis of justice and equity
		- Holding that the original contract was mutually rescinded and replaced by a new agreement
	+ This case represents an incremental change in law
		- The law will recognize that a variation to an existing contract, unsupported by consideration, is enforceable if not procured under economic duress
			* Consideration and promisory estoppel work in tandem to impose an injustice on promisees who have acted in good faith
			* Consideration doctrine developed centuries before the recognition of modern doctrine of economic duress
		- Post-contractual modification, unsupportable by consideration may be enforceable so long as it is established that the variation was not procured under economic duress
	+ A person who agrees to pay more than the original contract price either in writing or in return for a peppercorn is entitled to argue that the agreement was procured under economic duress
* Judgment: appeal dismissed in favour of GFAA



* The Court of Appeal of NB accepts Williams and Roffey with open arms
* Navcan is making sure that planes are taking off and landing under safe conditions
* Navcan decides that as part of a project for extending a particular runway, parts of the ILS (Instrument Landing System -- navigation system for a plane landing when sight is impossible) should be replaced with a new system for measuring distance (DME -- Distance Measuring Equipment)
	+ The BME costs a significant amount
	+ Navcan demands the GFAA to pay the money or else they will not relocate the ILS
	+ GFAA agrees, but under protest
		- It is no secret that they feel they have been pushed to the wall on this issue
* The actual benefit here is that the job gets done
* In this case, the court finds that Navcan put GFAA under duress, extracting the extra money
* Unlike in Williams and Roffey, the court deals with duress as an official doctrine

### *\** Foakes v Beer

* Foakes was in debt to Beer for £2,090, 19s
* The sum had been paid, but R claimed interest
* Earl of Selborne LC:
	+ The promise de futuro was only that of R, that if the payments were regularly paid, she would take no proceedings
		- A was under an obligation to pay at those dates
		- Payment at those dates by the indulgence of the creditor could not be a consideration



* Beer is loaning money to Foakes
* Beer agrees that Foakes can give £500 immediately, and sets up a payment schedule, and waives her right to interest
* Beer gets an actual benefit: the money in advance, and a commitment to receive the rest
	+ She makes the promise that in exchange he doesn't have to pay interest
* The problem here is that he already owes the money
	+ His promise to pay back money he already owes can't be consideration
* Mrs. Beer sues Dr. Foakes for the interest
	+ The court says sorry, there was no consideration for the promise not to collect the interest
	+ In this situation Beer is holding the sword, and Foakes is holding the sword
	+ What is relevant: the promise is of a nature that puts the promisee into a shield-like position
		- The promise is a promise to do less
* Mrs. Beer gets an actual benefit with no legal benefit
* She is making a promise that is lessening the burden on Dr. Foakes
	+ A promise that she won't take something from him that she is owed
* The court sees no consideration

## 4. Waiver and Promissory Estoppel

**Sword and shield**

* One thing we need to know:
	+ If the promise is: "I will give you an extra widget"
		- And B doesn't give consideration
		- Can B enforce the promise? No!
		- This is a positive promise (sword)
		- See Combe and Combe for authority of this
	+ If the promise is: "You don't have to give me a widget"
		- Where B is selling widgets to A for money and A says you can give me fewer widgets for the same money
		- A is relieving B of his promise
		- This is a waiver promise (shield)
		- This is what we have in High Trees
* In some cases we will allow promissory estoppel to protect promise type 1
	+ Until Waltons only shield promises can trigger this doctrine
		- After Waltons there are some limited exceptions to this
	+ The question we will get: is this a situation where assuming we take a wider reading than the BCCA, where it is unconscionable for A to walk away from the promise
* There are some circumstances where a promise will be enforced in the absence of consideration
	+ Intended to be binding
	+ Intended to be acted upon
	+ In fact acted upon
* What does it mean to be intended to binding, acted up, and indeed acted upon?
	+ Foakes and Beer is an example of this:
		- A makes a promise to B
		- This promise was relied upon by B
		- A reneges on promise and sues B for not complying with terms of original contract
		- The nature of the promise is a waiver
		- Beer is waiving rights, this is not a conferral of new rights
		- The problem here is that there is no consideration moving from B to A, that A will not comply with terms of agreement
		- The solution is an equitable remedy
			* This is known an promisorial estoppel, or reliance doctrine
			* If one party leads another to believe that the contract will not be insisted upon, and acts upon that belief, then the first party will not be able to insist on the original legal right where it is will be inequitable for him to do so
		- Where does the word estoppel come from?
			* The party is stopped from insisting on the strict legal rights
		- 2 central elements to this:
			* The idea that the promise is intended to be binding and acted upon
				+ A must lead B to believe that the strict rights will not be insisted upon, and intend B to act in that way
				+ Not a problem in Foakes and Beer
				+ Not obvious in see John Burrows

Did A intend B to rely upon misrepresentation

* + - * The idea of reliance
				+ B must actually act upon the belief that the strict legal rights will not be enforced
				+ It would then make it inequitable to insist upon the strict legal rights
				+ B's legal issues are dealt with in 3 cases: D&C Builders, etc
				+ Did B extract this promise? Was A put under undue pressure?
				+ Did B exercise duress, thereby making it not inequitable to allow A to reassert the strict contract
			* What do we mean by reliance?
				+ What if there is no time in between the promise and the renege of the promise?
				+ The court must figure out if it makes sense to think that B is going to go out and do something that would pull out the carpet from B if the strict legal rights were insisted upon

### \* Central London Property v High Trees House

* + Facts:
		- P (Central London Property) granted to D (High Trees House) a tenancy for a term of 99 years at a rent of £2,500/year
		- In 1940 P confirmed in writing the reduction in rent to £1,250/year
		- In 1945 the receiver of P ascertained that the rent should be £2,500
		- D pleaded:
			* That the letter reducing the rent applied to the whole term of lease
			* In the alternative, that P was estopped from alleging a rent exceeding £1,250
			* Further alternative, P had waived rights in respect of any rent which had accrued until 1945
	+ Denning J:
		- A promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration
		- The promise here was that the rent should be reduced to £1,250/year as a temporary expedient while the block of flats were not fully let, owing to the conditions
			* This applied until 1944
		- The promise was understood to apply only under the prevailing conditions, while the flats were partially let and did not extend further
	+ Judgment for P

Class notes:

* The reality of the situation is that both the parties are the victims of externally created circumstances
* It is agreed that for the duration of the war, the rent will be reduced
* This case is Foakes and Beer all over again
* There is no consideration because paying 1250£ is not the 2500£ that is owed
* You could argue that Central London is getting an actual benefit by receiving some rent, rather than having their leasee default on the rent
* The war ends and the Lessor, Central London Property wants the rent to return to the original agreement
	+ Central London is not suing for back payments
* Denning says that Central London's oral promise to reduce the price was binding, despite the fact that there was no consideration for it, based on the doctrine known as promisory estoppel
	+ There is a doctrine of estoppel that is separate from promisory estoppel
		- Estoppel is part of property law
		- Promisory estoppel has to do with promises, and it therefore contract law
* From all of this, we get that if the promisor leads the promisee to believe that the legal rights are being waived, and if it would be inequitable for the promisor to go back on the promise, then the promise is binding
* If Central London had given reasonable notice to High Trees of the increase to the contract price, this may have been ok
* Here promissory estoppel is used in defense, not offence

Sword/Shield

* Why would it have been inequitable to allow Central London to walk away from their promise to High Trees
	+ High Trees relied upon this promise, and charged reduced rates to their tenants
	+ They wouldn't have the money to pay back Central London
	+ Is there any evidence that High Trees has rearranged its business affairs?
		- * Reasonable people in that situation could be expected to rely upon the promise





### *\** John Burrows v Subsurface Surveys

* + D: Subsurface Surveys Ltd purchased a business belonging to P (John Burrows Ltd) for $127,000
	+ Promisory note of $42,000 given in March 1963
		- Contained acceleration clause permitting the creditor to claim the entire amount if there was a default of more than 10 days on any monthly payment
		- D was consistently late
		- P sued for the whole amount owing when D was late in 1964
	+ In *Hughes v Metropolitan Ry. Co:* if parties who have entered into definite and distinct terms involving certain penalties or legal forfeiture - afterwards with their own consent, enter negotiation which leads one of the parties to suppose that the strict rights of the contract will not be enforced, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable
	+ There must be evidence that the first party intended that the legal relations created by the contract be altered as a result of the negotiations
	+ Following the above doctrine would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgence would be translated into a waiver of rights to enforce the contract according to its terms
	+ Judgment: Burrows behaviour is consistent with his having granted friendly indulgences while retaining his right to insist on the letter of the obligations, which R was in default in payment of



* In the 19th month, after another payment has not been made on time, the seller calls in the full month, asserting his rights under the contract
* Subsurface claims that because Burrows accepted the late payment every time, this equaled a promise that was intended to be binding
	+ Obviously there is no consideration here
* Was there an intention on the part of John Burrows to waive the strict legal terms of the contract to instill in Subsurface the belief that the strict terms of the contract would not be enforced?
	+ The court says no; he permitted friendly indulgences with intention of enforcing contract
* What does a promisor has to do to evidence the promise being made is supposed to be relied upon?
	+ In High Trees there is an actual statement to this effect; it is not at all unclear
* Burrows tells us that the courts will expect a certain level of explicitness, and a certain level of intention expressed

### *\** D & C Builders v Rees

* + D (Rees) has a shop where he sells builder materials
	+ P (D &C Builders) is a decorator and a plumber
	+ D employed P
		- P did the work and rendered account for £746 13s 1d
		- D paid £250
		- In July 1964 P was owed £482 13s 1d, which D did not pay
	+ D's wife called and offered £300 in settlement
	+ P was in desperate financial straits and had no choice but to accept settlement for fear of bankruptcy
	+ D insisted that the receipt contain the words "in completion of the account"
		- D knew the position P was in financially
	+ P complained that D had extricated a receipt of some sort or another
	+ D claimed bad workmanship and that there was a binding settlement
	+ Lord Denning:
		- Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts on that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance
			* But he is not bound unless there has been truly an accord between them
		- In this case there was no true accord
			* D put undue pressure on P (economic duress)
		- No person can insist on a settlement procured by intimidation
	+ Trial judge decided in favour of P. D appeals to this court
		- D's (Rees) appeal dismissed



Reliance

1. Abstract idea that the promisee must have relied on the fact that it would be paying or doing less
	* It must have rearranged its business affairs on this basis
	* Now it would be detrimental to pull the promise to waive the strict legal rights

### *\** The Post Chaser

* + P agreed to sell palm oil to D who contracted this to sub-buyers
	+ The terms required declaration of ship to be made to buyers in writing as soon as possible after ship's sailing
		- This was late
		- Buyers and 1 sub-buyer did not protest the lateness although other sub-buyers did
	+ Robert Goff J:
		- Issue: whether the buyers waived their right to reject the sellers' tender of documents
			* There was a sufficiently unequivocal representation for the purposes of a waiver
		- Issue: whether there was sufficient reliance by the sellers on this representation to give rise to an equitable estoppel
			* No finding of reliance
		- Quotes Denning: the principle of equitable estoppel requires that it must be inequitable for the representor to be allowed to go back on his representation
			* However, it might be sufficient for that purpose that the representee had conducted his affairs on the basis of the representation, and that it was immaterial whether he had suffered any detriment by doing so
				+ The sellers did not spend money as a consequence of the representation
				+ The time involved was short that it is not important
				+ However, the sellers did present the documents, and it therefore can be said that they conducted their affairs on the basis of the buyer's representation

Yet, there is nothing which would render it inequitable for the buyers to thereafter enforce their legal right to reject the documents

The necessary element for the application of equitable estoppel is lacking, since the sellers position had been prejudiced

* + Notes:
		- According to Goff J, a representee must show that he relied to his prejudice, but not necessarily to his detriment



* An analogy with the taxi is that someone is waiting at the other end for the taxi to show up, but you forget to tell them when the taxi will be leaving, so they don't expect your arrival
* The seller is required to make that declaration, but didn't, and the buyer doesn't make a big deal about it
* The seller presents the documents, and the sale will go through, despite the fact that the seller is in breach of contract for not declaring the shipment
* The buyers refuse to go through with the sale 2 days later, on the basis that the seller breached the contract for not declaring the sailing of the ship
* The seller claimed that it was represented that it was ok to have not declared the ship
	+ They claimed the buyer waived the contractual right to enforcing the contract
	+ They use the doctrine of promisory estoppel to hold that waiver
* The buyer did not breach the contract here, the seller is the one who screwed up
* The buyer is within his rights to reject the sale if the seller has breached the contract in this way
* If equitable estoppel is supposed to be a shield and not a sword, in this case, the person bringing the action (the estoppel), has the sword
	+ The seller is bringing the case
	+ The person making the representation is insisting on the strict legal terms of the contract

### *\** W.J. Alan & Co. v El Nasr Export & Import Co.

* + Facts:
		- Buyers purchased 500 tons of coffee from the sellers
		- The contract was to be specifically governed by English law under Kenyan shillings
		- Payments were accepted under sterling
		- Sterling was devalued, and sellers prepared invoice for the difference in Kenyan shillings
	+ Megaw LJ:
		- The necessary consequence of that offer and acceptance of a sterling credit is that the original term of the contract of sale as to the money was varied from Kenyan currency to sterling
		- The contract had been varied
		- This contract dealt with the establishment of a credit which is to cover the whole of the payment for the whole of the contract
			* Once the credit is established, it is unalterable except with the consent of all parties
	+ Lord Denning:
		- Issue: was this a variation of the original contract or a waiver of the strict rights or a promissory estoppel precluding the seller from insisting on his strict legal rights
		- The principle of **waiver** is: if one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other shall act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so
			* The one who waives his rights cannot afterwards insist on them
			* He may be able to revert to his strict legal rights for the future by giving reasonable notice or making it plain by his conduct
	+ Stephenson LJ:
		- In this case the buyers did act to their detriment on the sellers' waiver, and the contract was varied for good consideration



* The sellers accepted even after there had been an announcement that the Brits were planning on devaluing their currency
	+ Compared to what it would have been in Kenyan currency, the sellers are now taking a loss despite the fact that the contract requires the higher currency
* Now the seller who has lost money, sues the buyer for the difference
* The seller holds the buyer to the original contract
* The big question: would it be inequitable to allow WJ Allen to insist on payment in Kenyan pounds after effectively accepting the British pounds
* The seller WJ Allen went into this deal with its eyes open; knew or should have known what was happening with the currency as an international trader
* What are the differences between this case and Burrows?
	+ This case accepts the money and doesn't say anything
	+ In Burrows there was a friendship, whereas this case is an arms length business transaction
		- Friendly indulgence doesn't exist here
* Under promisory estoppel, the buyer relied on the representation, even if the reliance was not necessarily detrimental
	+ In all of these cases the reliance is actually beneficial, because the party is actually paying less… therefore it is a benefit
		- High Trees, Foakes and Beer follow this logic
	+ The detriment must be found somewhere else
		- The implication here is that El Nasr (buyer) has been told they have a certain amount of money in hand (they have been told they can keep the difference)
			* They have been allowed to benefit from the difference in currency
			* El Nasr as a business entity will then act on the basis that they have extra money

### *\** Petridis v Shabinsky

* + P had a restaurant in a mall owned by D
	+ The lease gave the option to renew on the same terms as the original lease, except that it would not contain the right of renewal, and the rent, if not agreed was to be fixed by arbitration
		- Negotiations took place but they were unable to agree on the rent
	+ D accepted an offer to lease from HiFi Express Inc
	+ P could not relocate on such short notice
	+ Grange J:
		- This is not a case of promissory estoppel as the doctrine is generally understand, ie an assurance by one party that it will not enforce its legal rights with the intention that the assurance be acted upon by the other party
		- People with rights are entitled to waive or suspend those rights and there may come a time in the course of the waiver or suspension when the rights are either lost or are not permitted to be enforced strictly without some notice
		- Here the landlord recognized the right of the tenant to renew
		- The extension of time is a waiver of a right under the contract
			* The landlord could have insisted upon the expiry of the option after Jan 1, 1981 but wanted the lease to continue and hoped to persuade the tenant to accept the proposed rent
		- It would be inequitable to allow the landlord to terminate the negotiations without some reasonable notice to the tenant
			* The tenant believed he had an option to renew, but without agreement as to rent
			* If the tenant is prepared to accept the renewed lease and pay rent in accordance with the contractual terms, the lease should be renewed

### \* Robichaud v Caisse populaire

* A: Robichaud
* R: Caisse populaire
	+ A bases his argument on the principle of promisory estoppel in asking that the judgment in favour of Caisse Populaire be removed
	+ *In Edwards v Harris-Intertype*
		- Some have said that the doctrine can be a shield, but not a sword, implying that it is only available to D
		- *Combe* cited cases where estoppel was used as part of P's action
			* This reliance might be just as strong whether the promisee appears as P or D
	+ In this case A is asking that R respect the promise that it made and on which he relied
		- A's appeal is allowed, but not on the basis of estoppel

Class notes:

* Robichaud is appealing a judgment that the bank can enforce its strict terms
* Robichaud is using the doctrine of promisory estoppel to try to get rid of the order that he has to pay money
	+ The Court doesn't like this
* Similar case to Foakes and Beer
	+ Just like Mrs. Beer, the bank wants to assert the rights that they have waived
* The court decides this one differently
	+ They pull a Williams and Roffey
	+ They say that the bank got an actual benefit, and there existed an actual detriment
* The court believes this type of thing should be enforced
* The bank knew what the actual benefit was; they did it with their eyes open
	+ Imposing traditional ideas of consideration would go against what the parties were trying to accomplish

### *\** Combe v Combe

* + Sword or shield?
		- Facts:
			* The parties were married but separated in 1939
			* The husband had allowed the wife £100/year
			* Husband made no payment
			* In 1950 the wife brought an action claiming from her husband arrears of payment for six and three quarter years
			* The judge held that there was no consideration for the husband's promise, but held nevertheless that the promise was enforceable on the principle stated in *High Trees*
				+ Because it was an unequivocal acceptance of liability, intended to be binding, intended to be acted upon, and acted on
		- Husband is appealing
		- Denning J:
			* The principle of *High Trees* should not be stretched too far
				+ This principle only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them
			* Sometimes it is P who is not allowed to insist on his strict legal rights
				+ A creditor is not allowed to enforce a debt which he has deliberately agreed to waive, if the debtor has carried on a business or changed his position in reliance of the waiver
			* Sometimes D is not allowed to insist on his strict legal rights
				+ His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim
			* Byrne J held that the wife could sue on the husband's promise despite there being no consideration
				+ This is not correct
				+ The wife can only enforce the promise is there was consideration
				+ Consideration does not do injustice in this case
			* Denning does not think it right for the wife, who is better off than her husband to take no action for 6 or 7 years then come down on him for the full amount



* A promise like in Williams and Roffey
* The wife relied upon this promise, but this reliance doesn't constitute consideration because there was no request
* Let's say they did have a valid contract, and then he had promised to top off the contract with extra money -- this wouldn't hold since promisory estoppel only applies to waiving rights, not promising to do more

### *\** Waltons Stores v Maher

* + Facts:
		- A (Waltons) negotiated with R (Mahers) for the lease of land owned by Mahers
		- R would be unable to complete construction unless demolition began immediately
		- A's lawyer claimed to have verbal instructions to accept the amendments but said he would get formal instructions
			* R was not notified of any objections
			* R went ahead with demolition and construction of new building
		- Several weeks later A returned unsigned lease with intention not to proceed
	+ Mason CJ and Wilson J:
		- Issue: whether A is estopped from denying the existence of a binding contract that it would take the lease
			* If so, whether R can support that A pay R damages in lieu of a lease agreement
		- Conclusion: R assumed that exchange of contracts would take place as a matter of course, not that exchange had in fact taken place undermines the factual foundation for the common law estoppel by representation
		- Promisory estoppel extends to representations (or promises) as to future conduct
			* The traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword
				+ High Trees was an instance of the defensive use of promisory estoppel
			* P can rely on promisory estoppel too when estoppel is part of a cause of action, and not a cause of action in itself
		- Issue: was A entitled to stand by in silence when it must have known that R were proceeding on the assumption that they had an agreement and that completion of the exchange was a formality?
			* A was under an obligation to communicate with R, within a reasonable time after receiving the executed counterpart deed and certainly once it learned that demolition was taking place
			* A's inaction constituted clear encouragement to R to continue to act
			* A is estopped in all the circumstances from its implied promise to complete the contract
			* What does it mean that A is estopped?
				+ To use the legal rule of estoppel to prevent something
	+ Brennan J:
		- To establish an equitable estoppel it is necessary for P to prove that:
			* P assumed or expected that a particular legal relationship exists between P and D or that it will exist
				+ That D is not free to withdraw from the expected relationship
			* D has induced P to adopt that expectation
			* P acts or abstains from acting in reliance of the assumption
			* D knew or intended him to act in reliance
			* P's action or inaction will occasion detriment if expectation is not fulfilled
			* D has failed to act to avoid that detriment
			* Is the above 6 things the essence of applying the doctrine?



* In Williams and Roffey we have a promise to do more; it is not a promise to build less, but rather a promise to provide extra funds
* This case is not the same as High Trees; the court interprets an implied promise to enter a lease
* The court is willing to extend the doctrine of promissory estoppels to situations where it would be unconscionable to allow the Walton's party to get away with their breach of promise
	+ At this point equity comes to the relief of Maher
	+ On the expectation that a contract will come into existence
		- Applies to this case
	+ **OR a promise will be performed**
		- This is a big OR (see pg 236)
* Prof’s ratio:
	+ This is suggesting that in any kind of promise, if the circumstances are such that a party has acted in a way that amounts to unconscionable behaviour, because they had led a party to believe something, then the promise can be upheld
		- Essentially this reverses Combe and Combe

### *\** M(N) v. A (AT)

* + Mr. M: P and R
	+ Ms. A: D and A
	+ Ms. A's claim to enforce a promise by Mr. M to pay the balance outstanding on the mortgage of her home in English if she would come live with him in Canada with a view to marriage
		- In reliance Ms. A moved to Canada
		- Relationship failed, partly because Mr. M failed to pay mortgage
		- Mr. M did loan her $100,000
	+ Trial judge:
		- D did not establish requirement for promissory estoppel
		- P did promise to pay mortgage
		- D did rely on this promise to her detriment
		- But D failed to establish the existence of a legal relationship between the parties
	+ Facts: Ms. A would like to not be required to pay back the loan
	+ Huddart JA:
		- *Waltons:* failure to fulfill a voluntary promise does not amount to unconscionable conduct
			* Brennan J saw the minimum elements required for estoppel as including an expectation to a legal relationship between the two parties
		- Neither party thought a legal relationship had been created by the promise; Waltons does not apply
		- There was no evidence that Mr. A's promise was to have a binding effect
			* Therefore Ms. A's appeal is dismissed, regardless of whether an existing legal relationship is needed for promisorry estoppel
		- \*Note, the court refused to deal with the issue of an existing legal relationship as a necessary element of promisorry estoppel
			* Instead, it was ruled that since the promise was not intended to be binding, it has no legal effect, and the discussion on promissory estoppel is not even relevant or necessary



## 5. Third-Party Beneficiaries

1. Doctrine of privity applies in Canada to prevent two types of persons from enforcing a contract:
	* A person who is a complete stranger to the contract
	* Third party beneficiary

### i) The Rule

#### \* Provendor v. Wood

* + D, assumed to the father of P upon marriage to be solemnised between P and daughter of D, to pay him £20
		- In this case the father of the wife is promising to the father of the husband to pay him when their kids get married
	+ What was the ratio of this case?

#### \* Tweedle v Atkinson

* + P was the son of John Tweddle (deceased)
	+ P married daughter of William Guy (deceased)
		- Both parents promised orally to give P a marriage portion and then entered into a written agreement to the effect
		- William Guy nor his executor paid the promised sum of £200
	+ Wightman J:
		- It is now established that no stranger to the consideration can take advantage of a contract, although it is made for his benefit
	+ Crompton J:
		- Natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained
		- The modern cases (speaking in 1861) show that consideration must move from the party entitled to sue upon the contract
	+ Blackburn J:
		- Natural love and affection are not a sufficient consideration whereon an action of *assumpsit* may be founded



* A patriarchal scenario of a father in law making a promise to the father of the son
* William Tweedle's father is named John Tweedle
* Father of the bride promises the father of the groom 200 pounds to the son (groom)
	+ The son is the third party beneficiary
* The son sues the executor Atkinson to make good on the promise
* The court says that contracting is a bilateral relationship of reciprocal benefit
	+ The whole notion of reciprocity ensures that there is an exchange
	+ In this case there is no consideration moving from the son, simply natural love and affection
	+ Therefore it would be monstrous to allow the son to sue the father in law

#### \* Dunlop Pneumatic Tyre v Selfridge's

* + A: tyre manufacturers -- Dunlop
	+ R: Selfridge's
	+ A sold tyres to Dew on the terms that Dew would not sell the tyres below Dunlop's list prices except to customers engaged in the motor trade
	+ R agreed to sell Dunlop tyres to two customers below the prices specified by A
	+ R signed an agreement with Dew that R agreed to pay £5 to A for every tyre sold in breach
	+ A is seeking damages for the tyres sold in the amount of £10
	+ Viscount Haldane LC:
		- Our law knows nothing of a jus quaesitum tertio (right of a third party to recover)
		- If a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request
		- A principle not named in the contract may sue upon it if the promisee really contracted as his agent
		- Dew sold to R goods which they had a title to obtain from A directly
			* The consideration did not come from A in this case
			* The consideration given came from Dew, as the agent, but as principles acting on their own account
		- Judgment: Dunlop's appeal dismissed
	+ Lord Dunedin:
		- The agreement being sued on is between Dew and Selfridge
		- Dew, having the right of property in the tyres, could give a good title to anyone he liked, subject to an action of damages at the instance of Dunlop for breach of contract

1. Ways in which a third party may acquire the benefit:
	* For some specific matters, legislatures have decided that a third party bar would be inappropriate or unfair
	* A trust or agency relationship might exist
	* Common law exception for employees claiming the benefit of a limitation of liability clause and another for waivers of subrogation rights



* You can't have a third party to a contract because contracts are inherently bilateral
* If Dew was acting as Dunlop’s agent, the contract would be enforced; no agency relationship

#### \* Beswick v Beswick (CA)

* + Old Peter Beswick was a coal merchant
	+ The business was to be transferred to his nephew John
		- Peter was to be employed for the remainder of his life at £6 10s/week
		- After his death the nephew was to pay the widow an annuity of £5/week
	+ Nephew paid the first £5, then stopped
	+ The widow brought an action against the nephew
		- She sued in the capacity of administratrix of the estate of Peter, and in her personal capacity
	+ Lord Denning MR:
		- Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him, or if he refuses to join, by adding him as a defendant
			* This is different when the third person has no legitimate interest
		- Here the widow sues in her capacity as executrix of her husband's estate
			* As a contracting party
		- And she sues in her person capacity
			* As a third person
		- This joint claim is good



#### \* Beswick v Beswick (HL)

* + Lord Reid:
		- The widow has a right as administratrix of her husband's estate to require A to perform his obligation under the agreement
		- Damages for a breach would be a less appropriate remedy since the agreement called for an annuity
		- D has received the whole benefit of the contract
		- P as administratrix is entitled to a decree of specific performance

 For the purposes of contract law, she is Peter -- she is not a stranger to the contract

* + Being Peter (the legal incarnation after his death), she can sue the wicked nephew as herself
	+ This is because she was the administratrix as the executor of Peter's will
	+ In her sole position as Mrs. Beswick she would have had no rights, but her role as administrator gave her the right to sue
	+ Executors, or administratrix, trustees etc, become the personification of the deceased in terms of legal obligations and rights

### ii) The Exceptions

Class notes:

* Courts need to find ways around the problems that are created by privity
* Here we have 3 parties
	+ The promise is flowing from A to B
	+ Consideration is flowing from B to A



* A's obligation is to B to give something to C
* But C has provided no consideration, therefore there is no legal obligation between A and C
* If B has fled the jurisdiction and refuses to enforce the promise, then C goes to court and sues A, but C is a stranger to the contract
	+ This is the doctrine of privity
* Applying privity is so unjust, the courts were forced to find a solution

#### a. Trust

1. A person (called the settlor) may transfer property or rights to a trustee to be held or managed for the benefit of a third party (called the cestui que trust -- or beneficiary)
2. A person may declare himself or herself to hold property or rights as trustee for the benefit of a specified beneficiary
3. Once a trust is created, the beneficiary is entitled to enforce the trust obligation directly

##### \* Vandepitte v Preferred Accident

* + A: Alice Marie Vandepitte sustained injuries, being involved in a car accident with a car driven by Jean Berry, daughter of R.E. Berry
		- As Jean was a minor, the father, R.E. was civilly liable
	+ A's husband was brought in as a third party
	+ Insurance Act, s 24:
		- The person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy
	+ Insurance policy of R.E. Berry:
		- The indemnity shall be available in the same manner and under the same conditions as it is available to the Insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the Insured, or of an adult member of the Insured's household
			* It was contended on behalf of A that Jean Berry was insured within s 24 of the Act, and R was liable to pay A the amount of the loss
			* In the alternative, either Jean Berry was directly a party to the contract, or that she was a cestui que trust of the promise contained in the contract to extend the indemnity to such a person as herself, being the trustee
	+ Lord Wright:
		- A contract can only arise if there is the animus contrahendi
			* There is no evidence that Jean Berry ever had any conceptions that she had entered into any contract of insurance
		- There is no evidence that R.E. Berry had any intention to create a beneficial interest for Jean Berry
			* No trusteeship here is made out; it looks like a contract, not a trust
		- The final paragraph of the policy gives no enforceable right to anyone
			* The clause states merely a promissory representation or statement of an intention that is not binding in law or equity
			* The loss here is of business reputation



* Alice is neither A nor B nor C
* Alice has been injured by C who is the daughter of B
* Alice sues Jean, but doesn't get the payment she wanted, and under Clause (4?) of Insurance Act she is entitled to go after the insurance company
	+ The problem here is that Jean has to be insured against such liability for Alice to succeed
	+ Crucial question: is Jean covered?
		- No, because of the doctrine of privity
* A court today would likely say that this is a stupid result, and the doctrine of privity will not be applied because it undermines commercial reality
	+ At the time that this case was decided in 1933 courts were less flexible in their approach, and were prepared to only exercise two intellectual maneuvers to get around this doctrine
		1. Agency
		- There was no evidence of an agency relationship here
		1. Trust
		- The benefit is given to someone to hold for a third party
		- Vandepitte argued that the daughter is covered by the insurance policy because the father was in the capacity of a trustee holding the benefit of the insurance policy on behalf of the daughter
	+ The court didn't like the argument above of trust

We will probably get a question like this on an exam

* Can we avail ourselves of the trust device?
	+ Our answer:
		- It is possible
		- Can the facts suggest any evidence of creating a trust?
		- What kind of evidence might be necessary for that?
			* Perhaps a statement of will to create a trust
		- Definitely bring in Vandepitte!
	+ In the instructions we will be permitted to assume certain facts

* This case is immediately reversed by legislation
	+ Makes no sense from a policy perspective
	+ And make no sense from the intentions of the parties
	+ Imposes formalistic rigor for the sake of formalistic rigor with no benefit in terms of policy

#### b. Agency

1. If the promisee is actually contracting as an agent on behalf of the third party, the doctrine of privity has no application
* The beneficiary is the principle (C) B is the agent, and A is the contractor
* B is making the contract as an agent of party C
* Here the promisee is transformed into an agent, and the third party is transformed into a *principle*
* The contract is between the principle and other parties
* In terms of consideration we have a weird relationship:



##### \* New Zealand Shipping v Satterthwaite

* + Expensive drilling machine was received on board the ship *Eurymedon* at Liverpool
		- The shipper was the maker of the drill
		- Bill of lading issued by agents for the Federal Steam Navigation Co Ltd (the carrier)
		- The consignee was AM Satterthwaite & Co Ltd
		- New Zealand Shipping Co used to be the stevedore
		- Satterthwaite became the holder of the bill of lading and owner of the drill prior to August 14, 1964
			* On this date, the drill was damaged as a result of the stevedore's negligence during unloading
	+ It was acknowledged by the consignee that the liability of the carrier was limited £100 under clause 11 of the bill of lading
		- Under the Carriage of Goods by Sea Act 1924 the carrier and the ship were discharged from all liability unless a suit was brought against them within one year after delivery
	+ Issue at appeal: whether the stevedore can take the benefit of the time limitation provision
		- No action was taken until April 1967
	+ Lord Reid in *Scruttons v Midland Silicones:*
		- Possibility of success of the agency argument if:
			* Bill of lading makes it clear that stevedore is to be protected
			* Bill of lading makes it clear that the carrier is also contracting as agent for the stevedore that these provisions should apply to the stevedore
			* The carrier has authority from the stevedore to do that
			* Any difficulties of consideration from the stevedore were overcome
	+ Does this contract satisfy the above provisions?
		- The only question in this case is the fourth, that it has not been shown that any consideration for the shipper's promise as to exemption moved from the promisee -- the appellant company
	+ Lord Wilberforce:
		- It is contemplated that a part of this contract (discharge) may be performed by independent contractors (appellant)
			* Clause 1 of the bill of lading exempts from liability the carrier, servants and independent contractors
			* This exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed
		- It is the opinion of the court to give A the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document
		- Denying validity to the clause would be to encourage actions against servants, agents, and independent contractors in order to get around exemptions



* The contract explicitly extends these limitations to the Stevedores by the second clause above
* On the face of the contract the Stevedores are covered; the doctrine of privity is causing problems
* Putting aside the doctrine of privity is what the parties agreed to
* The House of Lords is trying to avoid the doctrine of privity for the sole reason that it doesn't make sense here
	+ All of the concerns of the party's intentions are in the opposite direction of privity
	+ If you conceive of that person as an agent, then all problems of privity are solved

#### c. Employment

##### \* London Drugs v Kuehne & Nagel

* + Issues:
		- The duty of care owed by employees to their employer's customers
		- The extent to which employees can claim the benefit of their employer's contractual limitation of liability clause
	+ A: London Drugs Ltd
	+ R: Kuehne & Nagel
	+ R: Dennis Gerrard Brassart and Hank Vanwinkel (employees)
	+ A delivered a transformer weighing 7500 pounds to R for storage
	+ A chose not to obtain additional insurance from R and arranged for its own all risk coverage
	+ While being lifted, the transformer fell, causing damages of $33,955.41
	+ Trainor J of the SCBC held Rs (employees) personally liable for the full amount of damages, limiting R (employer) to $40
	+ Court of Appeal reduced R's liability to $40
	+ R and A are cross appealing
	+ Iacobucci:
		- A argues that Rs should not benefit from a limitation of liability clause
		- Rs argue for a relaxation of the doctrine of privity,
		- Accepts the submission that this is the time and case for a judicial reconsideration of privity as it applies to employers' contractual limitation of liability clauses
		- Courts have the power and the duty to make incremental changes to the common law to see that if reflects the emerging needs and values of our society
		- No concern for double recovery or floodgates of litigation
		- Recognizing a right for a third party beneficiary to rely on a limitation of liability clause should have relatively little impact on the rights of contracting parties to rescind or vary their contracts
		- Privity fails to appreciate the special considerations between employee-employer and employer-customer relations
		- Employees have the prime responsibilities related to the performance of the obligations that arise from the contract
		- In this case, A knew the role to be played by the employees
		- The court is witnessing an attempt to circumvent the limitation of liability
		- This should not be sanctioned
		- According to modern commercial practice an employer such as R performs its contractual obligations with a party such as A through its employees
		- Holding the employees liable in these circumstances would lead to serious injustice
		- In what circumstances should employees be entitled to benefit from a limitation of liability clause found in a contract between their employer and the P (customer)?
		- The limitation of liability clause must expressly or impliedly extend its benefit to the employees seeking to rely on it
		- The employees seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and P when the loss occurred
		- This new exception to privity is dependent on the intention of the contracting parties
		- It involves very similar bench marks to the recognized agency exception
		- Iacobucci is proposing a very specific and limited exception here:
			* Permitting employees who qualify as third party beneficiaries to use their employer's limitation of liability clauses as "shields" in actions brought against them, when the damage they have caused was done in the course of their employment and while they were carrying out the very services for which the P had contracted with their employer
		- In this case Rs fall under the above exception

##### *\** Edgeworth Construction v. N.D. Lea

* + A: Edgeworth Construction Ltd
	+ R: N.D. Lea (engineers)
	+ A won a bid to build a section of highway in Revelstoke area
	+ A commenced proceedings for negligent misrepresentation against the engineering firm which prepared the drawings upon which it entered its bid
	+ Liability for negligent misrepresentation arises when a person makes a representation knowing that another may rely on it, and P in fact relies on the representation to its detriment
		- The facts of the case meet this test
	+ The purpose of supplying the information was to allow tenderers to prepare a price
		- P relied on the information prepared by the engineers in preparing its bid
		- This establishes a prima facie cause of action against the engineering firm
	+ It is argued that the contract between A and the province is negated or subsumed the duty of care owed by R
		- The contract converted the representation from one made by R to one made by the province; the contract destroyed the proximity
	+ McLauchlin cannot accept the above argument
		- Neither the Ministry nor the contractor ever assumed the risk of errors of R
		- The protection provided in the contract was intended for the province alone
		- R could have taken measures to protect itself from the liability in question
			* This is unlike the employees in London Drugs
		- Much of the loss could have been avoided if R had ongoing supervisory duties
		- Cl. 42 of the contract between the contractor and the province does not assist R

Class notes:

* The court knocks out the issue on the ground that the people seeking the coverage are not explicitly mentioned
	+ You have the find that the promise was actually meant to extend to the third party
* This case doesn’t move things forward very much

#### d. Subrogation

##### *\** Fraser River Pile and Dredge v. Can-Dive Services

1. The "Sceptre Squamish" belonging to A (Fraser River) sank, while under charter to R (Can-Dive)
2. Contract of insurance between A and the insurer contained a clause under which the insurer waived its right of subrogation against any charterer and extended coverage to affiliated companies and charterers
3. The insurer sued Can-Dive, who relied on the waiver of subrogation
4. At trial the court took the view that Can-Dive, as a third party, could not enforce the waiver in the contract of insurance
5. Issue: Is Can-Dive, as a third party beneficiary under the insurance policy pursuant to the waiver of subrogation clause, entitled to rely on that clause to defend against the insurer's subrogated action on the basis of the principled exception to the contract doctrine established by the Court's decision on London Drugs?
6. Iacobucci J:
	* It was not the intention in London Drugs to limit application to situations involving only employer-employee relationship
	* Questions to be asked:
		+ Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision?
		+ Yes
		+ Having contracted in favour of Can-Dive as within the class of potential third party beneficiaries, Fraser River and the insurers cannot revoke unilaterally Can-Dive's rights once they have developed into an actual benefit
		+ Are the activities performed by the third party seeking to rely on the contractual provision the vey activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?
		+ Yes
	* Policy to consider
		+ It is time to put to rest the unreasonable application of the doctrine of privity to contracts of insurance established by Vandepitte
		+ This was inconsistent with commercial reality
		+ When sophisticated commercial parties enter into a contract of insurance which expressly extends the benefit of a waiver of subrogation clause to an ascertainable class of third party beneficiary, any conditions purporting to limit the extent of the benefit or the terms under which the benefit is to be available must be clearly expressed
	* The circumstances of this appeal meet the requirements established in London Drugs for a third party beneficiary to rely on the terms of a contract
		+ Can-Dive is entitled to rely on the waiver of subrogation clause whereby the insurers expressly waived any right of subrogation against Can-Dive as a charterer of a vessel included within the policy's coverage
* In this case, London Drugs gets understood in a broad way, potentially making minced meat of the doctrine of privity
* This case is not the creation of another exception, but an extension of London Drugs
	+ Prof doesn’t like that the book is trying to create another category of exception

Exam hints:

 \* When writing an exam, outline what my presumptions are; they will often leave things unclear forcing us to clarify the presumption

* Consideration:
* There is this doctrine, and there are ways of getting around it
	+ When answering an exam question we want to go through all the alternatives
	+ One approach: find new consideration based on the party's true intentions to end a contractual relationship and start a new one
	+ In the alternative, if that doesn't work, we look at Williams and Roffey, and how they created a way around this, saying that if the promisor has actually gotten a benefit even without any legal detriment, without unduly extraction, then it is ok, and we can say that the absence of a legal detriment will not be fatal in finding consideration
* As we will see, there is one more strategy that can be deployed, the doctrine of reliance, or promisory estoppels
* Much of the Christmas exam will be asking us to apply these three doctrines to a given set of facts
	+ There will be a factual scenario, people entering into a contract, someone will promise to do something, and we will have to determine:
		- Is there consideration for that promise?
		- Then we will say, in the alternative, if there isn't consideration, maybe we can conceptualize this as a new contract
		- In the alternative, we can try Williams and Roffey, and the doctrine of estoppels

Exam

* He will give us a hypothetical and then likely ask us 2 or 3 questions about it
* He will allocate a certain number of marks to each question
* 1 page single spaced of facts

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# Excluding and Limiting Liability and Standard Form Contracts

* Contracts are enforced when courts feel there is agreement between the two parties
* A bargain is a type of transaction that is thought to reflect consensus
* The courts are particularly concerned in the consumer context because of the inequality of actors
	+ Less concerned in commercial context

## Unsigned Documents

* Ticket cases:
	+ Document in the form of a ticket or receipt and dispute arises when someone seeks to rely on its terms, claiming that it governs the relationship between the two parties
		- These things are usually included on the ticket
			* Break leg at ski hill
			* Lose luggage in airport
			* Hit by puck at hockey game
		- The aggrieved party sues issuer of ticket and issuer says they have no liability
		- Aggrieved party claims they didn't read fine print so terms have no legal significance
		- If the document is handed over as part of the contracting process it will be part of the contract unless the court is of the opinion that it would be unreasonable to expect the receiver to read it, to understand it, or to consider it to be a condition of the agreement
			* How is there the necessary ad item, if there is no chance the person has read it
	+ Parker case (not on syllabus -- discussed in Thornton)
		- Railways were first instance of massive corporations providing consumer experience to many people
		- P deposits a bag at a cloakroom at D's railway station
		- Is it reasonable to assume that a holder of a ticket has read the conditions?
			* Classic case where the court is willing to take the consumer's state of mind
			* If you admit that you were aware of condition, then you are bound by it
			* What is more complicated is when the company did what was reasonably sufficient, and the consumer was not aware of the condition
			* If you receive the conditions after the transaction takes place, is it still relevant?
				+ Yes this is a factor, but it is not definitive

### \* Thornton v Shoe Lane Parking

* + Ds (Shoe Lane Parking) held liable at trial for the personal injuries suffered by P as a result of an accident which occurred in a multi-storey car park of which the Ds were occupiers
	+ Trial judge found the P was half liable, and D half liable
	+ Ds acknowledge they were at fault, but claim they are protected by exempting conditions on the ticket which was issued to the P
		- They say it was a contractual document when exempts them from liability
	+ P did not read the words which said the ticket was subject to the conditions as displayed on the premises (on the garage)
		- Reading the conditions would have taken him considerable time
	+ In a parkade:
		- Customer pays his money and gets ticket
		- He cannot refuse it and he cannot get his money back
		- The offer is made when the proprietor of the machine holds it out as being ready to receive the money
		- Acceptance takes place when customer puts his money into slot
	+ Finding: customer not bound by terms printed on ticket if they differ from the notice because ticket comes too late
		- Customer is bound by exempting condition if he knows that the ticket is issued subject to it, or if the company did what was reasonably sufficient to give him notice of it
		- In the absence of such reasonable sufficient notice, if the D wants to argue that P knew or believed there to be contractual conditions, the burden of proof is on D
* There is a relationship between severity of condition and degree of notice necessary
	+ The more onerous a clause is the less likely you would think it would be there

### \* Interfoto v Stiletto Visual

* + Ps run a library of photographic transparencies and sent transparencies to D (advertisers)
	+ P sent invoice to D as a holding charge for the transparencies
	+ P's claim is based on conditions printed on their delivery note
	+ Dillon LJ:
		- The holding fee charged by P was extremely high and exorbitant
		- The contract came into existence when the Ps sent the transparencies to D, after opening the bag, accepted them by Mr. Beeching's phone call to P
			* Was condition 2 (regarding the holding fee) a term of the contract?
				+ Was it sufficiently brought to D's attention?
		- Condition 2 is a very onerous clause
			* Ds could not have known, if their attention was not drawn to the clause, that the Ps were proposing to charge a holding fee for the retention of the transparencies at such a high rate
		- As in Thornton, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party
		- In the present case, nothing was done to draw D's attention particularly to condition 2
			* Consequently, condition 2 never became part of the contract
	+ Bingham LJ:
		- For the reasons given by Dillon LJ no contract was made on the phone when Ds made their initial request
		- No contract was made on delivery of the transparencies before the opening of the bag
		- Once the delivery note was taken out, it is an inescapable inference that Ds would have recognized delivery note as a document likely to contain contractual terms
		- Ds are to be relieved of that liability because the Ps did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention
		- Unlike the previous two cases this is a commercial transaction
		- Reasonable steps must be taken to drawn D's eyes to the conditions

### \* McCutcheon v MacBrayne

* + Lord Reid:
		- A sent his car by Rs to West Loch Tarbert by ferry from the island to the mainland
			* Vessel sank due to negligent navigation and the car was lost
			* No document was signed or changed hands until contract was completed
		- If this oral contract stands unqualified there can be no doubt that Rs are liable for the damage caused by the negligence of their servants
		- Rs exhibit copies of the conditions in their office, but neither the A nor his agent read these notices
		- R's clerkess made out a risk note, but she was not present, and the purser forgot to ask him to sign the risk note
		- There had been no constant course of dealing
			* Sometimes he was asked to sign and sometimes he wasn't
			* He did not know what the conditions were but accepted the offer in good faith
	+ Lord Devlin:
		- If the form had been signed as usual, A would have had no case
		- That there had been previous dealings between the parties does not assist the Rs
			* Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them
			* Without knowledge there is nothing
		- Rs in this case have failed to prove that A made himself acquainted with the conditions that they had introduced into previous dealings
1. In UK legislation protects consumers from terms that may not be brought to their attention, and they will be relieved of obligations even if they signed, if statutory requirements are met
* In Canada we are still fighting out in the courts how far Canada should go in protecting consumers
* Ontario CA decision in Rent-A-Car represents one side of the tension that currently exists
1. Standard form contracts cannot be governed by Parliament because it falls under 92(13)

## Signed Documents

1. Case in 1930s: when someone puts their signature, we presume they knew what they were doing

### \* Tilden Rent-a-Car v Clendenning

* + Mr. Clendenning rented a car from Tilden and assented to extra coverage
		- He signed the contract in the presence of the clerk, but he had not read the terms of the contract before signing, which was readily apparent to the clerk
	+ Issue: is D liable for the damage caused to the car while being driven by him by reason of the exclusionary provisions which appear in the contract?
	+ On the back of the contract, in particularly small type there are a series of conditions
	+ At the time of impact he was capable of the proper control of a motor vehicle
	+ A witness stated that unless inquiries were made, nothing was to be said by its clerks to the customer with respect to the exclusionary conditions
	+ Mr. Clendenning had assumed that he would not be responsible for any damage to the vehicle on payment of the extra premium unless such damage was caused by reason of his being so intoxicated as to be incapable of the proper control of the vehicle
		- He stated that had he known the full terms of the written instrument, he would not have entered into such a contract
	+ A transaction such as this one is invariably carried out in a hurried, informal manner
	+ Since the important provisions were on the reverse side and in very small type, even the most cautious customer is discouraged from endeavoring to read and understand it
		- It was not open to Tilden to rely on those clauses because it had no reason to believe the terms were consented to
1. Signature does not necessary mean person consents to agreement; depends on circumstances
	* + There may not be a meeting of the minds even though a person signed at the bottom

### \* Karroll v. Silver Star Mountain Resorts

* + P sustained a broken leg while participating in a downhill skiing competition at Silver Star
	+ P alleges that the Ds were negligent in failing to ensure that the downhill race course was clear of other skiers before permitting her to descend the course
	+ She signed a document releasing Silver Star and its agents from liability
		- If P is bound by this document she has no action
	+ P contends that she was given neither adequate notice of its content nor sufficient opportunity to read and understand it
	+ Issue: whether P is bound by the terms of the release
	+ 2 principles:
		- Principle of general contract law: where party signs document which he knows affects legal rights, party is bound by document (in absence of fraud or misrepresentation), even though party may not have read or understood document
		- Party seeking to rely on an exclusion of liability which the signing party has not read, must show that he has made a reasonable attempt to bring the signing party's attention to the terms contained on the form
	+ McLachlin CJSC
		- Where a party has reason to believe that the signing party is mistaken as to a term, then signing party cannot reasonably have been taken to have consented to that term, with result that signature which purportedly binds him to it is not consensual act
		- In Tilden the hasty, informal way in which the contract was signed, the fact that the clause excluding liability was inconsistent with the overall purpose of the contract, and the absence of any real opportunity to read and understand the document given its length and the amount of small print on its reverse side, led the court to conclude that D should have known the P had no intention of consenting to the onerous exclusion
		- Miss Karroll signed the release knowing that it was a legal document affecting her rights and she is bound by the release unless she can establish:
			* In the circumstances a reasonable person would have known that she did not intend to agree to the release she signed
			* In these circumstances the Ds failed to take reasonable steps to bring the content of the release to her attention
		- The release was consistent with the purpose of the contract
		- She had herself signed such releases on previous occasions before similar races
		- In these circumstances it was not incumbent on Silver Star to take reasonable steps to bring the contents of the release to her attention or ensure that she had read it fully
* The court tries to reconcile this case with Tilden
	+ Must narrow the scope
		- The clause in this case is not as onerous as the clause in Tilden
	+ Unlike Tilden there was nothing unusual about the clause given the nature of the activity
		- Common understanding that when you are engaged in a dangerous sport, particularly in a competitive context, injuries are possible
	+ It was not hidden
	+ Signing these kind of releases is common
		- She had done this before and she told a friend what the significance of the clause was
	+ This case was not found exceptional, and accepts that Tilden is exceptional
* On the exam we will have to ask if something is more similar to Tilden or is it more similar to Karroll

## Fundamental Breach

1. What happens when we have commercial arrangement, and not scenario of consumer transaction?
	* Parties that know what they are doing in the market with roughly equal bargaining power
	* With two businesses we will unlikely apply Tilden in Canada, and unlikely use the legislative equivalent in England
	* Left in a situation where we have nothing other than the laws insistence that we are all grownups, and contracts that we sign should be enforced
2. What do we do in a particularly egregious situation?
3. Doctrine of fundamental breach
	* If the other party was so poor in its performance, then conceptually the entire contract would be brought to an end by the severe breach
		+ Acted so badly, so negligently in disregard of its contractual obligations
		+ The breach must go to the root of the contract
	* If the contract is dissolved, then the exclusion from liability clause is likewise dissolved
	* Rule of law approach:
		+ As a matter of law, in the event of fundamental breach the contract and exclusion of liability is dissolved
	* Rule of construction: (adopted in Photo construction)
		+ Whether or not the exclusion of liability clause exists in the case of a fundamental breach depends on the context of the contract
		+ We are concerned about what the parties agreed to
		+ More within the traditional doctrine of respecting agreements of individual parties
			- What did they agree to in the circumstance of a fundamental breach?
4. Denning's rule of law approach is more radical

### \* Karsales v Wallis

* + Wallis inspected a car and agreed to buy it if Stinton could arrange financing
	+ Karsales bought the car from Stinton and sold it to Mutual Finance Ltd which let the car out to Wallis on hire-purchase terms
	+ When the agreement was concluded it was still in Stinton's possession
	+ The car was badly damaged and D refused to accept the car in this condition
	+ Karsales is suing D (Wallis) for ten months installments of payments under the agreement
	+ Denning LJ:
		- When hirer has himself seen and examined the motor car and made application for hire-purchase on the basis of his inspection of it, there is an obligation on the lender to deliver the car in substantially the same condition as when it was seen
	+ Finding: breach went to root of contract and disentitled lender from relying on exempting clause
* Denning is talking about what he sees as the operative principle of when a car isn't a car
* A client cannot rely on an exempting clause when he delivers something that is fundamentally different from what was promised
* Rule of law approach
	+ Exclusion clause is not applicable in event of a breach that goes to the root of the contract

### \* Photo Production v Securicor

* + Appeal arises from the destruction by fire of R's factory
		- Is A (company that provides security services) liable for this sum?
	+ The contract incorporated standard conditions which limited liability
		- Can these conditions be invoked at all in the events which happened?
		- If yes, whether the exclusion provision, or a provision limiting liability can be applied on the facts
	+ Employee of A deliberating started a fire by throwing a match on some cartons
		- It was not established that he intended to destroy the factory
	+ In a commercial contract many obligations are left by implication of law from the legal nature of the contract
	+ An exclusion clause is one which excludes or modifies an obligation that would otherwise arise under the contract by implication of law
	+ Securicor had an obligation to ensure that the visits by the night patrol were conducted by persons who would exercise skill and care for the safety of the factory
		- This obligation was limited to exercising due diligence in its capacity as employer in hiring persons that exercise reasonable care and skill for the safety of the factory
		- Appeal allowed
1. The true construction of what they meant when they entered the deal is what truly matters in the case of a fundamental breach
2. Arguably the breach was fundamental in this case
	* They hired a security company to protect the premises, and instead, they burnt it down
	* This breach goes to the root of the contract
	* Here we have commercial actors with roughly equal bargaining power and we should be giving effect to their agreements
3. Courts in Canada are willing to be more interventionist in the context of commercial transactions
	* Still less willing than in consumer transactions of course
4. As a result of this decision we have a bit of a messy picture in Canada
5. In Photo Production fundamental breach is rejected
6. Essential of True Construction:
	* In photo prod, the court says that the fundamental breach, exclusion etc is no different from any other contractual problem
	* We don't need a special rule
		+ Rather we need to treat these situations the same as others: define the true conceptions of the parties by construing the contracts that they signed
	* What did the parties intend to happen in the event of a fundamental breach?
		+ Let's read the exclusion clause and see
7. Then we have the construction approach
	* We don’t want to treat these situations any different than others, so we ask, what did the parties actually intend to happen; what did they agree to?
	* Now we see no reason to have a doctrine that allows the court to be paternalistic
	* We will do what we are supposed to do: give effect to the intentions of the parties

### \* Hunter Engineering v Syncrude Canada

* + Syncrude contracted for the supply of extraction conveyer systems
	+ Defects were discovered in the gearboxes
	+ Wilson J:
		- Fundamental breach has been described as a breach going to the root of the contract and results in performance totally different from what parties had in contemplation
		- As per Photo Production: 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 which it was the intention of the parties that he should obtain from the contract
		- Although the gears were obviously an important component of the conveyer system, their inferior performance did not have the effect of depriving Syncrude of substantially the whole benefit of the contract
			* The breach was not fundamental, but even if there was, it would not be unfair or unreasonable to allow the clause to operate
		- The courts have continued to apply a modified rule of law doctrine
		- This law needs clarification
		- The exclusion clause cannot be considered in isolation from the other provisions of the contract and the circumstances in which it was entered into
		- Exclusion clauses should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated
			* After having ascertained the parties' intentions the court must still decide whether or not to give effect to it in the context of a fundamental breach
		- Where there is no inequality of bargaining power the courts should, as a general rule, give effect to the bargain freely negotiated by the parties
		- To dispense with the doctrine of fundamental breach and rely solely on the principle of unconscionability would require an extension of the principle of unconscionability beyond its traditional bounds of inequality of bargaining power
			* There is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances
		- It is preferable to determine whether or not the impugned clause should be enforced in all the circumstances of the case and avoid reliance on awkward and artificial labels
			* In this case there is no reason not to enforce the clause excluding the statutory warranty
	+ Dickson CJC:
		- Disagree with Wilson J's approach to the doctrine of fundamental breach
		- Inclined to adopt the course of Securicor to treat fundamental breach as a matter of contract construction
		- Does not favour (as Wilson does) requiring the court to assess the reasonableness of enforcing the contract terms after the court has already determined the meaning of the contract based on ordinary principles of contract interpretation
			* The court should not disturb the bargain the parties have struck
			* Inclined to replace the doctrine of fundamental breach with a rule that holds parties to the terms of their agreement, provided the agreement is not unconscionable
		- In cases where extreme unfairness would result from the operation of an exclusion clause a fundamental breach of contract was said to have occurred
			* The party in breach was not entitled to rely on the contractual exclusion of liability but was required to pay damages for contract breach
		- Waddams:
			* Not all exclusion clauses are unreasonable
				+ This is ignored by the rule of law approach to fundamental breach
			* Exclusion clauses are not the only contractual provisions which may lead to unfairness
				+ There is no sound reason to apply special rules in the case of clauses excluding liability than for other clauses producing harsh results
		- Inclined to lay the doctrine of fundamental breach to rest and deal explicitly with unconscionability
			* Only where the contract is unconscionable, such as cases of unequal bargaining power, should the courts interfere with agreements the parties have freely concluded
		- Allis-Chalmers is not liable for the defective gear boxes
			* The warranty provision limited the liability of Allis-Chalmers
			* There was no unconscionability (no inequality of bargaining power)
				+ Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract
1. Wilson maintains the doctrine of fundamental breach but finds the case fails to meet the standard
* We need to give effect to the contract but there will be times when things happen that the parties hadn't anticipated (even in business transactions)
* As a matter of policy, when there is such a bad breach, we must consider whether it is fair to allow that exclusion clause to be enforced
	+ Jab at Dickson (interventionist in a way Dickson didn’t like in Photo Production)
		- She is willing to go further than Dickson in asking about fairness, even where equality of bargaining power
	+ Was there a fundamental breach?
	+ Did it go to root of contract?
	+ If yes, is it fair and reasonable to allow the party in breach to rely on exclusion clause in light of circumstances of breach?
		- Based on what happened at time of breach, not when contract was entered into
			* Doesn’t care about intentions of parties (similar to Denning in Karsales)
* She wants to hold onto the possibility, in light of really bad breaches (sharp dealing, fraud etc), to ask whether it still makes sense to apply exclusion of liability
	+ She sets the bar quite high for her test; the breach must be exceptionally awful
* She finds in this case it is reasonable to enforce the contract because there was equality of bargaining power between the parties
	+ How is this different? If she is saying that where there is equality of bargaining power between the parties she will almost never find unreasonableness
	+ Wilson sees the equality of bargaining power as an important piece
	+ It seems that there is a general test, that an exclusion clause will not be enforced if is unfair, unreasonable or unconscionable to do so
1. Dickson does away with doctrine of fundamental breach and applies doctrine of true construction
	* He claims that not all exclusion principles are unfair, yet all are rendered inoperative as a result of the doctrine of fundamental breach
		+ Doctrine is not inclusive enough; what about other kinds of clauses?
		+ This is wrong, because perhaps the parties intended the exclusion clause to apply in the circumstances
* Dickson's judgment effectively says the same thing as Photo Production, except he substitutes the doctrine of unconscionability for the Unfair Contract Terms Act legislation
	+ When you have two businesses of roughly equal bargaining power, enforce the contract
		- Give effect to the intentions of the parties as expressed in the contract
	+ When you have the kind of scenario which would be dealt with under Unfair Contract Terms Act (unequal bargaining power), then use the doctrine of unconscionability
1. This is a nice example of two judges who are philosophically opposed in terms of what they think contract law should be doing
	* Wilson thinks contract law has two functions:
		+ Give effect to intentions of parties and make sure fairness exists
	* Wilson uses language of fairness, whereas Dickson uses language of unconscionability
		+ Unconscionability requires unequal bargaining power
		+ If Wilson wants to do something where there is equal bargaining power, she can't use the language of unconscionability because it requires unequal bargaining power
		+ Therefore she adopts the term fairness
* At the end of the day, we get the question of is it unconscionable or unreasonable to enforce a contract

### \* Fraser Jewelers v. Dominion Electric Protection

* + P operated a jewelry store where ADT was to furnish a burglar alarm system
	+ P's owner testified that he had not read the agreement, that he was unaware of the exclusionary provision and that it was not pointed out to him by D
	+ In Hunter the SCC held that while such provisions were enforceable according to their true meaning, a court was empowered in limited circumstances to grant relief against provisions of this nature
	+ D's negligence in failing to respond cannot be equated to a fundamental breach
		- It was not deliberate or willful
		- While entitling the P to damages, it cannot be characterized as fundamental
	+ Relief should be granted only if the clause can be said to be unconscionable (Dickon) or unfair or unreasonable (Wilson)
	+ In the absence of fraud or misrepresentation a person is bound by an agreement to which he has put his signature whether or not he has read its contents
	+ The fact that parties may have different bargaining power does not in itself render an agreement unconscionable or unenforceable
		- The question is whether there was an abuse of bargaining power
	+ Finding: the parties should be held to their bargain
1. We are in the realm of small business
	* Not in the world of Tilden or Syncrude
2. True, perhaps ADT should have drawn his eyes to the part of the contract about getting insured, but as a business transaction, Fraser had a responsibility to read the contract himself
3. Even if there was a fundamental breach, then we must move onto the second step of Wilson's test:
	* Was the clause unconscionable, unfair or unreasonable?
	* The clause was not undermined because we still have two businesses
	* The question is whether there was an abuse of bargaining power
	* Nor was the clause unusual
4. In the world of business, certain presumptions hold that don't apply in consumer agreements
5. Caveat emphator: buyer beware
* Prof's thoughts
1. Fraser Jewelry is better articulated than Solway
* Solway is poorly reasoned in terms of the logic and the policy

### \* Solway v. Davis Moving

* + Ps contracted with D to have their household goods, including rare and valuable items removed from their house, stored, and delivered to new home
	+ Labrossse JA:
		- Kennedy Moving admitted liability for the loss of the goods, but only to the extent of the terms of the bill of lading and relevant regulations
			* Limiting claim to $7,089.60
		- Ps testified that Kennedy Moving had represented that their goods would be secure during the move
		- Trial judge found that Kennedy had given false assurances that had induced the Ps to agree to the limitation clause
		- To limit the loss of Ps would be unconscionable (Dickson) or unfair or unreasonable (Wilson)
	+ Carthy JA (dissenting):
		- Commercial realities required a limit to that liability
			* If not, then the cost of insurance for the most valuable of goods would impose prohibitive charges on the consigner of lesser valued goods
		- No policy basis for not applying the limitation provision against the Rs in this case
			* Allowing their claim opens the door to every imaginable complaint of misfeasance and undermines the structure built under this longstanding policy
		- Movers should treat all belongings alike
			* If the goods were of special value then the consigners should have purchased a corresponding amount of insurance
1. The exclusion clause was mandated by legislation
2. Does the limitation of liability clause apply in this case?
	* Yes!
3. Within our system legislation trumps common law
4. Hunter and Fraser: a clause will not be enforced if it is unconscionable or unreasonable
	* The doctrine of fundamental breach is out the window
5. In deciding not to enforce the limitation clause the trial judge appears to have equated the words unconscionable and unreasonable
6. Dissenting judge:
	* There is a claim that legislative policy is being undone in this case
	* The carrier was not reckless, but rather negligent
7. The prof is with the dissenting judge on this one
	* He finds the majority have gone too far

### \* Plas-Tex v. Dow Chemical

* + Appeal by D (Dow Chemical) against P (Plas-Tex)
	+ Ps provided pipeline systems to carry natural gas to rural co-ops
	+ Dow sold defective resin to two of the Ps
		- Dow knew the resin was defective and what the use of the resin was
	+ Ps were forced to undertake major remedial operations and use of the pipe was eventually prohibited
		- P's reputation was damaged which led to bankruptcy
	+ Trial judge:
		- Concluded that there had been a fundamental breach because the companies did not get what they had contracted for
		- Dow knew the purpose for which it would be used
		- Found inequality of bargaining power since Dow knew there were significant problems with the resin and didn't disclose these concerns
		- Dow could not rely on the clauses in the contract which limited its liability and that Dow was liable for the breach of contract
	+ Picard:
		- In Hunter the Court determined that as a result of fundamental breach the limited liability clauses contained protecting the breaching party were enforceable
		- The court in previous cases concluded that if D:
			* Knew of a possible risk associated with its product
			* Failed to disclose important knowledge thereby preventing the other party from properly measuring the consequences and risks
			* Deliberately withheld information and induced claimant to enter contract
		- Then if the above conditions are met, they would prohibit D from relying on the limited liability clauses in the contract
		- A party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause
	+ Finding: the trial judge's reasons are supported
1. We have two big businesses in an agreement with each other, and the court finds an inequality of bargaining power
	* If one party has all the information, and that party is keeping the information from the other party, this has implications in terms of bargaining power
* The court finds that the clause is unconscionable; that it is unconscionable to allow the clause to apply in this context
	+ Due to an inequality of bargaining power
1. The court reads Hunter as saying that failure to disclose risks is a form of unconscionability
2. When we say buyer beware, we presume that the buyer can find out

# Protection of weaker parties: duress, undue influence and unconscionability

* Idea of contracts being vitiated based on concern that weaker parties are being taken advantage of
* It has always been recognized that contracts with children are void or voidable, since children are not in a position of bargaining power strength, and lack the capacity to fully form an intention, can too easily be taken advantage of
	+ The same is true of people with disabilities
	+ The court is willing to go beyond these, at least in standard form consumer contracts, and inequality of bargaining power
	+ Collective bargaining undermined the notion of equal bargaining power
		- It took legislation to bring this into effect

## 1. Duress

* In a normal commercial arrangement, when can we say that consent has been vitiated?
	+ These cases often come up in situations where parties agree to do more than they have already agreed to
	+ Question: whether the party to take less or to do more is being put under duress
		- In D&C and Rees, the court finds that D&C was put under duress
		- In neither Gilbert Steel or Williams and Roffey was duress found
* It will be seen as duress if the party extracting a promise acts in such a way that it undermines the notion of consent

### \* Greater Fredericton Airport Authority v. Nav Canada

1. The arbitrator erred in finding that the variation was supported by fresh consideration
2. Developing doctrine of economic duress and illegitimate pressure
	* In 1975 the English courts began to recognize economic duress as a form of coercion that would render voidable an otherwise enforceable agreement
	* Duress is a coercion of the will so as to vitiate consent
		+ It must be shown that the conduct coerced did not amount to a voluntary act
	* Lord Scarman's test for economic duress:
		+ Pressure amounting to compulsion of the will of the victim and
		+ The illegitimacy of the pressure exerted
		+ Nature of the pressure
		+ Nature of the demand
			- Pressure does not have to be characterized as unlawful in order to be found illegitimate
* The courts will spend too much time trying to explain the difference between legitimate and illegitimate pressure
	+ This judge is not prepared to hold that illegitimate pressure is a condition precedent to a finding of economic duress in cases involving post contractual modifications to executory contract
* Economic duress - the analytical framework
	+ Nothing is to be gained by infusing into the economic duress doctrine concepts such as inequality of bargaining power, unconscionability and undue influence
	+ A gratuitous promise may still be enforceable, if it is the product of a consensual agreement
	+ A finding of economic duress is dependent initially on two conditions
		- The promise must be extracted as a result of the exercise of pressure
			* Demand or threat
		- 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
			* The absence of a practical alternative is evidence of lack of consent, but is not conclusive
	+ A finding of economic duress does not automatically follow
	+ We then move on to the ultimate question: whether the coerced party consented to the variation
		- Whether the promise was supported by consideration
			* A variation supported by fresh consideration lends weight to the argument that it was the product of commercial pressure and not economic duress
		- Whether the coerced party made the promise under protest or without prejudice
			* Most practical way to establish economic duress
		- Whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable
			* In the absence of a promise made under protest, the law insists that the victim take reasonable steps to repudiate or disaffirm the promise as soon as practicable
	+ The supposed good faith of the coercer should not impact on the victim's contractual right and expectation to receive performance in accordance with the original terms of the contract
* Finding:
	+ Nav Canada exercises a monopoly when it comes to providing aviation services and equipment to public airports
	+ GFAA had no practical alternative but to submit to Nav Canada's demand
	+ The two threshold conditions have been met
		- Nav Canada exerted pressure to obtain a contractual modification
		- GFAA was left with no practical alternative
		- Promise was not supported by fresh consideration
		- GFAA agreed under protest
* Two things happen in this case that represent a shift
	+ Even in the absence of a legal detriment, if one of the parties has gotten an actual benefit, it's still enough to constitute consideration
	+ Once you open up that door, that it is possible for someone in Williams position to effectively provide consideration even without suffering some legal detriment, then we open the door to coercion and duress

## 2. Undue Influence

* Undue influence is found where there is an ability to exercise exceptional power in relation to another person's choices
* Can be established in either of two ways:
	+ To prove actual undue influence
	+ To prove a special relationship between the parties
* Focuses on relationships, where it seems like due to the nature of the relationship, there is a possibility of one party getting another to enter into contractual terms that are in the first party's interests, and not in the second party's interests

### \* Geffen v. Goodman Estate

* R (Stacy Goodman) commenced an action claiming that he and his siblings were entitled to certain property left to his mother (Tzina) by his grandmother (Annie)
	+ As are the brothers and nephew of Stacy's mother (Tzina)
	+ Annie had 4 children (Sam, Jack, Ted, Tzina)
* Annie executed a will providing a life estate to Tzina and on Tzina's death that her estate should be distributed to all of Annie's grandchildren
	+ But a new will had been executed!
		- Annie left the property to Tzina with bequests to her sons and that the property be held in trust for Tzina and pass to Tzina's children
* The trust deed prepared by the lawyer of Sam, Jack and Ted provided that upon Tzina's death the property would go to all of Annie's grandchildren
	+ When Tzina died, she left her entire estate to her children
* Does the relationship between the parties give rise to a presumption of undue influence?
	+ Equity has recognized that transactions between persons standing in certain relationships will be presumed to be relationships of influence until the contrary is shown
		- Solicitor client
		- Doctor patient
		- Parent child
		- Guardian ward
		- Future husband and fiancee
	+ Influence is referring to the ability of one person to dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power
	+ Steps:
		- Whether the potential for domination inheres in the nature of the relationship itself
		- Examination of the nature of the transaction
			* P is obliged to show that the contract worked unfairness
				+ P unduly disadvantaged
				+ D unduly benefited
		- Once P has established that the circumstances are such to trigger application of the presumption, the onus moves to D to rebut
			* P must be shown to have entered into the transaction as a result of his own "full, free and informed thought"
* A review of the circumstances between the deceased and her brothers *at the relevant time* does disclose that the relationship between them was such that a potential existed for the brothers to exercise a persuasive influence over their sister
	+ They regarded her as a potential liability and sought to avoid any financial responsibility
	+ The brothers were aware that their sister had reposed her trust and confidence in them to help her straighten her legal and financial affairs
		- They knew their sister was vulnerable and that she was relying on them to help her and that they had interests of their own
* The relationship between the deceased and the appellants was such that it could have afforded them the potential to exercise undue influence over her
	+ However, there was little contact between the brothers and the deceased at the relevant time, she was not relying on her brothers to advise her
* It is difficult to conclude that the appellants have not successfully rebutted the presumption of undue influence

### \* Royal Bank of Scotland v. Etridge

* Transaction in which a wife charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company which he carried on business
	+ The wife later asserted she signed the charge under the undue influence of her husband
* Undue influence
	+ Objective is to ensure that the influence of one person over another is not abused
	+ 2 forms of unacceptable conduct:
		- Overt acts of improper pressure or coercion such as unlawful threats
		- Relationship between two persons where one has acquired a measure of influence, or ascendancy of which the ascendant person takes unfair advantage
	+ Also includes cases where a vulnerable person has been exploited
	+ It is not essential that the transaction should be disadvantageous to the pressured or influenced person, either in financial terms or in any other way
	+ Burden of proof
		- He who asserts a wrong has been committed must prove it
	+ Relationships within the special class
		- Parent child, guardian and ward, trustee and beneficiary, solicitor and client, medical advisor and patient
	+ In these cases the law presumes that one party had influence over the other
		- Complainant need not prove he reposed trust and confidence in the other party
			* + Sufficient to prove the existence of the type of relationship
		- Husband and wife is not one of these relationships
			* But the court will note the opportunities for abuse which flow from a wife's confidence in her husband
	+ The court will consider whether the complainant received advice from a third party (independent advice) before entering into the impugned transaction
		- But outside advice does not necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence
	+ 2 prerequisites to evidential shift in burden of proof from complainant to other party
		- Complainant reposed trust and confidence in the other party or the other party acquired ascendancy over the complainant
		- The transaction is not readily explicable by the relationship of the parties
	+ Whether a wife's guarantee of her husband's bank overdraft, together with a charge on her share of the matrimonial home, was a transaction manifestly to her disadvantage
		- * She undertakes a serious financial obligation but personally receives nothing
	+ Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband should not, be castigated as undue influence
		- Courts should not too readily treat such exaggerations as misstatements
* A wider principle
	+ The bank must take reasonable steps to bring home to the wife the risks involved
	+ A bank cannot be expected to probe the emotional relationship between two individuals, whoever they may be, nor is it desirable that a bank should attempt this
	+ Relationships in which undue influence can be exercised are infinitely various
		- They cannot be exhaustively defined, and there is no rational cut off point
	+ Different considerations apply where the relationships between the debtor and guarantor is commercial, as where a guarantor is being paid a fee or a company is guaranteeing the debts of another company in the same group
		- Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees

## 3. Unconscionability

* Traditional doctrine: excuse was available when 2 elements present:
	+ Improvident bargain (manifestly unfair)
	+ Inequality in the positions of the parties
1. This doctrine allows people to avoid contractual obligations when the obligations are unconscionable
2. This doctrine seems to allow that there may have been consent by a party, but it would still be wrong to hold that party to the terms of the agreement
3. Unconscionability is the premise that underlies the other two doctrines

### \* Morrison v Coast Finance

* Morrison, an old woman of 79 years of age and a widow of meager means was persuaded to borrow a sum of money from R (Cost Finance Ltd) on a first mortgage of her home and to lend the money to Lowe and Kitely
	+ The mortgage was to be repaid from payments from Lowe and Kitely
	+ She had no independent advice
* They failed to pay A
	+ It was unconscionable for Lowe and Kitely and the two companies to have A mortgage her home in order to secure the money to lend to Lowe and Kitely to enable them to pay off the finance company and buy the two cars from the automobile company
* Material ingredients:
	+ Proof of inequality in the position of parties from ignorance, need or distress of weaker party, leaving him in the power of the stronger
	+ Proof of substantial unfairness in the bargain obtained by the stronger
* The above creates a presumption of fraud
	+ Extreme folly of this old woman is evident
	+ No expectation of reward and no real security
	+ It will be sufficient to set aside the mortgage, without requiring the A to repay the money
	+ The companies made no attempt to prove that the whole transaction was fair, just and reasonable
1. We are talking about really deliberately manipulative behavior
	* Holding back facts, lying, cheating, fraud
2. Where the weakness of the weaker party is really very weak (weakness is quite exceptional)
3. It doesn't happen that often that we have malice on the one side, and severe weakness on the other
	* But we do have it in this case

### \* Lloyds Bank v Bundy

* Bundy owned a farm as his only asset, going back 300 years
* He mortgaged it to the bank for the sake of his son, whose company was in difficulties
* The circumstances were such that he ought not to be bound by it
* The father had no independent advice
* In due course the bank insisted on the sale of the house
* Categories:
	+ Duress of goods
		- Stronger demands of the weaker more than is justly due and he pays it in order to get the goods
			* Such a transaction is voidable
		- Man is in a strong bargaining position by virtue of his official position of public profession (Colore officii)
			* + Inequality of bargaining power renders the transaction voidable and the money paid to be recovered back
	+ Unconscionable transaction
		- Weakness exploited by another far stronger so as to get property at undervalue
		- Extends to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker
	1. Undue influence
		+ 2 classes:
			1. Those where the stronger has been guilty of some fraud or wrongful act
			2. Those where the stronger has not been guilty of any wrongful act, but has through the relationship which existed between him and the weaker, gained some gift or advantage for himself
	2. Undue pressure
		+ Where one party stipulates for an unfair advantage to which the other has no option but to submit
	3. Salvage agreements
		+ When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position
			1. Vessel is in urgent need and the parties cannot be truly said to be on equal terms
* General principles
	1. English law gives relief to one who, without independent advice, enters into a contract upon terms which are unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other
	+ The consideration moving from the bank was grossly inadequate
	+ Relationship between the bank and father was one of trust and confidence
	+ Father's natural affection had much influence on him
		- He trusted his son
	+ Conflict of interest between bank and father
* This case falls within the category of undue influence of the second class
1. Denning agrees with Bundy that the mortgage was unconscionable
2. Unlike in Morrison there was no suggestion of improper behaviour on behalf of the bank
3. This case moved the common law forward in 3 ways:
* By suggesting you can relieve parties of deals even if they walked into them with their eyes open and consented
* That the perpetrator doesn't necessarily have to have had malice, or done anything fraudulent or manipulative
	+ The party in this case was innocent of that
* The victim doesn't have to be extraordinarily vulnerable

### \* Harry v Kreutziger

* + - * A sued to have the court set aside the sale to R of his fishing boat
* A is Indian, suffers from congenital hearing defect, has grade 5 education, not widely experienced in business
* R approached A to buy the boat
	+ A refused several times
	+ R assured A that he would be able to get a new license with a new boat
* Issue: did A enter into this bargain under such circumstances that the court will exercise its equitable jurisdiction to rescind the contract and return the parties to their original positions?
	+ 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
* A was not the equal of R and R proceeded aggressively with full knowledge of value of license
* Allow appeal and direct that the contract be rescinded
1. Simply being unequal in bargaining is not sufficient
2. The key to this case: there was at a minimum a reckless or false representation regarding the ease of a getting a new license combined with the fact that the seller was not getting his own information
3. This case lines up more with Morrison than it does with Bundy
	* In Bundy the behaviour was not suspect, but it is in this case and in Morrison
	* In Bundy there was a special relationship of trust, and while the party was not acting in bad faith, the party was in a position of power
	* While the party was not explicitly taking advantage of that power, they were benefiting from that power
4. At a minimum, we need to find this power imbalance
	* Whether we need to also find that the party is acting in a morally suspect way (recklessly or worse) is an open question
	* The interesting case will be one where we may have this relationship of conflict of interest
5. Difference: how vulnerable - vulnerable must be
	* Bundy and Harry we have people within the norm, not people who are extreme vulnerability
	* Both these we have people with business experience
	* The sense in Morrison is that the woman did not have business experience
6. In a test we must determine the nature of the relationship and how vulnerable each party actually is
7. If we make the misinformation innocent rather than manipulative, this case becomes more similar to Bundy

# Mistake and Frustration

## 1. Mistake

1. Let's say you have a painting and you believe it is an original, and you sell it, only to find out after that it is a fake
	* First approach:
		+ The contract should be rescinded for the sake of fairness
		+ The seller should be put back in the position they were originally in
	* Second approach
		+ Follows traditional notions of contract
		+ The contract should be enforced since the seller was not at fault
		+ Buyer beware

### \* Smith v. Hughes

1. Contract for sale of quantity of oats from P to D
	* D wanted to buy old oats
	* P denied that any reference had been made to the oats being old or new
2. Trainers as a rule always use old oats
	* P denied having known that D never bought new oats or that trainers did not use them
3. 2 issues:
	* Whether the word "old" had been used
	* Whether P had believed that D believed, or was under the impression that he was contracting for old oats
4. D believed the oats to be old, and was thus induced to buy them, but he omitted to make their age a condition of the contract
5. Blackburn J
	* On the sale of a specific article, unless there be a warranty making it part of the bargain that it possess some particular quality, the purchaser must take the article he has bought though it does not possess that quality
	* Even if the vendor was aware that the purchaser thought the article possessed some quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound unless the vendor was guilty of some fraud or deceit upon him
		+ There is no legal obligation on the vendor to inform the purchaser that he is under a mistake
	* If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms
	* Neither did the D intend to enter into a contract on the P's terms, that is, to buy this parcel of oats without any stipulation as to their quality, nor could the P have been led to believe he was intended to do so
	* There should be a new trial
6. Hannen J
	* There should be a new trial
	* It is doubtful whether the jury sufficiently understood the direction they received to enable them to take it as their guide in determining the question submitted to them
	* If P knew that D dealt with him on the assumption that the P was contracting to sell him old oats, he was aware that D apprehended the contract in a different sense to that in which he meant it, and is thereby deprived of the right to insist that the D shall be bound by that which was only the apparent, and not the real bargain
7. The implication is that the oats are old, but there is no misrepresentation
8. The court decides that the contract says nothing about the age of the oats
9. When it is a different thing in essence there was no meeting of the minds
10. You could be totally mistaken about the Picassso, but unless it is written into the contract, the contract is valid
11. We can't imply any conditions that the buyer thought it was a Picasso, it has to actually be written into the contract

### \* Bell v. Lever Brothers Ltd.

1. Lever Bros had controlling interest in Niger Company, appointed Bell and Snelling to board of directors
	* B and S had speculated in the company's business to their private advantage, thereby committing breaches of duty which would have justified terminating their appointments
2. Lever Bros then negotiated their termination without knowledge of the above breach
3. Lever Bros claimed that the agreement was breached and money paid under a mistake of fact
	* They would have been dismissed without compensation had Lever Bros been aware of the breaches of contract
4. Mistake as to the quality of the thing contracted for will not affect assent unless it is the mistake of both parties, and is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be
5. In this case the identity of the subject matter was not destroyed by the mutual mistake
6. The court holds that the mistake doesn't entitle Lever to cancel the contract
7. Denning says that we have this mistake doctrine that can jump in
8. Ontario has decided to ignore the judgment that has ignored Denning (ie Denning was right)
9. However this case is still open in BC because Ontario is not an authority here

### \* McRae v. Commonwealth Disposals Commission

For example:

* Man drives down to Vancouver to buy a car
	+ The car is not actually there
	+ They are both mistaken
	+ B may have been at fault, because he was reckless about whether the car was there
1. Commission entered into a contract to sell P one oil tanker wrecked
2. P fitted a salvage expedition at considerable expense but found no tanker
3. There was not at any material time any oil tanker lying at or near the location specified
4. The reckless and irresponsible attitude of the Commission's officers is clearly indicated
5. Issue:
	* Whether a contract was made between Ps and Commission
6. Bell v Lever Bros:
	* 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 the consideration
7. The Commission took no steps to verify what they were asserting, and any mistake that existed was induced by their own culpable conduct
	* The Commission can't rely upon the mistake to void the contract because the mistake was the Commission's fault
8. The buyers relied upon, acted upon the assertion of the seller that there was a tanker in existence
9. There was a contract, and Commission contracted that a tanker existed in the position specified
	* Since there was no tanker, there has been a breach of contract and Ps are entitled to damages for that breach
10. If something had happened that neither party could anticipate, then we would have a situation where both parties were innocent

### \* Solle v. Butcher

1. Butcher owned a war damaged house with five flats
2. Solle advised Butcher that the rebuilt flat would not be subject to rent control, and assuming this was correct they entered into a 7 year lease
	* In fact the rent was fixed by statute
	* Solle then sued to recover his overpayment
	* Butcher claimed for rescission on the grounds of mistake
3. Denning:
	* Mistake is of 2 kinds
		+ Mistake which renders the contract void
			- Nullity from the beginning
				* The kind of mistake which is dealt by the courts of common law
		+ Mistake which renders the contract not void, but voidable
			- Liable to be set aside on such terms as the court sees fit
				* Kind of mistake dealt with by the courts of equity
	* There was a contract
		+ They agreed in the same terms on the same subject matter
		+ Fundamental mistake is not a ground for saying that the lease was from the beginning a nullity
	* Court of Equity would often relieve a party from the consequences of his own mistakes, so long as it could do so without injustice to third parties
	* A contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental
		+ Or if one party, knowing 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
		+ Or if the parties were under a common misapprehension either as to the facts or as to their relative and respective rights, provided that this misapprehension was fundamental and that the party seeking to set it aside was not himself at fault
	* The landlord relied on what the tenant told him and authorized the tenant to let at the rentals which he had suggested
		+ Now Solle wants to take advantage of the mistake
	* This court should impose terms which will enable the tenant to chose either to stay at the proper rent or to go out
4. Can we rely on Bell and Lever in this case?
	* No, he is getting rent for an apartment, which is not wholly different from what he thought he was getting
5. The common law doctrine of mistake does not assist Butcher
6. The equitable doctrine of mistake, which makes contracts voidable, where in light of the mistake it would cause injustice to enforce it, will help Butcher
	* More flexible and easier to trigger
7. In this case the court says it would be inequitable for Solle to rely on the landlord’s mistake
8. This is a movement away from the traditional buyer beware approach
9. The Court of Appeal in 2002 rejected this approach
10. Reluctance on the part of courts to start to meddle and intervene in contracts that are formed between parties that should know better

### \* Great Peace Shipping v. Tsavliris

1. From Brazil to China, a vessel suffered serious structural damage with risk to vessel and crew
	* They were advised that Great Peace, a vessel owned by Ps was the closest vessel and that it should be able to rendezvous within 12 hours
	* They entered into an arrangement
2. Within a few hours it became apparent that the vessel was further than thought
3. D contracted with Nordfarer for similar assistance, a different, closer vessel, and cancelled arrangements with P
	* Ds were unwilling to pay any sum to P with respect to cancelling the agreement
4. Hobson v Pattenden suggests that 5 elements must be present for common mistake to avoid a contract:
	* There must be a common assumption as to the existence of a state of affairs
	* There must be no warranty by either party that that state of affairs exists
	* The non-existence of the state of affairs must not be attributable to the fault of either party
	* The non-existence of the state of affairs must render performance of the contract impossible
	* 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
5. Issue:
	* Whether the mistake as to the distance apart of the two vessels had the effect that the services that the Great Peace was in a position to provide were something essentially different from that to which the parties had agreed
6. Mistake in equity
	* *Solle v Butcher* court held that a court has an equitable power to set aside a contract that is binding in law on the ground of common mistake
		+ No case defines the test of mistake
	* *Bell v Lever Bros*: 2 categories of mistake
		+ One that renders a contract void at law and one that renders it voidable in equity
	* It is impossible to reconcile *Solle* with *Bell*
		+ If coherence is to be restored, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law
7. Ds did not want to cancel the agreement until they knew if they could find a nearer vessel
	* They did not regard the contract as devoid of purpose
	* 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
	* They were liable to pay the cancellation fee of the Great Peace
8. This is an unusual example of the English Court of Appeal finding that one of its own decisions, *Solle v Butcher*  is not longer good law
9. D can't rely on the doctrine of common law mistake, because D essentially bought what was contracted for
	* It was qualitatively different, but not essentially different
10. There is a difference between a common law rule working an injustice and a bad bargain

### \* Miller Paving v. Gottardo

1. Miller contracted to supply aggregate materials to R construction company (Gottardo)
2. Miller acknowledged that it had been paid in full but then rendered an invoice after discovering deliveries it had not billed
3. Issue:
	* Whether the trial judge erred in failing to apply the doctrine of common mistake to set aside agreement of being paid in full
	* Whether the contract should be set aside
4. *Bell* articulated the test for determining whether a contract is void for mistake at common law
	* 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
5. *Solle* developed the equitable jurisdiction to set aside as voidable contracts that might be found enforceable at common law
	* This allowed courts to relieve for common mistake when it would be unconscientious in all the circumstances to allow a contracting party to avail itself of the legal advantage it had obtained and where this could be done without injustice to third parties
6. In England *Great Peace Shipping* changed things for that country
	* Court of Appeal was of the view that *Solle* could not stand with *Bell* and therefore should not be followed
		+ Eliminated the equitable doctrine
		+ Restated the test for declaring a contract void at common law
		+ There must be a common assumption as to the existence of a state of affairs
		+ There must be no warranty by either party that that state of affairs exists
		+ The non-existence of the state of affairs must not be attributable to the fault of either party
		+ The non-existence of the state of affairs must render performance of the contract impossible
		+ 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
	* *Great Peace* has not been adopted in Canada
7. The billing practice in this case made it the responsibility of the supplier (Miller) to determine what was owing and invoice for that amount
	* The agreement requires Miller to bear the consequence when that risk (of not receiving full payment) transpires, rather than allowing it to invoke the doctrine of common mistake
8. To apply the common law approach found in *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
		+ Nothing about the mistaken assumption changes that subject matter
	* To engage the equitable doctrine of common mistake as described in *Solle*, Miller must show that it was not at fault
		+ The mistake was due to unexplained error's in Miller's own procedures
9. It is not unjust for Gottardo to avail itself of the legal advantage it obtained
10. Miller's claim must fail
11. They affirm Solle and Butcher in the province of Ontario
* Good exam question: how do we reconcile this?
	+ We have different views in Ontario and in GB
	+ The first thing to do is ask the question of whether on the question of common law mistake the contract is sufficiently different
	+ Secondly, we would note that the doctrine of equitable mistake is currently uncertain, whether it is part of law of BC -- is in Ontario, and not in GB
	+ If it is, this is what we would do
	+ If it isn't, there is nothing we can do
	+ He would want to see us going through the process of applying the principles of Solle and Butcher if we are in BC
1. To engage the equitable doctrine, Miller must show that it was not at fault
	* The court is not sympathetic if the court claiming mistake was at fault
2. Miller messed up
	* It was their own fault
3. Even though Gottardo gets to keep extra money, the scales of equity favour Gottardo and not Miller

## 2. Frustration

1. Whereas mistake deals with inaccurate assumptions or lack of knowledge about past or existing circumstances, frustration relates to inaccurate assumptions about future circumstances
* Test of whether to relieve parties has to do with whether the contract becomes something different than what it was, in ways that could not have been anticipated, nor provided for in the contract
1. The fundamental difference between mistake and frustration is the time frame
	* Mistake deals with situations where the event that makes the contract different happens before or while the contract is entered
		+ Horse is dead while the contract is being entered into
	* Frustration occurs when the event occur after the contract has been entered
		+ Horse dies after the contract is signed, and money exchanged

### \* Paradine v. Jane

1. Paradine had leased lands to Jane
2. Rupert, an alien and enemy of the king drove away his cattell and expelled him from the lands
3. When the party by his own contract creates a duty or charge upon himself, he is bound to make it good
4. As the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor
5. Lessor shall have his whole rent

### \* Taylor v. Caldwell

1. Ds agreed to let Ps use The Surrey Gardens and Music Hall for four days
	* In a state fit for a concert was essential for fulfillment of contract
2. Hall was destroyed by fire without the fault of either party
3. Issue:
	* Whether loss of Ps is to fall on D
4. If the performance of the promise becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee) excuses the borrower or bailee from the performance of his promise to redeliver the chattel
5. We find that the parties contracted on the basis of the continued existence of the Music Hall
6. The Music Hall, ceasing to exist, both parties are excused
7. One of the first cases to deal with this
8. You can imply a term that parties will be excused from performance if it becomes impossible for the parties to perform their obligations
	* What fair and reasonable people would have agreed to had they been able to anticipate the problem
9. If reasonable people could have anticipated the problem, then they should have provided for it
10. If on the exam he asks us for examples of objective theory of contracts, the above would be one of those things

### \* Can. Govt. Merchant Marine v. Can. Trading

1. As contracted with the Canadian Trading Company to transport lumber from Vancouver to Australia in two vessels
2. The ships were under construction at the time for As and vessels were not ready in time
3. As claimed that their contract had been frustrated because the ships were unfit for sailing at the time set for performance
4. Duff J:
	* When the time for performance arrives, that a state of things contemplated by both parties as essential to performance according to the true intent of both of them fails to exist
	* No such term should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances being what they in fact proved to be when the time for performance arrived
	* There was nothing in the facts known to them making it unreasonable from R's point of view that they should expect an undertaking as touching the date of sailing unqualified, in respect of any of the manner which have been suggested as accounting for A's default
	* Real impossibility of performance arising from destruction of ships by fire would have presented a different case
5. Mignault J (concurring)
	* The contingency which relieves a party from performing a contract on the ground of impossibility of performance is an unforeseen event
	* Here the A undertook to carry a cargo on a ship nearing completion
	* Without providing against the contingency of non-completion in time, the A, assumed the risk of this contingency
* The court refuses to imply the term that the parties would have agreed to end the contract in these circumstances because they believe that reasonable people would have been able to anticipate the circumstances that arose
	+ Therefore, they should have provided for it in the contract
1. Two things that come out of these passages:
* Would reasonable people have anticipated this
* Does it go to the route of the contract?
1. If you could have known, then you should have known, and you can't rely on frustration

### \* Claude Neon General Advertising v. Sing

1. D rented a neon sign but lighting restrictions were introduced for WWII
2. D says that carrying out the contract has been impossible by a change of law
3. 2 classes of frustration cases:
	* Coronation Cases:
	* Contract could be carried out but circumstances which formed basis had wholly changed
	* Cases in which a change in the law or the advent of war involved such a fundamental change in the contract that it might be said that any contract that could be carried out would essential differ from what the parties had in contemplation
4. The neon sign was constructed for the purposes of the D, erected on D's premises and was operated for some time
5. D certainly gets less benefit but it is not entirely useless as a day sign
6. The court decided that he had gotten something similar enough that the contract was not frustrated; different in quality, but not different in nature
7. Example of a court that is narrow in its approach
8. This case could really go either way

### \* Davis Contractors Ltd.

1. P entered into a building contract to build 78 houses within 8 months
2. Adequate supplies of labour were not available and it took 22 months to complete
3. Contractor claimed contract was frustrated
4. *Tamplin v Anglo-Mexican Petroleum Products Co Ltd*:
	* If the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist, then a term to that effect will be implied, though not expressed in the contract
	* The court can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted
5. The meaning of the contract must be taken to be, not what the parties did intend, but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provisions as to their several rights and liabilities in the event of its occurrence
6. Frustration occurs whenever the law recognizes 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
7. A's case seems to be a long way from frustration
8. 2 things prevent the application of frustration in this case:
	* Cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen
	* Though timely completion was no doubt important, it is not right to treat the possibility of delay as having the same significance for each
	* It is misuse of legal terms to call in frustration to get the contractor out of his unfortunate predicament
9. It is not through any fault of the contractor that the houses are not built in 8 months as promised, but rather 22 months
	* There was a shortage of labour and shortage of supplies
10. The cause of the delay was not any new state of affairs that the parties could not have foreseen

### \* Capital Quality Homes Ltd.

1. P agreed to purchase from D, 26 lots within a registered plan of subdivision
	* Both parties were aware that the purpose was to erect a home on each lot and sell each individually
	* Certain amendments came into affect restricting an owner's rights to convey and makes necessary the obtaining of consent from the relevant committee of adjustment designated in the amending legislation
	* This substantial change in law 33 days prior to anticipated closing date resulted in some discussion of postponement
	* No new conveyances were forthcoming
2. Following failure to close, the purchaser contended that the vendor was in default
3. The 33 days made it impossible to obtain the necessary consents
4. There can be no frustration if the supervening event results from the voluntary act of one of the parties or if the possibility of such an event arising during the term of the agreement was contemplated by the parties and provided for in the agreement
	* The legislation was not contemplated by the parties, not provided for in the agreement and not brought about through a voluntary act by either party
5. The legislation destroyed the very foundation of the agreement
	* It is relevant that the vendor was aware of the purpose of sale
6. The doctrine of frustration can be invoked to terminate the agreement
	* Contract was frustrated, doctrine applicable and should be invoked with the result that both parties are discharged from performance of the contract and the purchaser is entitled to recover the full amount paid
	* Lack of anticipation
	* This is something entirely different than parties thought they were getting

### \* Victoria Wood Development Corp.

1. P, Victoria Wood, entered into contract to purchase from D 90 acres of land
	* To the knowledge of D, P intended to subdivide and develop the land
	* New regulations brought the property under restricted development area and precluded its subdivision development
2. P sought a declaration that contract was frustrated for return of deposit
3. Unlike *Capital Homes*, the very foundation of the agreement has not been destroyed
	* The agreement was in no sense made conditional upon the ability of the purchaser to carry out its intention to subdivide
	* The foundation was that the vendor would sell and the purchaser would buy
	* Nothing in the legislation affects the abilities of the parties to carry out the obligations
4. A developer in purchasing land is always conscious of the risk that zoning or similar changes may make the carrying out of his intention impossible
	* He may attempt to guard against this risk, but there is no evidence he attempted to do so in this case
5. The court here takes a narrower approach to frustration
6. Unwilling to see the use of land as going to the foundation of the agreement
7. If you were worried about this possibility you should have included it in the contract
8. In his view, in the present instance the foundation of the agreement had not been destroyed
9. What is the difference? Who knows!
10. In the above case they seemed willing to infer something, in this case they weren't

### \* KBK No. 138 Ventures Ltd.

1. Issue: whether or not an agreement between the parties for sale of land has been frustrated
2. Canada Safeway Ltd sold property as "prime development opportunity"
	* Described as being zoned C-2 with a certain maximum floor space ratio
3. R (KBK) wanted to purchase and develop as a mixed commercial and residential condo project
4. The property was rezoned and neither party had contemplated such an eventuality
5. The facts distinguish this from *Victoria Wood*
	* Safeway had more than mere knowledge that KBK had the intention of redeveloping the property
		+ See the advertisement placed by Safeway
			- Certain floor space ratio
			- See the contract itself
			- Specified condo development of mixed commercial/residential use
	* The deal was structured on KBK's goal of redeveloping property as mixed commercial/residential condo
6. Unlike *Victoria Wood* there was an intervening event and change of circumstances so fundamental that strikes at the root of the agreement and is entirely beyond what was contemplated by parties
7. The change in zoning and reduction in floor space was not a mere inconvenience, but transformed the contract into something totally different than what was intended
8. The court agrees that the purpose has been frustrated
9. This case went further than the subdivision case where the seller merely had knowledge of the subdivision plans
10. The seller built into the contract that this would be used to build a condo

# Remedies

### \* ‘The Expectation Interest’ 791

1. Contract law should protect reliance interests of non-breaching parties
	* Should award the expectation measure of damages
2. Lord Atkinson stated that the ruling principle to be applied in awarding damages for breach of contract was to place Ps in the same position they would have occupied if the contract had been performed
* Compensation for a breach
1. 3 things that can happen
	* Reliance
		+ The victim might have relied on the other party (might have spent money)
	* Restitution
		+ Have monies restored that had been paid
	* Putting the person into the position had the contract been performed
		+ Most controversial and most litigated kind of damages or compensation
		+ This deals with something that didn't happen
		+ 2 things to ask for here, and we will look at one of them
			1. Specific performance
				- You ask the court to require the other to actually perform the contract
				- We will not look at this in detail
			2. Damages
				1. We will look at this

### \* Chaplin v. Hicks

1. D, a theatrical manager, announced a competition for aspiring actresses, who were invited to submit photos for publication in a newspaper
	* Nomination of 12 ladies, who would all receive three year contracts from D to work as actresses
2. P, one of the entrants, assented to the alteration in the terms of the competition
3. P did not receive the letter in time to keep the appointment
	* As a result, D selected 12 other winners
4. P sued for loss of chance of selection
5. The fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying damages for breach of contract
6. Jury came to the conclusion that the taking away from the P the opportunity of competition deprived P of something which had a monetary value
	* They were right; appeal fails
* Given the gravity of the situation, D should have taken more steps to ensure that P was actually contacted

### Note

1. Cost of completion v difference in value
2. Cost of completion:
	* Cost of buying substitute performance from another including undoing any defective performance
3. Difference in value:
	* Market value of the performance the contract breakers undertook minus that actually given

### \* Nu-West homes v. Thunderbird

1. Nu West (R) contracted to build house for Thunderbird (A) in accordance with certain plans and specifications
2. A began to complain of deviations from the specifications
	* The disputes were never resolved and A arranged for completion by someone else
3. In most cases the cost of replacement is the measure
	* The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained
		+ Then the measure is the difference in value
4. The aggrieved party is entitled to expect the aggrieved party to act reasonably, not perfectly
5. The defects and deficiencies cannot be characterized as trivial and innocent
	* Thunderbird acted reasonably
	* Therefore Thunderbird must be allowed what it paid to tear out and reconstruct the basement
* 2 requirements:
	+ The nature of the defect is substantial
	+ The steps taken to remedy were reasonable

### \* Jarvis v. Swan Tours

1. Jarvis bought a two week holiday package in the Swiss Alps
2. Jarvis sued Swan Tours for damages, including failure to meet expectations generated by the tour company through its brochure, and the mental distress and aggravation he experienced both on the holiday and in its wake
	* He only got mini skis, no Swiss cakes, disappointing yodler
3. Denning:
	* During the first week he got a holiday which was some extent inferior
		+ The second week he got a holiday which was very largely inferior
	* In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort
		+ If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by breach
		+ No more difficult to assess than personal injury cases for loss of amenities
	* The right measure of damages is to compensate him for the loss of entertainment and enjoyment which he was promised, and which he did not get
* How to compensate Jarvis?
	1. The trial judge gave him half the holiday he contracted for, and half his money back
* He was compensated for his disappointment
	1. Intangible expectation loss

Cost of Completion v. Difference in Value

* Here damages are calculated on the basis of cost of completion
	+ In this case it is going to be a lot more expensive than L17
	+ It will include all his expenses plus the difference in price between the two vacations
* Cost of completion is better for Mr. Jarvis and lucky for him the law mostly awards cost of completion
* Cost of completion v. difference in value often comes up in construction cases
	+ Do you award the costs of the difference in value?
	+ Or do you award costs for tearing down the house and starting over?

### \* Wallace v. United Grain Growers

1. Wallace had worked for a commercial printing company for 25 years
	* Another company (UGG) lured him away with various inducements including an assurance of job security until retirement
		+ They fired him
2. Iacobucci:
	* Insufficient evidence to support a finding that the actions of UGG constituted a separate actionable wrong either in tort or in contract
		+ However, in the circumstances where the manner of dismissal has caused mental distress, but falls short of an independent actionable wrong, the employee is not without recourse
	* Bad faith discharge:
		+ A requirement of good faith reasons for dismissal would, contravene the principles mentioned in the case, and deprive employers of the ability to determine the composition of their workforce
		+ A is unable to sue in either tort or contract for bad faith discharge
	* Punitive damages:
		+ No foundation for an award of punitive damages
	* Reasonable notice:
		+ There can be no catalogue laid down as to what is reasonable notice in particular classes of cases
			- Must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant
		+ The above inducements are properly included among the considerations which tend to lengthen the required notice
			- Need to safeguard the employee's reliance and expectation interests in inducement situations
		+ The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection
			- When termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating
			- In the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being untruthful, misleading, or unduly sensitive
			- The law must recognize a more expansive list of injuries which may flow from unfair treatment or bad faith in the manner of dismissal
		+ Although the loss of a job is very often the cause of injured feelings, the law does not recognize these as compensable losses
			- However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of a dismissal, injuries such as humiliation, embarrassment and damages to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case
3. McLaughlin CJ:
	* While Iacobucci holds that the manner of dismissal may be considered generally in defining the notice period for wrongful dismissal, an alternate view is that the manner of dismissal should only be considered in defining the notice period where the manner of dismissal impacts on the difficulty of finding replacement employment
		+ Absent this connection, damages for the manner of termination must be based on some other cause of action
			- This is more consistent with the nature of the action for wrongful dismissal
			- Honours the principle that damages must be grounded in a cause of action
			- More consistent with the authorities (see Voris)
			- Better aid certainty and predictability in the law governing damages for termination of employment
			- Other equally effective ways to remedy wrongs related to the manner of dismissal which do not affect the prospect of finding replacement work
				* Agrees with Iacobucci that an employer must act in good faith and fair dealing when dismissing employees

Employers should be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith

* + - * + Differs that she sees no reason why the expectation of good faith in dismissing employees should not be viewed as an implied term of the contract of employment
				+ There is a necessity for protection of the vulnerable party and requiring employers to treat their employees with good faith at the time of dismissal provides this special measure of protection
* Firing an employee in itself is not something that will attract punitive damages or aggravated damages.
* Wallace is an important case because it backtracks from Vorvis
	+ Vorvis held that unless there is a possibility for punitive damages there is nothing the courts can do
	+ Wallace turns that around bringing in through the backdoor what Vorvis says can’t be done
	+ Vorvis found that punitive damages will be rare possibly non-existence
		- Aggravated damages cannot be awarded simply because someone is out of a job
	+ “The law has long recognized the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary.”
	+ Damages have to concern the manner in which he was fired then

### \* Whiten v. Pilot

Aggravated vs. Punitive Damages

* Punitive damages are designed to punish
* Punitive damages punish not for leaving of the contract, but rather for how you left the contract
* Aggravated damages are designed to compensate
	+ You add damages because the breach has caused intangible damages to the aggrieved party like emotional distress or anguish
	+ Those further intangible damages need to be compensated and that is what aggravated damages are designed to address
1. Whiten discovered a fire in her house which destroyed the home and its contents
	* When fleeing, Mr Whiten suffered serious frostbite on his feet
2. A was able to rent a small cottage nearby
	* Insurance covered rent for a few months, then cut it off without warning and pursued a hostile and confrontational policy forcing A to settle claim at substantially less than fair
3. The insurance company acknowledges that it is under a duty of good faith and fair dealing
4. A breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss
	* Constitutes an actionable wrong within Vorvis which does not require an independent tort
		+ McIntyre J in Vorvis chose the expression "actionable wrong" rather than "tort"
			- SCC relies on that language to reinterpret Vorvis more broadly
		+ In *Royal Bank of Canada*, referring to Vorvis, "the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare"
		+ The requirement of an independent tort would unnecessarily complicate the pleadings, without adding much substance
5. Note:
	* Binnie makes it clear that the requirement of an independent legal wrong for the purposes of punitive damages can be satisfied by the breach of a separate contractual obligation and does not necessarily require proof of a tort, breach of fiduciary or some other different category of legal wrong

Remoteness

1. In damages we will run into the issue of causation
	* How far do you go in the chain of causation from the time the breach happens to the various consequences down the road
2. What matters in assessing damages is:
	* The normal course of events
	* Where there are special circumstances

### \* Hadley v. Baxendale

1. Ps carried on an extensive business as millers and mill was stopped by a broken crank shaft
2. Delivery of new shaft delayed; P did not receive new shaft for several days, causing a loss of profit
3. Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally
	* If these special circumstances were wholly unknown to the party breaking the contract, he could only be supposed to have had in his contemplation the amount of injury which would arise generally
4. In this case, the only circumstances communicated at the time of contract was that the article to be carried was the broken shaft of a mill, and the Ps were the millers of that mill
	* The special circumstances were never communicated
	* Loss of profits cannot be reasonably considered a consequence of breach of contract
5. The complete shutdown of the mill was not something that would be reasonably anticipated by reasonable people not familiar with milling
6. This case would have been different if P had communicated the closure to D

### \* Victoria Laundry v. Newman Industries

1. Ps wished to expand their laundry and agreed to purchase a boiler from D
	* It was damaged and P sued for loss of business profits during this period
2. Divergence between the knowledge and contemplation of the parties respectively has obscured the general importance of the decision
	* That P can recover loss of such profits as would have arisen from the normal and obvious use of the article
3. Propositions:
	* Governing purpose of damages is to put the party whose rights have been violated in the same position as if his rights had been observed
	* In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach
	* What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties
	* Knowledge possessed is two kinds
		+ Imputed :reasonable people are taken to know ordinary course of things
		+ Actual: added knowledge actually possessed outside ordinary course of things
	* In order to make the contract breaker liable under either rule, it is not necessary that he should actually have asked himself what loss is liable to result from a breach
	* Nor, need it be proved that upon a given state of knowledge, the D could, as a reasonable man, foresee that a breach must necessarily result in that loss
		+ It is enough if he could foresee that it was likely to result
4. They knew they were supplying the boiler to a company carrying on business of laundrymen
5. It was amply conveyed that delay in delivery would lead to loss of business
6. Appeal allowed and additional damages awarded

### \* Scyrup v. Economy Tractor Parts

1. Freedman:
	* Appeal by D holding D liable to P for damages for breach of contract arising from sale of a hydraulic dozer attachment for P's tractor
	* P's made known to D that the attachment was needed for a particular job, and he needed it in a hurry in working condition
		+ Equipment did not measure up to terms of contract
			- Supercrete cancelled contract with P and hired someone else
	* The loss of profit is the main item of damages in this suit
	* Victoria Laundry, in considering Hadley made it clear that damages for breach of contract should be measured by what was reasonably foreseeable as liable to result from breach
	* Agree with trial judge that D is liable as claimed
2. Miller (dissenting)
	* Foreseeability inferred by trial judge is not supported by evidence
		+ Doubtful whether sufficient evidence was given to D to indicate responsibilities to be assumed by equipment
		+ The damages could not have been reasonably foreseen
* Based on Hadley, he should win, since he made his intentions clear
1. This case seems to go in the same direction as Victoria Laundry
2. The dissenting judge distinguishes this case from Victoria Laundry
	* You can generally estimate how much revenue will be lost from a lost boiler
	* In this case what will be done with that tractor attachment is very specific
		+ We shouldn't quantify that loss
	* This judge is unwilling to impute knowledge, and unwilling to accept that special knowledge was communicated

### \* Koufos v. Czarnikow (The Heron II)

1. R chartered A's vessel (Heron II) to carry sugar
	* Vessel made deviations which caused delay of nine days, in which time, sugar price dropped
2. Shipowner did not know the charterer's intention, but he must be held to have known that in any ordinary market prices are apt to fluctuate from day to day
	* He had no reason to suppose it more probably that during the relevant period such fluctuation would be downwards rather than upwards
3. Loss of profit could not be reasonably considered as having been fairly and reasonably contemplated by both the parties
	* Would not have flowed naturally from the breach in majority of cases
4. Crucial question: whether, on the information available to D when contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation
5. If one party wishes to protect himself against risk he can direct the other party's attention to it before contract is made
	* In tort, there is no opportunity for the injured part to protect himself in that way
		+ Tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing
6. Loss of profit in this case was not too remote to be recoverable as damages
7. Fairly recent case
8. Deals with this question of what it is reasonable to impute in terms of knowledge in a particular context, in the light of a moving target (the market)

# Representations and Terms

## Misrepresentation and Rescission

1. 3 basic issues:
	* What kinds of pre-contractual statement will, if false, be characterized as misrepresentations giving rise to rescission?
	* What is the nature of the remedy of rescission?
	* What limitations are imposed on one's ability to rescind for misrepresentation?
2. A representation doesn't have any contractual force
	* It is something that is stated around the contract
3. If the representation ends up being false, there is no contractual remedy
	* If a term is false, then there is a breach with a contractual remedy
4. False representations
	* Sometimes there is fraud
	* Sometimes the misrepresentation is innocent or careless
		+ No willful deceit
5. If there is no breach of a contract, there is no remedy
	* But still, this seems wrong, so equity comes in!!!
6. Equity can't compensate for the loss, but it can relieve the party of its obligations under the contract; ie, it can rescind the contract
7. If the court is unwilling to call a representation a contractual term, then you argue in the alternative to be relieved of obligations under the contract, because what was traded was deficient or insufficient
	* Equity will do this, even though the common law can't
8. The best way of dealing with this
	* That the representation is actually in the contract
	* That the statement is actually a warranty
	* It was an innocent misrepresentation that requires rescission
		+ No damages for any losses

### \* Redgrave v. Hurd

1. P, an elderly solicitor, advertized that he would take an efficient lawyer as a partner, if he would purchase his house too
2. P said his income yielded about 300-400 pounds/year
3. D did not examine the papers and agreed to purchase the house and share in business
	* The practice was utterly worthless, and D refused to complete the transaction
4. P brought suit for specific performance, and D alleged misrepresentation
5. D's claim fails on damages because, not proved that P did not know the allegations were untrue
6. Rescission:
	* A man is not to be allowed to get benefit from a statement which he now admits to be false
		+ No man ought to seek to take advantage of his own false statements
	* If a man is induced to enter a contract by a false representation, it is not sufficient to tell him that if he had used due diligence he would have found the statement untrue
	* There were no books which showed the business
		+ D was not guilty of negligence in not doing that which it was impossible to do
7. Finding: rescission of contract and return of deposit

### \* Smith v. Land and House

1. P offered for sale a hotel, with a “desirable tenant”, but the tenant was not desirable
2. D refused to complete transaction, alleging description of tenant amounted to misrepresentation
3. 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
	* He impliedly states that he knows facts which justify his opinion
4. The statements here are statements which the vendors know everything and purchasers nothing
5. The above assertion was not true, regarding the desirability of the tenant
6. Take away message from this case:
	* Sometimes a statement of opinion can amount to a statement of fact
	* Like in this situation the fact was imbedded in the statement of opinion
7. If both parties know that Fleck is a bad tenant, then they both have equal knowledge
	* So much in contract law comes down to imbalances of knowledge
	* If they both have equal knowledge, then when P says that Fleck is desirable, the D has something to evaluate against
		+ However, if they don't have equal knowledge, then the D is relying on P's representation
8. What about where failure to say anything or failure to be clear can be taken as a misrepresentation?
* In Redgrave we have a straight misstatement
* In Smith we have a statement in the form of an opinion, but carries with it an implication of fact
* Third situation where saying nothing amounts to a representation, misrepresentation, claim for rescission (Bank of BC v Wren)

### \* Bank of British Columbia v. Wren

1. D (Smith) was president and managing director of the corporate D and D Allan was director, secretary, minority shareholder
2. Shares were released to bank as security
3. Releases of the above shares were made at the request of D Smith without knowledge or consent of D Allan or corporate D
4. Allan signed the first guarantee, then was advised that a second guarantee needed to be signed
	* He did so under the reasonable impression that the bank still held the shares as collateral
5. Allan was misled by the words, acts and conduct of P into believing that there had been no change in the collateral securities held by P and otherwise he would not have signed it
	* He was induced by misrepresentation
		+ Allan not liable to P upon second personal guarantee
6. Nothing is said, but the circumstances amount to a misrepresentation
7. The person who says nothing is fully aware that by saying nothing the person will presume a certain set of facts
8. The whole idea of rescission is to end the contract and put the parties back where they started
	* It is not a cause of action for damages because it is an equitable remedy
9. What if rescission becomes impossible?
	* The person has done something with or to the property that makes it impossible to give it back?

### \* Kupchak v. Dayson Holdings

1. A (Kupchak) purchased shares of a motel from R (Dayson) in return for two properties
2. Learning that the representations made by R's agent regarding past earnings of hotel were false, As stopped making payments on the mortgage
3. Rs then sold an undivided half interest in one of the properties, tore down building, and built a new apartment building
4. Trial judge held that while they were able to restore to R the shares in motel, the R could not restore one of the two properties
5. There is ample evidence to support a fraud
6. Equity has the power to order one to pay compensation to the other in order to effect substantial restitution under a decree for rescission, just as it can order one party to pay money on account, or by way of indemnity
7. Rs ought to compensate As for the property respondents are allowed to keep
	* Particularly since they acted after they had notice of A's claim of fraud
8. The court decides that the property has been so changed that it would be unjust to give it back
9. We will respect the spirit of rescission, but because we can't do that literally with this piece of property which is no longer what it was, we will do it with money
	* We will take the punitive value of the property at the time, before the improvements were made, and apply 5% interest for the intervening time, and that is what they get

## Representations and Terms

* There is no legal remedy to deal with a false representation -- which is why we have the equity remedy

### \* Heilbut, Symons and Co. v. Buckleton

* A: rubber merchants who instructed Johnston to obtain applications for shares
* R telephoned Johnston and said: I understand you are bringing out a rubber company
	+ Johnston said: we are
* R purchased shares because the rubber trade had a high standing
	+ But there was a large deficiency in the rubber trees and the shares fell in value
* R brought action against A for fraudulent misrepresentation
	+ Alternatively for damages for breach of warranty that the company was a rubber company whose main object was to produce rubber
* Jury found no fraudulent representation by A or Johnston
	+ But they found the company could not be properly described as a rubber company
* There may be a contract, the consideration for which is the making of some other contract
	+ It is collateral to the main contract, but each has an independent existence
	+ Such collateral contract, the sole effect of which is to vary or add to the terms of the principal contract, are viewed with suspicion by the law
* In the present case there is no evidence to support the existence of a collateral contract
	+ If there were, it would amount to saying that the making of any representation prior to a contract relating to its subject matter is sufficient to establish the existence of a collateral contract that the statement is true, and therefore to give right to damages if such should not be the case
* On the Common Law side, the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation
* This House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made
* There is nothing which can by any possibility 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
* The question of warranty should not have been left to the jury
1. There is a little contract attached to the big contract
	* Logic behind collateral warranties, and cautions against their use
		+ If the parties want something in the contract, then they should put it in the contract
	* Slippery slope:
		+ Could potentially water down the strength of written contracts by lending credence to oral contracts
2. It would not have been difficult for the broker to insist upon the company being a rubber company in the contract
3. The burden of proof rests on the broker to prove that the seller's statement was intended to be contractual

### \* Dick Bentley Productions v. Smith

* Bentley brings an action against Smith for breach of warranty on the sale of a car
* Smith said that the car had been fitted with a replacement engine and gearbox and had done only 20 thousand miles since
	+ He would guarantee the car for 12 months
* Bentley repeated these statements to his wife in the presence of Smith
* That the car had done only 20 thousand miles, was this innocent misrepresentation or a warranty?
* If a representation is made in the course of dealings for a contract for the very purpose of inducing the other part 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, in that he was in fact innocent of fault in making it, and that it would not reasonable for him to be bound by it
* Smith was in a position to know, or find out, the history of the car
	+ When the history was examined, his statement turned out to be false
	+ He ought to have known better
* Ample foundation for the inference of a warranty
1. Was Smith's statement a warranty or a representation?
	* The difference is important
	* Bentley has expended money to keep the car on the road, so he wants damages
	* He wants to turn Smith's statement into a warranty that is breached, to get damages
2. Following the above case, Bentley would have to prove that Smith intended his statements to have contractual force
	* That a reasonable person speaking to Smith would have intended this to be contractual
3. Rather than separating law and equity, the judge is polluting common law with equitable maxims
4. This comes awfully close to saying that an innocent misrepresentation that induces a person to enter a contract will be held as binding
	* This is exactly what the previous case was warning against
5. Denning is worried about protecting buyers from careless sellers

### \* Leaf v. International Galleries

* Buyer bought from the sellers an oil painting of Salisbury Cathedral
	+ On the back was a label indicated it had been exhibited as a Constable
	+ Sellers represented that it was a Constable
* Nearly 5 years passed, and the buyer was advised it was not a Constable
* Is the buyer entitled to rescind the contract?
	+ There was a mistake about the quality of the subject-matter
	+ If it was a condition, the buyer could reject the picture for breach of the condition at any time before he accepted it or was deemed to have accepted it
	+ If it was a warranty, he could not reject it but was confined to a claim for damages
* This term was a condition
	+ The buyer is deemed to have accepted the goods, when after a lapse of reasonable time, he retains the goods without intimating to the seller that he has rejected them
* In this case the buyer must clearly be deemed to have accepted the picture and cannot now claim to rescind
* Resitutio in integrum is possible
	+ The picture itself retains the condition which it possessed at the time of sale and can be returned to the sellers
1. If you have had the goods for more time than was necessary to ascertain their quality, the you are considered to have accepted them and you will be barred for repudiating or rescinding the contract
2. This is current law

## Statutory Reform

* A number of jurisdictions have enacted legislation that departs from the common law test for determining when a statement is a term of a contract
	+ These jurisdictions have treated as terms of a contract, or warranties, representations that at common law would not satisfy the test of contractual intention
* Reflect deeper underlying tensions between paternalistic approaches and those giving freedom of contract
	+ Reasons for protecting buyers
		- People simply don't have access to information
		- In a consumer economy, most buyers are consumers
* This is really a question of consumer protection
	+ He does not want us to worry about the legislation in our answers on exams