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| *LAW 110* | CONTRACTS | |
|  | | Condensed  Annotated  Notes | |

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# LEGEND

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# OFFER & ACCEPTANCE

### OFFER

* + 1. OFFER AND INVITATION TO TREAT

This doctrine draws the line between *negotiation* and contractual *liability*. Why is this important? Only the latter will implicate the coercive power of the state in case of a breach.

If the offeree accepts the offer, then we have *consensus ad idem*.

If the offeree rejects the offer, it's dead and can no longer be accepted.

What happens if the offeror makes an offer and the offeree doesn't reject or accept the offer, but modifies it? This is considered a counter-offer and the players switch roles (offeror becomes offeree and vice versa). Original offer has expired, only the new offer exists. New offeree can in turn accept, reject or make a counter-offer, in which case the roles would switch again. A contract will only form at that moment when one of the eventual counter-offers is accepted.

But what is an offer? How is it distinct from an invitation to treat (in other words, an invitation for an offer)?

What about advertising? Often considered "a mere puff" – in other words, sufficiently irrational and ridiculous offers are not binding.

## CANADIAN DYERS ASSOCIATION LTD. v. BURTON [1920] ONT HC

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| **FACTS** | Contract is between buyer and seller of property. Buyer writes to seller requesting lowest price. Seller states price. More than a year later, buyer writes again, requesting a lower price. **KEY POINT**: Seller writes back, "...the last price I gave you is the lowest I am prepared to accept." Buyer accepts and sends $500. Seller returns cheque for $500 and claims there was no contract. |
| **REASONING** | Ruling for **P** – **D**’s statement that “...the last price I gave you is the lowest I am prepared to accept” constitutes an offer. Furthermore, the **D**’s conduct after the **P** sent the cheque suggests intention to make an offer – the **D** submitted a deed, suggested search of his title, named a date for close, and retained the cheque. |
| RATIO | 1. Language and conduct can be objective evidence of an offer. 2. Example of application of objective theory of contracts. |

## PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v BOOTS CASH CHEMISTS [1953] UK

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| **FACTS** | The Pharmaceutical Society, the **P,** brought a case against Boots for selling 'poisons' without the supervision of a registered pharmacist, contrary to thePharmacy and Poisons Act (1933). Customers would place their intended purchases in a basket, then take them to the checkout for purchases. The **P** argued that displaying the goods constituted an offer, and placing goods in the basket constituted an acceptance of offer. |
| **REASONING** | Ruling for **D** – the cashier was free to refuse the sale, so the selection of good for purchase could not be construed a contract. There is no agreement until the customer offers to the cashier to buy the item, and the cashier accepts. |
| RATIO | In point-of-sale transactions the offer for sale and acceptance of that offer is deemed to take place at the checkout, and that displaying goods on shelves does not constitute an offer for sale. |

## CARLILL v CARBOLIC SMOKE BALL CO. [1893] UK

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| **FACTS** | **D** sold smoke balls. They made an advertisement that said that they would pay a reward to anyone who got the flu after using the ball as directed 3 times a day for 2 weeks. They showed their sincerity by depositing money is a specific bank. **P** used the D's product as advertised. P then contracted influenza. **P** asked for payment and sued **D** after **D** refused to pay. |
| **REASONING** | Ruling for **P** – where an offer is made with the intent to sell more goods, notification of acceptance of the offer is not necessary, and performance of the condition sought by the offeror is sufficient. Addressing the defendant’s argument that the advertisement was "a mere puff", the court stated that where an advertisement contains language underscoring the sincerity of the offer (namely, £1000 had been deposited by **D** in a local bank account) it is very plainly a promise to pay. **D**'s state of mind isn't dispositive – enforceability depends on objective standard of what the advertisement would communicate to a reasonable person. |
| RATIO | Advertisements of unilateral contracts can be treated as offers. When? Where the language is clear that an ordinary person (ie. the judge) would find an intention to offer, anyone who relies on this offer and performs the required conditions thereby accepts the offer and forms a contract. |

## GOLDTHORPE v LOGAN [1943] ONT CA

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| **FACTS** | Logan, the **D**, made guarantee regarding electrolysis for hair removal in advertisement. Goldthorpe, the **P,** comes in, **D** reiterates guarantee. The electrolysis doesn't work, so **P** sues. |
| **REASONING** | Ruling for **P** – a reasonable person seeing a professional making a guarantee will lend credence to it. The guarantee is specific and technical, not general and unlikely. The Court also makes a policy argument based on consumer protection – namely, the information asymmetry between buyers and sellers leads to structural vulnerability of buyers to deception, and so the court can intercede. |
| RATIO | 1. Look to words and actions to determine if a contract is made. 2. An advertisement constitutes an offer that can be accepted on the terms it proffered. 3. The offeror bears the risk of extravagant promises. |

* + 1. COMMUNICATION OF OFFER

What if A offers person C something through person B, and C finds out through B?

## BLAIR v WESTERN MUTUAL BENEFIT ASSN [1972] BCCA

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| **FACTS** | Blair was a secretary, and retired after many years working for Western. Towards the end of her employment, she was given oral minutes of a meeting of the board of directors that she copied down into print. In these minutes was a discussion that if she were to retire, she would be given approximately two years' pay as a bonus for her long service. She does retire, but does not get this money. She sues the company for the lost wages claiming that a contract was formed. She was unsuccessful at trial, which she appealed. |
| **REASONING** | Ruling for **D** – there was no contract for 3 reasons:   1. no promise was made and accepted for consideration; 2. no change in the existing relationship took place; and 3. there was no evidence of an intention to change the relationship to create new legal obligations.   Bull says that a "bare resolution" that is delivered, such as here, cannot be considered to indicate an intention to create a legal obligation capable of acceptance. It is not unequivocal. This could be refuted if Blair could show something to indicate the intent of Western to be bound, but nothing could be shown to this effect.  McFarlane says that another problem is there is not sufficient connection between the resolution and Blair's reasons for retirement to imply that she accepted the offer through her performance (retiring) – which is what she claimed (that this was a unilateral contract).  Robertson simply says that this publishing cannot be considered to be an offer, as a reasonable person would not think that the employer intended to be bound. |
| RATIO | 1. A party must intend to make an offer for it to be an offer capable of acceptance, and it must be communicated to the party to whom it is directed in order to prove that the offeror intended to be legally bound. 2. It makes no difference if the offeree knows about the offer by another means – it must be deliberately communicated to them by the offeror. |

What if you find a dog and return him, then find out about a possible reward - can that be enforced?

## WILLIAMS v CAWARDINE [1833] UK

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| **FACTS** | Walter Carwardine was murdered on April 12, 1831 and was seen that night with Mary Anne Williams (who was questioned but gave no information of worth). William, Walter's brother, posted a handbill for information as should lead to the discovery of the murderer with a reward of £20. Williams was beaten by her husband and believing she was going to die made a statement which led to the conviction of her husband for Walter's death. |
| **REASONING** | Ruling for **P** – the court held that Williams had clearly performed the terms of the offer (giving information that lead to the conviction of the murderer) and the handbill, **which she must have known of given that it was posted all over town**, promised to give money for that information. As a result, a contract was formed with any person who performed the condition, without considering the motivations of the individual. |
| RATIO | 1. The motive of an individual in accepting the contract offered has nothing to do with his right to recover under the contract. 2. Neither mutual consent nor communication of assent is important in case of reward. |

## R v CLARKE [1927] AUSTRALIA

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| **FACTS** | Two people were murdered at the end of April 1926 and a reward was issued May 21. One of the murderers (Treffene) was arrested on June 6 with Clarke. Clarke, having given information to the Crown to protect himself, wants to claim the reward; he had seen the reward but up to June 10th had no intention to claim reward. He is quoted as "first decided to claim the award a few days after the appeal had been dealt with" and "gave no consideration and no intention with regard to the reward". The Crown holds that no contract was formed between them and Clarke. |
| **REASONING** | Ruling for the Crown – the court, despite objecting on public policy grounds that not finding a contract would dissuade other individuals from coming forward with evidence in the future, held that Clarke could not accept an offer he didn't know about, citingFITCH v SNEDAKER. Forgetting about the reward was as good as ignorance. Further, Clarke had no expectation interest when he gave information to fulfill conditions of contract. The court ruled further than not only was a contract not formed, but Clarke had not fulfilled the terms of the contract as the reward stated a reward for "such information as shall lead to the arrest" and the arrests took place **before** the information was given. |
| RATIO | 1. One cannot accept an offer one doesn't know exists, or that one has forgotten exists. 2. One needs an expectation or reliance interest in the reward in order for that reward to be recoverable. |

There is a presumption that if the reward was widely known, offer has been communicated to the specific party in question.

This presumption is rebuttable – it was overridden in Clarke’s case because of his testimony as to his subjective state of mind suggested he was not aware of the offer.

### ACCEPTANCE

* + 1. ACCEPTANCE

## LIVINGSTONE v EVANS [1925] AB SC

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| **FACTS** | Evans wrote to Livingstone proposing to sell a piece of land for $1,800. Livingstone wired in return "Send lowest cash price. Will give $1600 cash. Wire." Evans responded with "Cannot reduce price." Livingstone then wrote to accept the original offer of $1,800. Evans no longer wanted to sell to Livingstone, Livingstone sued for specific performance. |
| **REASONING** | Ruling for **P**, order of specific performance granted.The court held that under HYDE v WRENCH, **a counter-offer constitutes a rejection**. Because of this long standing precedent, Livingstone's first telegram is a counter-offer and an inquiry and although both, the counter-offer kills original offer. Evans' reply "Cannot reduce price" is, however, a renewal of the original offer which Livingstone then accepted. |
| RATIO | 1. A counter-offer constitutes a rejection. 2. An offer can be renewed after a counter-offer through ambiguous language. |

## BUTLER MACHINE TOOL v EX-CELL-O [1979] UK CA

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| **FACTS** | **P** made and sold machine tools. They sent a letter to Ex-Cell-O, the **D,** offering them some new machinery for £75,535. The letter contained standard contract terms which included a price variation clause, so if the **P**'s manufacturing costs went up, that price rise would be passed on to **D**. **D** replied and said they would order the machinery, but on **D**'s own standard terms, which did not have a price variation clause. **P** replied, "We accept your order on the terms and conditions stated therein", reasserting that the deal was being made under **P**’s original terms. A while later, nothing further had been said, and **P** delivered the machinery. They asked for £75,535, plus £2,892 according to their price variation clause. **D** refused to pay the extra, and the **P** sued. The lower court held that the seller's price variation clause continued through the whole dealing and so the sellers were entitled to rely upon it. |
| **REASONING** | Ruling for **D**, don't have to pay price variation.Denning, writing for the court, laid out the traditional test for the contract: the quotation of the price was an offer subject to terms and conditions and the order by Ex-Cell-O constituted a counter-offer which Butler accepted. However he also lays out a "better way" to analyze such situations applying an objective test of the conduct and language. Generally in such situations the last of the forms (the "last shot") is the victor and an analysis of all the documents in this case makes it clear that the contract was on the buyer's terms. |
| RATIO | 1. In a battle of forms generally the last shot wins. 2. An objective look at the documents as a whole should determine whose terms prevail. |

## ST JOHN TUG BOAT v IRVING REFINING LTD [1964] SCC

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| **FACTS** | **P** had a deal with **D** to supply them the use of their tugboats for assisting incoming oil tankers to their shipyard. However, with no firm arrangements made, **P** stated that they would only have two boats available, and advised **D** to look elsewhere for help. **P** ended up having two more tugs available, and told **D** that they could use them if they paid $450/day to have them "on call" until a certain date. This date passed, and **P** continued to keep the tugs on call and **D** continued to use them for a few months. However, when billed for these months after the original end of the contract, **D** refused to pay. **P** sued for payment and was successful at trial, but this was overturned on appeal. |
| **REASONING** | Ruling for **P**, **D** has to pay.Ritchie, writing for the court, says that after the original deadline passed, **P** were essentially serving **D** a new offer every time they sent them an invoice and kept the tugs on call, and that **D** continued to imply acceptance by their continuation of using the service. **D** must have known that the tug was still standing by, and that the **P** expected to be paid. |
| RATIO | 1. Silence can constitute acceptance when combined with conduct. 2. If a party allows another party to work for them under such circumstances that no reasonable person would suppose that the work was being done for nothing, then the first party will be liable to pay for it - the doing of the work is the offer; the permission to do it, or the acquiescence in its being done, is the acceptance. |

## ELIASON v HENSHAW [1819] US SC

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| **FACTS** | **P** wrote **D** a letter proposing to buy flour at Georgetown and asking “Please write by return of wagon whether you accept our offer” to Harper’s Ferry. The letter was delivered to **D** a few days later on the 14th, but the wagoner informed them that he would not be returning to Harper's Ferry. **D** wrote in acceptance on the 15th and the letter was sent by the regular mail carriage to Georgetown on the 19th, the next available wagon. **P** sent a reply on the 25th acknowledging the receipt of the letter, but said that the response was too late as it was not returned by the wagon. Henshaw sued for non-performance. |
| **REASONING** | Ruling for **D**.Washington held there had been no acceptance and hence no contract was formed. Three things were amiss:   1. the contract was not accepted within the proper time - not sent back by the wagon; 2. the contract was not accepted in the right place - the acceptance should have been sent back to Harper's Ferry, not to Georgetown; and 3. the contract was not accepted by the correct manner - should have been sent by wagon, but was sent by mail.   As it was perfectly reasonable for **P** to have dictated the terms of acceptance, the court found no contract was created and hence no breach. |
| RATIO | The offeree must follow the terms of the offeror (time/place/manner of acceptance) for an acceptance to be valid and binding. |

* + 1. COMMUNICATION OF ACCEPTANCE

## BRINKIBON v STAHAG STAHL [1983] UK

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| **FACTS** | **P** was a London company that purchased steel from **D**, a seller based in Austria. **P** sent their acceptance to a **D** offer by Telex to Vienna. **P** later wanted to issue a writ against **D** and applied to serve an out of jurisdiction party. **P** would only be able to do so if the contract had been formed in England. |
| **REASONING** | Ruling for **P** - acceptance occurs at the time and place that the acceptor accepts the offer, whether the communication by phone, telex, fax, etc. In the case of electronic communications, there cannot be acceptance until there is receipt of the acceptance. |
| RATIO | In the case of instantaneous communication, which includes telex, the formation generally occurs in the place where the acceptance is received. |

## HOUSEHOLD FIRE & CARRIAGE ACCIDENT INSURANCE CO v GRANT [1879] UK

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| **FACTS** | Grant had negotiated to purchase shares in Household Fire. His application was accepted, and his name was added to the list of registered shareholders, however, the letter informing the appellant of this never reached him and thus Grant never paid for the shares. His earnings from dividends were credited to his account. Eventually Household Fire went into liquidation and the liquidator applied for money from the appellant. He refused to pay on the grounds that he was not a shareholder – he had never received the notification in the mail and was not aware.  The trial judge found that the appellant implied that the respondent was to send him the notification that he had been issued the shares in the mail by requesting them by mail, and therefore they were not to be penalized for sending the notification that way. The liquidator was thus successful at recovering the money, which Grant appealed. |
| **REASONING** | Ruling for Household Fire – with mail, acceptance occurs when letter of acceptance is dropped off at the post office (mailbox rule), because the letter of acceptance has been handed over to an agent of the offeror in the post office. Not a perfect rule, but instituted to avoid fraud (I didn't get the letter!) and uncertainty (has the offeror received my acceptance yet?) – the open question of physical delivery from the post office becomes a non-issue. Offeror can always choose to make the acceptance binding only upon his receipt of the notification that it has been accepted in the original offer. |
| RATIO | A contract becomes binding the instant that the acceptance is put in the mail, so long as the parties contemplated the mail as a viable means of communication in their dealings (the mailbox rule or postal presumption). |

## HOLWELL SECURITIES v HUGHES [1974] UK

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| **FACTS** | Hughes, the **D**, granted Holwell, the **P**, a six-month option to purchase a property, and stated that the option had to be exercised "by notice in writing". Before the six months were up, **P**'s lawyer wrote to **D**'s lawyer stating that his client was exercising his option, and also included a cheque for the deposit. **P**'s lawyer sent a copy of the letter to **D** by mail, but it was never delivered. **D** refused to sell the property and **P** sued for breach. Hughes was successful at the lower court and **P** appealed. |
| **REASONING** | Ruling for **D**. The court finds that the word notice is crucial, as notice implies something more than simply delivery to a mailbox, but that someone is **actually** notified. Thus, the implication was that the postal system was not the intended mode of communication. In the alternative, even if the postal system was intended to be used, it must have been the mutual intent that the acceptance be actually be received. |
| RATIO | The mailbox rule does not *always* apply. It is a presumption that can be rebutted by the intentions of the parties or where its application would lead to inconvenience or absurdity. |

# EXCLUDING & LIMITING LIABILITY AND STANDARD FORM CONTRACTS

### CONTRACT INTERPRETATION PRINCIPLES

Contract interpretation is founded on the principle that the court should attempt to give expression to the intention of the parties, but these intentions must be found in the actual words of the contract between the parties. Extrinsic evidence won’t be used to determine the plain meaning of words, but can be used to resolve ambiguities or determine special meanings. Courts are generally unwilling to admit evidence of prior negotiations, as this precedes the theoretical *consensus ad idem*.

There is some authority to support the proposition that direct evidence of subjective intentions is also inadmissible (REARDON SMITH LINE v HANSEN TANGEN). Despite this, courts are generally willing to consider evidence as to the background circumstances surrounding the making of the contract. The most helpful principle is that the words in a contract are interpreted in their broader context.

If the contract was drafted by one party, any ambiguities will be resolved in favor of the other party.

## SCOTT v WAWANESA [1989] SCC

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| **FACTS** | The **P**’s home was damaged by a fire deliberately set by their 15-year-old son without their knowledge or complicity. At the time, they had a homeowner's insurance policy with **D**. **D** denied their insurance claim on the ground that the loss occurred through the "wilful act...of the Insured" within the meaning of an exclusion clause in the insurance policy. The word "Insured" in the policy included "the Named Insured" and "if residents of his household, his spouse, the relative of either, and any person under the age of 21 in the care of an Insured".  The trial judge held that the definition of "Insured" did not include the Scott's son. He found that the son's interest was separate from that of his parents and, accordingly, the exclusion clause was inapplicable to their claim. The Court of Appeal reversed the judgment. |
| **REASONING** | Held for the **D** – when the wording of a contract is unambiguous, the courts should not give it a meaning different from that expressed by its clear terms, unless the contract was unreasonable or had an effect contrary to the intention of the parties. |
| RATIO | Courts should not interfere in the plain meaning of contracts and imply terms if the contract is clear. |

### UNSIGNED CONTRACTS

If the underpinning of contract law is to facilitate agreement between people, what about situations where you have no involvement in shaping the terms or the chance to fully understand what the terms are?

Capitalism based on the idea that markets facilitate choice, and ultimately that leads to good outcomes socially and politically. If contract law operates to coerce others, then it’s working against these foundational principles.

What happens when one party controls the negotiations? It occurs frequently in regards to agreements for basic human needs. Historical context where this comes up:

1. Tickets (eg: with the railroad industry in Parker)
2. Written agreements (three types: consumer agreements; internet; commercial cases)

We agree to things we don’t read or take time to digest **all the time**, and this undermines the fundamental role of *consensus ad idem* in contract law.

1. Internet

We’re not signing agreements – we’re clicking boxes.

Type 1: Ticket cases

Legal issues arise when issuing party seeks to rely on limit of liability or specific terms on the ticket (ski pass, for example). As a rule, the terms will be considered to be binding unless unreasonable for the reader to read it and understand it. Even if formal aspects of contract are in place, court may not enforce the terms it if there is no evidence of consent.

Ticket cases lay out the principle that if you read the contract, you're bound by it - if you didn't read it, did the issuer make sufficient effort to tell you? In TILDEN, the Ont CA goes right to the heart of the issue and finds that signature *does not always mean* consent.

## PARKER v SOUTH EASTERN RAILWAY [1877] UK CA

(consumer transaction)

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| **FACTS** | **P** deposits bag at coat check worth $24 and was given a ticket which says “see back”. Terms listed on back limit liability for items over $10. The **P** claims he didn’t read the clause and had no idea what the writing meant and thought they were just receipts (not part of contractual relationship). **P** successful at trial. |
| **REASONING** | Ruling for retrial – the **P** is still bound by conditions he didn’t read so long as he was given reasonable notice, a question of fact for the jury. |
| RATIO | The customer is bound by the exempting condition if:   1. he knows that the ticket issued is subject to it, and 2. the company did what was reasonably sufficient to give notice of it. |

## THORNTON v SHOE LANE PARKING [1971] UK CA

(consumer transaction)

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| **FACTS** | The **P** parked his car with **D**. Shoelane’s terms not on ticket itself – instructions to read the sign (slight nuance from Parker). The **P** says he knew there was writing, but didn’t read it. Did Shoelane Parking do what they needed to do to ensure **P** understood the exemption? |
| **REASONING** | Ruling for **P** – the **D** failed to prove **P** knew of the exemption so **P** will not be held to be bound by it.   * 1st issue: what is the relationship between the severity of the clause and the steps the company took to notify the recipient? [What the company must do depends on how severe the clause is]. Key relationship to note: * 2nd issue: “Reasonable sufficiency” (were reasonable steps taken?). If issuer has not taken sufficient steps, and issuer wants to argue recipient bound by contractual conditions, then issuer must prove recipient possessed adequate knowledge or belief. |
| RATIO | 1. The more destructive the terms on the recipient’s rights the more the issuer must do to notify them of those terms. 2. The evidentiary burden is on the party issuing the ticket to prove recipient had knowledge of the terms, which is difficult to do. |

## INTERFOTO v STILETTO VISUAL [1989] UK CA

(commercial transaction)

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| **FACTS** | Photo library sends package of 47 photos along with a delivery note containing with terms of late fees (p. 484). The issue is that fees are not what a reasonable person would expect. **P** sues **D,** an ad agency, for ₤3,783 for keeping photos for an extra week. Court says **P** can succeed in getting the money – but only ₤3.50 per picture per week. Given all the circumstances, was it reasonable that **D** would have seen the note? Were conditions not sufficiently brought to their attention? As in THORNTON, the more onerous the clause, the less likely the **D** would expect it, the more effort must be done to bring it to their attention (485). |
| **REASONING** | Held for **D**: if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that particular condition was fairly brought to the attention of the other party (486). |
| RATIO | Principles that apply in consumer transactions can apply in commercial context. This analysis can apply to any type of clause, though it normally comes up in the context of liability clauses. |

## ***McCUTCHEON*** v ***MacBRAYNE*** [1964] UK

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| **FACTS** | McSporran, the **P**'sbrother-in-law acting as his agent, arranged to ship McCutcheon's car to the mainland. Usually, David MacBrayne Ltd. would have had its customers sign a standard form indemnifying MacBrayne but it was never signed. **P** had signed before too, but not every time arrangements were made. Further, the **P** did not read the conditions previously nor understand what they meant.The ferry carrying the car, sank due to negligent navigation on the part of MacBrayne. David MacBrayne Ltd. argued that even though it was not signed, the term letting McCutcheon assume the risk of an accident had been incorporated into their contract through a course of dealing. |
| **REASONING** | Ruling for **P.** Reid begins with assessing the relevant principles; the contract was purely oral and any terms on the receipt came after the formation and thus cannot be regarded as terms. As a result there is no doubt the respondents are liable for the damage.  Devlin begins with assessing the evidence; essentially nobody reads the contracts with MacBrayne as they have no choice but to use them to ship things to and from the island. While there was no argument made that McSporran had read the terms on this contract, MacBrayne argued that the the history of dealings indicated an acceptance of the terms. Devlin rejects this saying that previous dealings are only relevant if they demonstrate subjective knowledge of conditions, not simply demonstrating that there were previous dealings. As they were unable to demonstrate that there had ever been a subjective acceptance of the risk note, MacBrayne remains liable for the damages done. |
| RATIO | 1. A party is bound to a contract if signed, even if they did not read it or understand it. 2. Knowledge of terms is tested subjectively, thus prior relations are therefore not enough unless there was actual subjective knowledge of the condition. |

### SIGNED CONTRACTS

The approach taken in McCUTCHEONis a consequence of the objective theory of contract law. But this theory also suggests that focusing on a single behaviour (namely, a signature) is artificial, and all circumstances should be taken into account in order to determine the parties' states of mind - this is the approach in TILDEN.

In 1977, the UK legislature passes the Unfair Contracts Act, legislating the whole issue in specific detail and removing the common law from these considerations. This didn't happen in Canadian federal law, because this would be a violation of the division of powers and provincial authority over property and civil rights.

## TILDEN RENT-A-CAR CO v CLENDENNING [1978] Ont CA

(consumer transaction)

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| **FACTS** | **D** rented a car from Tilden Rent-A-Car. He signed the rental agreement which contained an exclusion clause denying coverage for accidents that occur if the driver had consumed any alcohol (barely legible on the reverse side on the agreement), although he testified that he had inquired what the $2/day fee covered and was told "full non-deductible coverage". The signing clerk would only describe the exemption clauses if directly asked, and would not offer the information. While in Vancouver, **D** hit a pole after having consumed alcohol. He pleaded guilty to impaired driving and tried to collect from the insurance policy to pay for the damages of his accident. He was successful at trial which Tilden appealed. |
| **REASONING** | TJ finds that **D** was not legally impaired, despite his guilty plea in the criminal action. Ruling for **D,** the CA refutes the precedents of **McCutcheon** and **L'Estrange**, and lays out a number of factors that militate against consent despite his signature:   1. The **D** did not read the contract, and the clerk knew he hadn't read it. 2. The conditions sought to be relied upon are inconsistent with the conditions providing coverage - on the front page the contract promised complete coverage for the additional premium, while on the back page the contract exempts coverage if the driver exceeded the speed limit, parked the vehicle in a no-parking area, had any amount of liquor, or drove the vehicle off a federal, provincial or municipal highway. The contradiction issue prefaces the misrepresentation issue at the heart of KARROLL. 3. If the **D** had known these clauses, he would never had signed the agreement, vitiating his consent – this conclusion is based on the application of a RP hypothetical, not **D**’s subjective state of mind (can’t trust that). 4. The contract was not the result of formal negotiation but entered into in haste, like most standard form contracts. This highlights the distinction between the consumer and commercial spheres: a signature in the commercial sphere creates the presumption of an agreement whereas the reality in the consumer sphere is not that of consensus; generally the signing of a contract is hurried and informal. 5. The **P** took no steps to alert the **D** to the onerous provisions in the contract. |
| RATIO | There is neither a necessary nor a sufficient link between a signature and *consensus ad idem*, overruling **L'ESTRANGE**. |

**DISSENT**

Lacourcière, in the dissent, held that the contract was not difficult to read (the terms clearly printed on the reverse) and was brought to the customer's attention clearly, fulfilling sufficiency of notice. While agreeing that the clause is strict, he held that it was economically efficient as insurance companies set their rates based on risk and as other rental companies have a similar approach it was not an unusual clause. Citing NEW ZEALAND SHIPPING v AM SATTERTHWAITE & CO (an interesting reference, as this precedent pushes against the orthodoxy of contract law, and further was an entirely commercial transaction, unlike this case), he finds that the court should give effect to the intent of a commercial document. With this he concludes the contract was binding.

TILDEN**'s status in Canadian law:** affirmed by the SCC in CROCKER v SUNDANCE, the BCCA in MAYER v BIG WHITE, and the ONT CA in FRASER JEWELLERS. But tension remains, and common law retains less paternalistic approach taken in L'ESTRANGE.

## KARROLL v SILVER STAR MOUNTAIN RESORTS LTD [1988] BCSC

(consumer transaction)

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| **FACTS** | **P** is injured in a ski race organized by the **D**. In the agreement she signed to enter the competition, RELEASE AND INDEMNITY PLEASE READ CAREFULLY is clearly stated, as well as the subsidiary exclusion clauses, which were very onerous and basically exonerated the **D** of any liability whatsoever for any negligence, recklessness, etc. **P** had participated in the event for four years prior to the race in which she was injured, and had always been required to sign a release.  **P** is injured by someone crossing the course while she's skiing downhill. She claims the mountain is negligent in not preventing this from happening. But if the exclusion clause is operative, then the **D** is entirely exonerated from liability. She did not recall whether she read the heading at the top of the form, and asserted she did not read the body of the document. She acknowledged she could have read the document in one or two minutes, but was unable to recall if she was in fact given an opportunity to take the time to read it. **P** contended she was not bound by the release, arguing she was not given adequate notice of its contents or sufficient opportunity to read and understand it. Alternatively, she submitted that the document afforded a defence only to the resort, not to the ski club and its members. |
| **REASONING** | Ruling for **D**. This decision attempts to bridge the gap between the approach taken in TILDEN and the approach taken in L'ESTRANGE, by narrowing the scope of the former to exceptional circumstances.  "There is no general requirement that a party tendering a document for signature to take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises. For to say silent in the face of such knowledge is, in effect, to misrepresent by omission."  Therefore, the **P** is bound by the release she signed unless she can establish:  That in the circumstances a RP would have known that she did not intend to agree to the release she signed;  That in these circumstances the **D** failed to take reasonable steps to bring the content of the release to her attention.  (*Mirroring* TILDEN)  Facts here are very different than in TILDEN. The release was easy to read, and the **P** had done it before. A reasonable issuer of this kind of agreement can assume that the issuee has read it and understood it. |
| RATIO | Narrows **TILDEN** to a misrepresentation exception for signatures obtained in situations where the signature was obtained without knowledge of onerous clauses and the issuer did not take reasonable steps to inform of these clauses. |

**TWO-PART TEST:**

Was it reasonable to presume that RP in P's position read the contract?

If not, did the D take **reasonably sufficient** steps to draw P's attention to the relevant clause in the contract?

In KARROLL, TILDEN is restricted to the misrepresentation described in L'ESTRANGE, rather than interpreted as overturning it. Only signatures gained through misrepresentation do not represent consent. But what does misrepresentation mean? What does it look it in cases with these form agreements between unequal bargaining power parties?

Courts have split on KARROLL- this has developed into two streams of law in terms of how courts have approached these issues.

Application of RP test succeeds in KARROLL. In the alternative, even if RP test fails, sufficient steps were taken on the part of the **D** to draw **P**'s attention to

Regardless of the conceptual approach, the Courts in KARROLLand TILDEN would have decided the opposite case in the same way – in other words, the two cases are highly distinguishable based on the facts, and *the facts were dispositive, not the law*.

**RELEVANT FACTORS:**

1. What is the nature of the document? Long? Short? Clear? Confusing? Paper? Digital? Where is relevant clause?
2. What's the nature of the transaction? Hurried? Relaxed? What did the clerk say? Was there a long line up?
3. What's the nature of the clause? Onerous? Unusual? Expected? Destructive of rights?
4. What's the nature of the parties? Consumers? Businesses?

Courts have either gone with the TILDEN approach (protecting the consumer) or the KARROLLapproach (protecting the traditional L'ESTRANGEapproach).

**ON THE EXAM**: If you're arguing before a court in BC, KARROLLis binding precedent. Outside of BC, it's trickier: you can probably choose between the two, but the best approach is to make arguments under both precedents. **This is also what you should do on the exam**.

### DOCTRINE OF FUNDAMENTAL BREACH

The primary proponent of this doctrine was Lord Denning. The doctrine was rejected in the UK. The SCC is split on this question in Canada (1-1-1) in HUNTER v SYNCRUDE. What is the fate of clauses when the contract has been so badly breached that the very root of the contract is at issue? Can they be relied upon? Cases that follow from that reduce to the questions in KARROLLand TILDEN.

## KARSALES (HARROW) LTD v WALLIS [1956] UK CA

(consumer transaction)

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| **FACTS** | **P** buys a car in good condition, but when it is delivered it is virtually destroyed, with no possibility of turning it back into a functioning car. |
| **REASONING** | The guy bought a car, not a hunk of metal. Such a fundamental breach ends the contract, and so the exclusion clause can't apply. This is called the **rule of law** approach to fundamental breach - it functions automatically. Contrasted with a **rule of construction** - to determine what happens in the event of a fundamental breach, you need to construe what the clause actually says. |
| RATIO | Outlines rule of law approach to fundamental breach: a breach which goes to the root of the contract automatically disentitles any reliance on exemption clauses. |

## PHOTO PRODUCTION LTD v SECURICOR [1980] UK HL

(commercial transaction)

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| **FACTS** | **P** agrees with **D** that **D**'s employees will make regular visits to the **P**'s factory for a minimal amount of money (important because of what it says about the expectations of the parties). The employee assigned to make periodic visits deliberately starts a fire at the factory and accidentally burns it down. But there is an exclusion clause (top of p 509) indemnifying the **D**. |
| **REASONING** | Court rejects the rule of law approach, arguing that only reasonable constructions should be allowed – the exclusion clause should be applicable if it was intended to be. Court construes agreement as to exclude liability based on these facts. Because **P** is a business, the Court doesn't think they need to cut them any slack - they are expected to read the contract and renegotiate it if they don't care for it. |
| RATIO | Replaces the rule of law approach with a rule of construction approach. Whether the exclusion applies after the fundamental breach depends on what the contract says and the intention of the parties that can be deduced from the agreement. |

## HUNTER ENGINEERING v SYNCRUDE CANADA [1989] SCC

(commercial transaction)

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| **FACTS** | Syncrude contracted with Hunter Engineering and Allis-Chalmers to design gear boxes. Due to design flaws, the boxes were not usable for their intended purpose. Syncrude spent over $1 million to repair the boxes. **C**lause 8 provides warranty that exempts seller for defects, but limitation clause shortens warranty period. If clause operates, it offers a full defence for issuer (Hunter). Syncrude trying to eliminate clause based on FB. But this is a negotiated agreement overseen by lawyers, so disputing on basis of TILDEN won’t work due to the nature of the contract (parties clear on the terms, two large corporations). |
| **REASONING** | SCC rules for Hunter and holds clause is operative.  **Dickson (majority):** holds that fundamental breach should be done away with, as business people don’t need paternalistic protection. Dickson argues for a true construction approach which relies on a doctrine of unconscionability based on inequality of bargaining power (526 “in light….unconscionability”). So Canada should dispose of doctrine of fundamental breach and rely on unconscionability to protect consumers like PHOTO PRODUCTION did with unfair transactions legislation. When there is equal bargaining power and a deal struck, the court’s job is to give effect to that deal – it is unfair to try save the unfortunate party (overinclusive). FB is also underinclusive because it doesn’t address fundamentally unfair contracts where there is no failure of performance.  **Wilson (dissent):** fundamental breach has a use, *but* no application in this case. Wilson wants to retain the court’s paternalist jurisdiction and allow a judge to ask “is this fair”, rather than “a deal is a deal”. Unhappy with Dixon’s bifurcation.  Page 520: “…undesirability…interpretation.”): Misleading when we’re just interpreting what the parties want. Wants to do away with formalism and be honest we, as judges, are making judgments. **If there’s a bad breach, we need to be able to go in and do something.** Doesn’t like relying on unconscionability (bottom of 522) and rejects the rule of law approach. Judge should have jurisdiction to assess reasonableness and fairness of exclusion clause if there’s been extraordinary breach (**2-part test**):   1. Was there FB? 2. If so, in light of FB would it be fair and reasonable to allow party to rely on exclusion clause?   Bottom of 517: based on these reasons, there is no FB. Places high bar to trigger the doctrine, but doesn’t resolve the reasonableness of reliance on the clause.  **McIntyre (concurrence):** agrees with Wilson, so unnecessary to deal with FB. Some argue this is implicit agreement with Wilson. |
| RATIO | DICKSON:  Fundamental breach should be abandoned; the unconscionability doctrine should be used to determine if an inappropriate allocation of risk between parties should be struck down.  WILSON:  Fundamental breach should be available where:   1. there is equal bargaining power; 2. substantially the whole benefit of the contract is deprived; 3. there is an unfair act by the other party; and 4. the court wants to help by enforcing the exclusion clause. |

**Q:** How have courts made sense of HUNTER?

## FRASER JEWELLERS v ADT [1997] ON CA

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| **FACTS** | Jewelry store owner and security company enter an agreement. Store gets robbed, and owner wants restitution. This is different than HUNTER— ma and pa store and multinational, not two multinationals. **D** argues they are not an insurer and their contract relieves them of liability, caps payouts at $10K. Owner of store didn't read agreement and was unaware of the clause and he was not insured, similar to Mr. Clendenning. TJ finds ADT’s negligence caused theft that resulted in loss of $50K. |
| **REASONING** | Clause should apply, held for **D** - parties should be bound by the agreement entered into. Court hedges its bets trying to figure out what's going in HUNTER v SYNCRUDE. Court finds there is no fundamental breach (implicitly following Wilson's approach in HUNTER) because breach doesn't destroy the commercial purpose of the original contract, it's just a failure of performance. Even if there was fundamental breach, the contract was not unconscionable (Dickson's approach) nor unfair or unreasonable (Wilson's approach), because:   1. Mr. Gordon was not under time pressure; 2. the clause wasn't hard to read; 3. the clause wasn't unusual; and 4. while there was inequality of bargaining power, it wasn’t sufficient to undermine the agreement, and there was **no abuse** of the inequality to obtain the contract(reminiscent of TILDENanalysis).   Court notes that ADT is not an insurance company and Mr. Gordon should have understood that he was not getting insurance from them - "limiting liability in this situation is manifestly reasonable".  Court is holding Mr. Gordon to a higher standard than they might hold a consumer in this situation because he is a business person – it kills his arguments. **WATCH OUT FOR HAPLESS BUSINESS PEOPLE ON HIS EXAMS - THEY OFTEN LOSE.** "A businessman executing an agreement on behalf of a company must be presumed to be aware of its terms and to have intended that the company would be bound by them" - reading contracts is such a basic competence in business that courts will presume that **anything signed is read**.  Wasn't breach fundamental? They promised security and failed to provide it… but that doesn't matter, ADT could have provided nothing at all and that still wouldn't be a case of fundamental breach! The contract and its limitation clause is a product that the business is buying (not a very good one) – the presumption of basic competence means that businesspeople are presumed to know the product is garbage. |
| RATIO | 1. Negative definition of fundamental breach in a set of facts that don’t meet the standard. 2. Implication that courts are applying Wilson's judgment in **HUNTER v SYNCRUDE** because fundamental breach is being considered rather than unconscionability. 3. Implication that the relevant test is strange hybrid of approaches in **HUNTER**: (1) is there fundamental breach?; (2) is there unconscionability?; (3) was the contract unfair or unreasonable? 4. Commercial actors will be presumed to have a basic competence not attributed to consumers (presumption that businesspeople read their contracts!). |

**Q:** What about when there is legislation limiting liability?

## SOLWAY v DAVIS MOVING & STORAGE INC [2002] ON CA

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| **FACTS** | The **P** contracted with **D** to pack, store and deliver their stuff to their new house. The goods included rare and valuable artifacts and antiques, and had been viewed by a member of Davis' sales staff. The goods were stored in a trailer which was parked overnight, unattended, on a public street to enable snow plowing to be done on Davis' lot. The trailer was stolen. **P** claimed replacement cost of their possessions, and the corporate respondents (owned by **P**) claimed income loss resulting from lost services. The **D** admitted liability for the loss of the goods, but only to the extent of the terms of the bill of lading and regulation 1088 of the ***Truck Transportation Act***, which it claimed limited liability to $0.60 per pound, for a total of $7,089, much less than the value of the goods.  At trial, **P** testified that **D** provided false representations that it would provide safekeeping of their goods by parking the trailer in its moving yard, removing its loading gear, locking it and locking the air brakes**. P** were never informed that the goods would be left unattended.TJ found for **P**, which **D** appealed. |
| **REASONING** | Court finds that limitations clauses implied by statute can be overridden by unconscionability. What's unusual in this case, and why it's not followed: suggestion that a clause that is incorporated into a contract by mandate of law rather than by the parties is bizarre. Unconscionability has to do with unequal bargaining power – so how can this occur when the government is forcing the clause in, and not one of the parties? It can still exist in theory, but it no longer affected the negotiation of the contract.  Court has to consider both HUNTER and FRASER:collapsed into a clause will not be enforced if it is unconscionable, unfair or unreasonable. Not terribly illuminating. |
| RATIO | Bad law, but pedagogical reason for including it: some courts, some judges are so concerned with these types of clauses that they will contort themselves absurdly to avoid them. The nature of these clauses seems to undermine the basis of contract law of *consensus ad idem*. |

**DISSENT**

If either Dickson or Wilson were confronted with these facts, they would both enforce the contract! And it really matters that the clause was imposed by statute.

## PLAS-TEX CANADA LTD v DOW CHEMICAL OF CANADA LTD [2004] AB CA

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| **FACTS** | The respondents were affiliated companies providing pipeline systems to carry natural gas to rural co-ops. They shared common ownership, management and goals. Dow sold defective resin to two of the respondents. Dow did not have a contractual relationship with the other respondents. One of the contracts contained clauses limiting Dow's liability by stating that Plas-Tex accepted all liability for loss or damage resulting from use of the resin. **Dow knew that that the resin was defective** and that some respondents would use the resin to manufacture pipe installed by other respondents to carry natural gas. The pipe was dangerous and allowed natural gas to escape. The respondents were forced to undertake major remedial operations and use of the pipe was eventually prohibited. Plas-Tex's reputation was damaged, which caused it to lose some of its customers and be petitioned into bankruptcy. The TJ found Dow liable in contract and tort. The respondents were awarded damages for the purchase price of the resin, cost of pipe repairs and lost profits, which Dow appealed. |
| **REASONING** | Court finds the exclusion clause is unconscionable and upholds the TJ's decision. Plas-Tex did not get what it contracted for, the resin was completely unsuitable for use in a natural gas pipeline, and therefore there is a fundamental breach.  Confirms that HUNTERis being collapsed into a single test. This case involves two large businesses – unconscionability generally applies in situations of unequal bargaining power and doesn't seem applicable here. But court here says that unconscionability can apply between two big businesses when informational asymmetry has been created by one company which creates unequal bargaining power. **Relative bargaining power must take into account the relevant context and circumstances**, not just the abstract facts of each business' size. Dow knew that the resin was defective, and did not disclose it to Plas-Tex. Plas-Tex had no way to compel that knowledge be put forward, they don't even know that there is knowledge that they should have – it's an unknown unknown! |
| RATIO | Doctrine of commercial unconscionability: information asymmetry can create inequality of bargaining power between otherwise equivalent organizations.  Application of hybrid of approaches in **HUNTER**:   1. **is there fundamental breach?;** 2. **is there unconscionability or was the contract unfair or unreasonable?** |

In GUARANTEE CO v GORDON CAPITAL, the SCC argued that both Dickson and Wilson agreed that the true construction of the contract is key:

If, as a matter of contractual interpretation, the parties clearly intended an exclusion clause to continue to apply in the event of fundamental breach, courts [are] required to enforce the bargain agreed to by the parties, rather than applying a rule of law to rewrite the terms of the contract.

There is only exception to the true construction:

The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson CJC, or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.

Dickson would disagree as he explicitly rejected the doctrine of fundamental breach, so this reconciliation is essentially a victory for Wilson's side in HUNTER v SYNCRUDE.

Arguably, Wilson's doctrine of fundamental breach doesn't require inequality of bargaining power (leaves door open with "or unfair or unreasonable")

Conceptual problem: fundamental breach is temporally limited to after incipient event, unconscionability seems to apply from the inception of the contract. Why should we restrict consideration to after serious breaches of the contract and in the case of exclusion clauses? Dickson argues this is a key fashion in which fundamental breach is underinclusive.

# PROTECTION OF WEAKER PARTIES

Do we assume that people are equally able and free to make their own decisions and conduct legal analysis behind this veil, or do courts have a duty to protect weaker parties from stronger parties in the context of contract law?

Even within very traditional conceptions of contract law the latter view has had some currency – for instance, contracts made with children are voidable, since children lack the capacity to fully form intentions and they can be taken advantage of. The same rule has applied to people with mental disabilities or sight or hearing loss. But traditionally, the basic presumption has been that most adults are held to a single objective standard and do not require special protection.

There are three different doctrines that have been developed to challenge this notion:

1. Duress (old)
2. Undue influence (old)
3. Unconscionability (newer, developed by Lord Denning)

### DURESS

**Duress** is a common law doctrine that is most easily understood as undermining the intention of the weaker party (WILLIAMS v ROFFEY,GFAA v NAV CAN).

Duress of the person

Coercion based on a threat to personal safety, such as a gun to the head.

Duress of goods

Coercion based on holding property hostage, rather than people.

Traditionally, these were the narrow circumstances in which courts would recognize duress. Today, motivated by concerns about fairness, courts will go further in finding duress, even in the absence of physical duress of person or duress of goods, but in situations of undue duress in a commercial context. The question then becomes "How much commercial pressure in contracting is **too much**?" because *pressure is always present in a market economy*. In PAO ON, the courts say mere commercial pressure is not enough, there needs to be "a coercion of the will so as to vitiate consent."

## GREATER FREDERICTON AIRPORT AUTHORITY v. NAV CANADA [2008] New Brunswick CA

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| **FACTS** | Nav Canada, the **D,** and GFAA, the **P,** had agreement governing responsibility for capital expenditures. As part of a $6 million runway extension project, **P** requested that **D** relocate an instrument landing system to the runway being extended. Rather than relocate existing equipment, **D** concluded that it made better economic sense to replace the navigational aid with distance measuring equipment ("DME"). **P** argued that **D** should pay the acquisition costs. In a letter to the **P, D** stated that it would not provide for the purchase of the DME in its fiscal budget unless **P** agreed to pay the acquisition cost. **P** agreed to pay but "under protest". On the basis of that letter, **D** completed the work, and incurred the $223,000 expense. **P** refused to pay.  The dispute was referred to arbitration. The arbitrator held that there was nothing in the agreement entitling **D** to claim reimbursement for acquisition costs. However, the arbitrator held that the *subsequent exchange of correspondence between the parties gave rise to a new contract that was supported by consideration*, and that **D** was entitled to recover the acquisition costs on that basis. The arbitrator rejected the argument that the words "under protest" were sufficient to negate contractual liability. This ruling was overturned by the Court of Queen's Bench and **D** appealed. |
| **REASONING** | Ruling for **P** – new contract was unenforceable because it was made under economic duress. |
| RATIO | A post-contractual modification, unsupported by consideration, may be enforceable as long as it is established that the variation was not procured by economic duress. Test for economic duress:   1. the promise but be made under pressure (demand/threat); 2. the pressured party must have no option but agreeing.   If these conditions are met, 3 factors must be analyzed to determine if there was true consent:   1. was the promise supported by consideration? 2. was the promise made "under protest"? 3. were reasonable steps taken to disaffirm the promise? |

GFAA was distinguished from WILLIAMS v ROFFEY because GFAA did not initiate this process. Another key factor was the GFAA protested and later repudiated the agreement in question, and that **Nav Can did not act in good faith** (crucial). It is also important who approaches whom, for if the alleged victim suggested the contract or variation, then it cannot be credibly argued to be duress.

So the bar is set fairly high when dealing with commercial actors, as there is a presumption that one isn’t coerced over the other. When there is coercion, it must be quite extreme.

Good faith will not *always* vitiate duress, but sometimes it will. WHEN and WHY?

### UNDUE INFLUENCE

**Undue influence** is an equitable doctrine that has more to do with the nature of the relationship between the parties, the key question being: was trust exploited?

This doctrine can apply to situations that don’t meet the bar for duress, **but** is inapplicable when the contracting parties are equally situated commercial actors. Why? Because it focuses on the nature of the relationship between the parties and asks whether one party took advantage of their power unduly (duress is focused on coercive action, not the nature of the relationship more broadly).

Wilson description of the doctrine in lead case at p.683 “There are many confidential…dominate the will of the other…” The values that give rise to presumption of undue influence are confidence, trust, dependence (eg: guardian and ward, teacher and student, solicitor and client) – essentially where one of the parties has confidence/trust that can potentially be abused.

P684: Description of the test – the categories aren’t closed and analogous relationships are ok.

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## GEFFEN v GOODMAN ESTATE [1991] SCC

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| **FACTS** | Tzina Goodman was a "manic depressive and immature" woman. Her mother, wrote her will to provide a life estate to Tzina and that upon Tzina's death the estate would be divided among all of her grandchildren. When her mother died, it was discovered that she had written a new will in 1975 which left the estate directly to Tzina. Her brothers, worried that she might not take care of the estate properly (and upset that their children had been cut out of the will) suggested they seek counsel. She went to see a lawyer recommended by her brothers who suggested they set up a trust with her brothers as trustees. After Tzina's death, her son tried to have it set it aside, arguing that his mother was unduly influenced by either the brothers or the lawyer. Tzina's will left the entire estate to her children, in conflict with the trust. |
| **REASONING** | Appeal allowed, trust upheld. Wilson held that a presumption of undue influence can arise in certain relationships, but each relationship must be looked at individually. While she held that in commercial transactions, an undue disadvantage/benefit must be shown, this was not true of non-commercial transactions. A gift is *ipso facto* disadvantageous and only a dominant relationship must be shown. At that point the onus shifts to the alleged dominant party to show with evidence that the transaction was entered into "as a result of [his/her] own full, free and informed thought".  A trust relationship was akin to a gift and therefore triggered the presumption, however there was sufficient evidence adduced (very little contact with the brothers, independent legal advice given to Tzina, outcome not unduly unfair) to show there was no undue influence.  Laforest disagrees with Wilson (but its obiter), and argues that the commercial and family trust distinction shouldn’t matter. The trigger for presumption is simply that a special relationship exists, even if not manifestly disadvantageous (p.687 “cannot adopt…had been tainted.”) |
| RATIO | For there to be a finding of undue influence:   * nature of the relationship - there must be dominance, manipulation, and coercive abuse of power; * nature of the transaction: * commercial transactions require undue disadvantage or benefit * gift transactions require only evidence of a dominant relationship |

**BAKAN**: that this case is an interesting example of conflict between underlying principles:

**Wilson**: notion of freedom of contract, less interventionist, less paternalistic, more willing to let parties work things out among themselves.

**Laforest:** paternalistic approach, wants to protect weaker party, wants to hold contractors to a moral duty to be good regardless of the fairness of the dealing. Second full para at 687 ..”Should be required element…focus upon the process rather than result…demonstrable disadvantage…”

## ROYAL BANK v ETRIDGE [2001] UKHL

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| **FACTS** | Wife had not fully understood legal advice that she had received, the spouse’s business went broke and the house was being repossessed. Skirts borderline b/w familial and commercial relationships (doctrinal area without sharp boundaries). |
| **REASONING** | Bakan’s key points we are responsible for:  Seems to confirm Wilson’s approach in Geffen.  Suggests 4 factors to consider in undue influence cases (p.692 under heading “manifest disadvantage”): the relationship, the bargain, the conduct of the parties and whether there was independent advice.  Because of consequences for the weaker party duty on bank to do due diligence (Halfway down at 695 “…bank should not be called upon…).  This is a pragmatic fix, as in this context remedy imposes obligation on the bank (like a regulatory norm).  Third line at 696: **the categories that raise presumption are not closed.**  Link with GEFFEN: value court assigns to independent advice in their determination (Bottom of p.691).  Fact to take into account but not decisive. |
| RATIO | Four key factors in undue influence:   1. Look at nature of relationship (was trust vested in the more powerful party?) 2. Look at nature of the bargain (was there a manifest disadvantage?) 3. Look at conduct of the parties (what were their obligations?) 4. Look at whether independent advice was sought and attained |

### UNCONSCIONABILITY

**Unconscionability** is based primarily on the concept of inequality of bargaining power. Even if two parties totally agree, if it’s unfair, there may be no obligation for compliance. This doesn’t require that one of the parties didn’t know what they were doing (as in GEFFEN and ROYAL BANK).

Instead, you need to prove that:

1. The relationship between parties is unequal.
2. The deal struck is substantially disadvantageous to weaker party.

Conceptual difference: undue influence and duress are doctrines based on notion that something about the transaction or relationship vitiates consent, whereas unconscionability suggests *consensus ad idem* was never reached. This seems to allow the doctrine to relieve a party of obligations if it seems unfair, despite *prima facie* consent,

In MORRISON, the court links unconscionability to fraud, as a blatant lie or deception creates an unconscionable agreement. Wrapping unconscionability into fraud allows contract law to maintain its traditional focus on consent.

## MORRISON v COAST FINANCE [1965] BCCA

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| **FACTS** | Morrison, a 79 year old widow, was persuaded by two men, Lowe and Kitely, to borrow $4,200 from Coast Finance Ltd. on a first mortgage on her home for that amount and interest to maturity and to lend the proceeds to them so that Lowe could repay $915 that he owed the finance company, and he and Kitely could pay the other respondent company $2,302 for two automobiles they were buying from it for resale. The proceeds of the loan were applied accordingly and the balance was repaid at once to the finance company and automobile company, respectively, by way of prepayment of monthly instalments, insurance premiums, and costs. The mortgage was to be repaid at the rate of $300 a month, which was to be secured from payments to be made by Lowe at the finance company's office on her account by way of repayment of the money lent to him and Kitely. She had no other means of repaying the money, and the house was her only substantial asset. She had no independent advice, although the evidence shows she wanted and asked for help. Lowe and Kitely failed to pay the appellant. She commenced action to have the mortgage set aside as having been procured by undue influence and as an unconscionable bargain made between persons in an unequal position.  The trial judge dismissed the action finding that there was not a sufficient relationship between the parties to create a presumption of undue influence. |
| **REASONING** | Davey, writing for a unanimous court, held that a bargain that is unconscionable invokes relief against an unfair advantage gained by an unconscionable use of power by a stronger party against the weaker. Proving this is the case requires proof of inequality in the position of the parties arising out of ignorance, need or distress, and proof of substantial unfairness of the bargain obtained by the stronger. Once these elements have been proven, there is a presumption of fraud which must be rebutted by the stronger party.  Applying this to the case at bar, the court held the finance company responsible because they "undertook the preparation of the documents" and took "advantage of her obvious ignorance and inexperience to further their respective business" raising a presumption of fraud. |
| RATIO | Example of traditional approach to unconscionability: an unfair deal with unequal power between the parties gives rise to a presumption of unconscionability which, once raised, the stronger party must rebut. |

“Plea of undue influence attacks sufficiency of consent…” (p.698)

What’s notable about this case: the weaker party was in an exceptional state of disadvantage (she's old, she's poor, etc.). What about less extreme circumstances - how far are we willing to apply the doctrine of unconscionability?

## LLOYD'S BANK v BUNDY [1975] UK

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| **FACTS** | Bundy owned a house, which was the extent of his estate. His son operated a business that did not do very well, and he asked his father to give him collateral for taking out loans from Lloyds. The father signed the original collateral for a smaller amount of money after considering it overnight and talking to his lawyer. Later on, the son needed more collateral, and the only way that Bundy could provide it was by using the house as collateral. When the lawyers from the bank came over with his son they explained that this was the only thing that he could do to help his son, and Bundy signed the document. Five months later the bank foreclosed on the son's assets, and as he was bankrupt they seized the house. Bundy refused to leave the house, and the bank sued to have him evicted. |
| **REASONING** | Ruling for **D**, Bundy.  "Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces."  So who does get protected? Denning reasons back from the facts to a distinction. Lord Denning is very sympathetic to the defendant, "Old Herbert Bundy". What makes these circumstances exceptional?   * Bundy didn't fully understand the mortgage transaction with his bank (who does?) * Bundy was very agreeable and a nice guy (srsly?)   Unlike in MORRISON, there are no con artists. The bank manager acted in good faith. So why does Denning find for Mr. Bundy? He looks at undue influence, duress, etc. and finds they are bound by one principle:  "They rest on inequality of bargaining power. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is 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 another."  So despite the fact that the bank acted in good faith and didn't create the pressure, Bundy was enormously pressured by his son's need. Furthermore:   * the deal was improvident (it was clear the business was going to fail and that Bundy was going to lose the house, there was virtually no consideration moving from the bank); * there was inequality of bargaining power between the bank and Bundy; * Bundy's son had a great deal of influence over him (only pressure on the father);   There was a conflict of interest between the bank and Bundy, and while the bank did not realize it (maintaining good faith), they did not suggest Bundy get independent advice. |
| RATIO | Ordinary contracts won't be found unconscionable – extraordinary circumstances are required. Denning accepts a certain extent of pressure within the market economy overall (like homelessness), but finds the particular pressure placed on Bundy was exceptional. |

But Mr. Bundy's extreme circumstances are not that uncommon… the doctrine of unconscionability is unruly and potentially of very broad application because it doesn't require evidence of wrongdoing, just pressure. **Fundamentally, the distinction between exceptional pressure and ordinary pressure of market economy doesn't hold up – it’s just cover for judge’s discretion.**

## HARRY v KREUTZIGER [1978] BCCA

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| **FACTS** | Harry was an aboriginal man who is partially deaf with little formal education who owned a boat, the "Glenda Marion" with a fishing license. Kreutziger offered $2,000 for the boat, which itself was worth very little, but the fishing license attached to the boat was highly valuable (around $14,000). Harry initially refused, but Kreutziger persisted and eventually agreed on a price of $4,500. Kreutziger later unilaterally reduced the price by $570 as he had to pay back license fees of this amount to use the boat. Kreutziger assured Harry that he would be able to get another license, but he was rejected on the grounds that he had left the fishing industry when he sold the boat. Harry sued to have the sale set aside, but was unsuccessful at trial. |
| **REASONING** | Court adopts test from MORRISON. Harry is (like Bundy) is an agreeable person. There was wrongdoing - Kreutziger was not acting in good faith (similar to MORRISON rather than LLOYDS). Clear on the evidence that **D** was aware that the market value of the license was much higher than the sale price and provided false assurances that the **P** would be able to obtain a new license. The Court holds that this is an unconscionable deal: there is an inequality of bargaining power, an unfair bargain, and this agreement is the product of one party taking advantage of the other.  Lambert outlines community standards approach to unconscionability. |
| RATIO | There are two different approaches to a test for unconscionability:   1. Inequality of bargaining power plus substantial unfairness in the bargain leads to a presumption of unconscionability which the stronger party must rebut (**MORRISON** test) 2. Community standards of commercial morality (simplified **LLOYDS** test) |

**DISSENT**

Lambert poses alternate test, but ultimately reaches same conclusion. His focus is community standard of commercial practice (what is acceptable within the business community?). This is different than Denning’s approach in LLOYDS BANK. Key concern seems to be what seems to be reasonable (712). Subsequent courts have treated it as a different test. This is **KEY** for BC context because it’s a BCCA decision (**but for purposes of the exam, ignore it**).

In LLOYDS BANK, the bank is not at fault, unlike MORRISON (fraud) and HARRY (undue pressure).

HARRY case falls in between LLOYDS BANK and MORRISON, as grandma Morrison is exceptionally vulnerable and clearly has been conned, whereas Bundy was a business person, and Harry who is somewhere in between.

**Key questions to ask**:

* What is the alleged victim’s vulnerability?
* What is the alleged perpetrators level of wrongdoing?
* How wrong was their act?

# MISTAKE & FRUSTRATION

**Mistake**: 2 parties enter agreement and are mistaken about central part of that agreement.

**Frustration**: agreement entered, but something happens that makes it impossible to perform.

Key difference is timing: did the event happen before or after the contract was entered?

### MISTAKE

Courts are reluctant to vitiate a contract because of a mistake. The exception is when there is an innocent mistake and the mistake goes to the heart of what is being contracted for (ie. there is no horse). Both of the parties need to be mistaken, otherwise then the issue is misrepresentation or fraud, and not mistake.

The utility of this doctrine is largely for those who wish escape their liability under a contract.

***Void ab initio***: something was defective from the beginning, and so the agreement never became binding at all. Distinct from an agreement which is *voidable* (it is a valid obligation, but there may be reasons for voiding it). This contrast tracks the distinction between the legal and equitable doctrines of mistake.

**HYPOTHETICALS FOR EXAM P563**

Threshold for caveat emptor — “…paramount importance that contracts should be observed”.

## SMITH v HUGHES [1871] UK

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| **FACTS** | Buyer thinks he got new oats but was sold old oats, and so he sues when he gets old oats. But the contract is for the sale of oats (not new or old). |
| **REASONING** | Terms of contract are key. (sale of oats was the contract, not the sale of new oats - 547). This case demonstrates courts only willing to do exactly what is in the contract (freedom of contract). |
| RATIO | If you want to contract for a specific thing, you should write it into the contract.  As long as seller doesn’t induce the buyer to buy then he is not liable. |

**BAKAN**: The English courts approach is that if the thing you get is entirely different from what you contracted for, then maybe mistake will work.

## BELL v LEVER BROTHERS [1931] UKHL

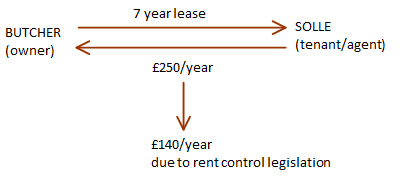
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| **FACTS** | Company underwent restructuring and downsized. Directors breached their duties and were terminated. The company paid them severance not knowing they weren’t required to. Company tried to claim mistake and recoup funds. |
| **REASONING** | Court refused to vitiate contract on the basis of mistake. *Caveat emptor*: do your due diligence, as mistake does not entitle Lever Brothers to void the agreement. This presumption underlies freedom of contract (“nothing more dangerous…something different in kind” p564). Courts may imply a term if the entire subject matter disappears (ie. Contract to buy a horse and get a goat). But courts are not willing to construe the facts to support an implied term, as the primary concern is giving “business efficacy to the transaction”.  Recall SMITH v HUGHES: if you want the contract to pertain to something specific, say it in the contract. **The court won’t find mistake if party alleging mistake is somehow at fault.** |
| RATIO | Common mistake does not lead to a void contract unless the mistake is fundamental to the identity of the contract |

## McRAE v COMMONWEALTH [1951]

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| **FACTS** | Relying on rumors, the **D** sold to **P** the right to salvage an oil tanker thought to be marooned at a specified location. Unfortunately the tanker did not exist. **P** sues, arguing there is a contract between him and the commission that has been breached and he should be compensated. **D** says may have been contract but we made a mistake.  Commission was at fault, as their mistake was a result of the commission’s own negligence. |
| **REASONING** | Held for the **P**, as the Commission "took no steps to verify what they were asserting and any mistake that existed was induced by their own culpable conduct." McRae wasted money searching for the non-existent wreck. His claim for the loss of profits expected from a successful salvage was dismissed as too speculative; however, reliance damages were awarded for wasted expenses. |
| RATIO | Can’t use mistake to benefit from your own negligence. The party seeking to vitiate the contract cannot be guilty of negligent mistake (note at 569). |

## SOLLE v BUTCHER [1950] UK

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| **FACTS** | Butcher let a flat to Solle for £250 per year. Solle is both a tenant and an agent who advises Butcher. Both parties believed at the time of letting that the flat was not subject to the Rent Restriction Acts. If it had been subject to the Acts the appropriate rent would have been £140 per year. Butcher claimed that he relied on Solle's assurances that the flat was not subject to the Rent Restriction Acts. Solle brought an action claiming that the flat was subject to the Acts and that, therefore, his rent should only be £140 per year.  There is actually a procedure in the Acts which would have allowed Butcher to get an exemption from the rent control price, but because Solle advised Butcher that the legislation didn't apply to these flats Butcher didn't apply for an exemption and no longer can. The reason Butcher was mistaken was because of Solle's advice, but the Court finds this to be an innocent mistake on both parties' part. Butcher claimed that the lease was either void at common law for mistake or voidable in equity. |
| **REASONING** | Ruling for **D** - **P** has to rescind lease or pay full rent.  2 ways to deal with it – common law (BELL) and equity (SOLLE)  Mistake which renders **K** void  BELL: Once a **K** has been made then the **K** is good unless and until it is set aside for failure of some condition on which the existence of the **K** depends, or for fraud, or on some equitable ground. Neither party can rely on own mistake to nullify it, even if fundamental. But Denning thinks this is unfair, and turns to equity.  SOLLE: In equity, contracts can be voidable. The courts can relieve a party from the consequence of his own mistake when not to do so would result in an injustice, so long as it could do so w/o injustice to 3rd parties.  A **K** will be set aside if the mistake is sufficiently fundamental.  **TEST for sufficiently fundamental mistake:**   1. the mistake of one party has been induced by a material misrepresentation of the other, even though not fraudulent or fundamental; or 2. if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain mistaken and concludes the K on these terms instead of pointing out the mistake; or 3. if the parties were under a common misapprehension to a matter fundamental to the contract. |
| RATIO | You can set a mutual mistake aside in equity if it is fundamental. |



Courts have essentially overruled SOLLE v BUTCHER explicitly in GREAT PEACE, but the Court of Appeal in Ontario left a space for the equitable doctrine of mistake and the law is in flux in Canada.

## GREAT PEACE SHIPPING v TSAVLIRIS SALVAGE [2002] UK

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| **FACTS** | Ship suffered some damage while travelling to China. **D** was salvage company that was contracted to help the distressed ship, and subcontracted to the **P** tugboat to do so. Parties were mistaken as to the location of the **P**'s boat, thinking it was much closer than it was. **D** subcontracted with a closer tugboat once it realizes its mistake and cancelled contract with **P** without paying the cancellation fee, argued that the K was either *void ab initio* and in the alternative, voidable due to the mistake. |
| **REASONING** | Court holds that the K is good and that the cancellation fee is payable and there is no relief from the K from either the common law or equitable doctrines mistake. Court explicitly overrules equitable doctrine of mistake, leaving only the common law doctrine mistake. It is impossible to reconcile SOLLEand BELL, and the equitable doctrine of mistake is not necessary due to other doctrines (fraud, undue influence, fraud, etc.). The mistake did not have the effect of delivering something substantially different than what was contracted for in the agreement - timing was not an essential element. |
| RATIO | Overrules equitable doctrine of mistake in the UK. |

## MILLER PAVING v GOTTARDO [2007] ONT CA

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| **FACTS** | **P** had been delivering gravel to **D**. Signed agreement that they had been paid in full. Later discovered they missed a few and sued in mistake. |
| **REASONING** | 3 types of analysis to determine whether mistake can be invoked:  Step 1: Construe the contract (I.e. See what the contract says. What does it say? Who bears the risk if mistake is made? If the contract speaks to what happens in the event of a mistake, it should be honored. You shouldn’t go any further.).  In this case, the court holds that the **K** does speak to eventuality of mistake and that the risk lies on Miller. P581: “I conclude that contract clearly allocates to Miller the risk…invoke the doctrine of common mistake.”  Step 2: Pf (Miller) must show that as a result of the mistake, the subject matter of the contract has to become something essentially different from what is was believed to be.  Step 3: Pf (Miller) must show that it was not at fault.  But what about equity? Gottardo got material by means of windfall, arguably due to unjust enrichment.  Different from S&B for 2 key reasons:  1) Court believes miller was at fault (not as duly diligent as they should have been).  In S&B, butcher wasn’t in a position where he could have known, at least not within reasonable expectation. Whereas Miller was unreasonably incompetent.  2) Reliance.  Gottardo was enriched but if you put that on the scale of equity it is offset by the fact Gottardo had relied.  The fact the court is even following SOLLE means they are disregarding the HL decision in GREAT PEACE SHIPPING. |
| RATIO | Equity can grant relief for “fundamental” mistakes. Common mistake in equity only applies when risk is not already allocated by K. |

### FRUSTRATION

Like mistake, but mistake as to some future anticipated fact rather than prior assumed fact (temporally, relative to the time of the agreement).

What about cases where one party was more aware of the future possibility than the other? Then that one party may have acted negligently in ignoring that possibility and not including it in the contract.

The test has to do with whether the contract has become something different than what it was.

## PARADINE v JANE [1647] UK

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| **FACTS** | Jane leases land for cattle grazing from Paradine. Jane expelled from land by Prince Rupert. Jane argues lease is frustrated. Paradine said you gotta keep paying rent despite being evicted by Prince Rupert. |
| **REASONING** | Court holds in favour of **P**. |
| RATIO | Example of traditional doctrine of frustration – if you’re worried about frustration, you should provide clause providing protection against it in your contract. If not, you’re bound. |

## TAYLOR v CALDWELL [1863] UK

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| **FACTS** | **P** and **D** entered into a contract, in which, **D** agreed to let the **P** use the Surrey Gardens and Music Hall on four certain days. After the signing of the contract, but before the first contract, the concert hall was destroyed by fire. The destruction was without fault of either party and was so extensive that the concerts could not be given. |
| **REASONING** | **P**'s action for breach of contract failed. The contract had been frustrated as the fire meant the contract was impossible to perform. **Legal fiction created in this case**: there is an implied term in any contract, that the subject matter of the contract exists. Therefore, parties will be excused from performing obligations if it becomes impossible to do so because the subject matter no longer exists. |
| RATIO | Obligations under a contract are discharged if performance of the contact involves particular goods, which without fault of either party, are destroyed, rendering performance impossible.  The doctrine of frustration due to impossibility through destruction of the subject matter was established in this case. |

The court intends this new doctrine to be quite narrowly applied, only in cases where the subject matter of the contract ceases to exist due to some truly unforeseeable event. Don't ask about what was in the actual minds of the parties (did the owner of the hall subjectively contemplate the risk of party), but what would be in the mind of the hypothetical reasonable parties.

## CAN GOVT MERCHANT MARINE LTD v CAN TRADING CO [1922] SCC

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| **FACTS** | **A** agreed to transport lumber for **R** to Australia in two ships that have not yet been built. **A** can't fulfill contract because ships are not completed in time, and argues that the contract was therefore frustrated. |
| **REASONING** | Construction delays are not events outside the normal course of things. As such, reasonable people would have assumed that there was a risk of the ships not being ready on time, and there is no frustration. |
| RATIO | Economic problems and labor conditions in the "ordinary course of events" do not cause frustration. |

## DAVIS CONTRACTORS LTD v FAREHAM UDC [1956] UK HL

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| **FACTS** | Contractor agrees to build 78 houses in 8 months for a municipality. It ends up taking 22 months to complete the work due to issues with supplies of labor and material due to the aftermath of WW2. |
| **REASONING** | The cause of the delay was not any new state of things which the parties could not reasonably have been thought to have foreseen - supply and labor shortages are predictable in the post-war period. This was a normal business scenario given the context of the contract. To allow frustration in this case would open the floodgates and frustration needs to be constrained to prevent parties from escaping their legitimate contractual obligations.  The court also questions the entire doctrine of frustration. The whole point of the implied term approach is really to apply consistency to what the parties agreed, and not doing what the Court thinks is right. Radcliffe points out that frustration is based on a fundamental legal fiction that perhaps should be abandoned in favor of strict application of remaining legal principles. There is no real difference in hypothesizing the behaviour of reasonable parties and the judge simply imputing what they think is reasonable - why not just be honest and ask the judge? If that's not okay, then why is the legal fiction alright? |
| RATIO |  |

Quite commonly, frustration involves legal changes instituted by a government changing the position of the parties (ie. zoning changes).

## CLAUDE NEON GENERAL ADVERTISING LTD v SING [1942] NS SC

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| **FACTS** | **D** rented a neon sign for his café. Lighting restrictions were introduced when Canada entered into WW2, limiting the use of said sign, and **D** didn't fully pay for it. |
| **REASONING** | “I do not think that I should say that the contract is for an illuminated sign.... No part of the contract between the parties became impossible. The defendant certainly gets very much less benefit from the sign, but it is not entirely useless as a daylight sign." |
| RATIO | Example of court's reluctance to relieve parties of their contractual obligations. |

Next two cases are book ends that define frustration.

## CAPITAL QUALITY HOMES LTD v COLWYN CONSTRUCTION LTD [1975] ON CA

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| **FACTS** | **P** buys 26 lots that are already subdivided to build homes on them and sell them separately. Between the sale and the closing, the previously unregulated land comes under the authority of a regulatory authority requiring individual approvals. |
| **REASONING** | Court finds that it will now be impossible to find the necessary consent. The supervening legislation was not contemplated by the parties, not provided for in the agreement and not brought about through a voluntary act of either party. Therefore the contract is frustrated. |
| RATIO | Intervening legislation can frustrate a contract if it destroys the essential subject matter of the contract. |

## VICTORIA WOOD DEVELOPMENT CORP v ONDREY [1977] ON HC

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| **FACTS** | **P** buys land, intending to subdivide it and sell the individual lots. Supervening law comes in and **P** wants to declare the contract frustrated and get their deposit back. |
| **REASONING** | Court is unwilling to see the use of the land for subdivision as going to the heart of the agreement, and so there is no frustration. |
| RATIO | Frustration has to go the essential subject matter of the agreement. |

**Q:** How to distinguish these two cases?

**A:** In CAPITAL, land was already subdivided - land in VICTORIAwas not. So crucial subject matter of agreement in CAPITAL was subdivided land, whereas in VICTORIA **/**it was merely land. Legislation changes the character of the subject matter in the former, but not the latter.

## KBK NO 138 VENTURES LTD v CANADA SAFEWAY LTD [2000] BCCA

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| **FACTS** | **P** bought the property as described as a prime redevelopment opportunity with a specified floor space ratio. Before the contract was completed, the land was rezoned to 1/10th the FSR – property value dropped from 8.5 million to 5.4 million dollars redevelopment impossible. **P** claimed that the **K** was frustrated and that **D** must give the deposit back under the Frustrated Contract Act. |
| **REASONING** | Held for the **P** - the **K** was frustrated because:   * neither party was at fault; * the change in zoning was unforeseeable; * beyond contemplation of the parties; and * so fundamental to the **K** that the change totally changed the **K**   Therefore, under the act, **P** should get the deposit back. The court distinguished this case from VICTORIA WOOD in that **D** had **more than mere knowledge** about what the **P**'s plans were – there was nothing in the contract about the buyer's intentions in the **K** in VICTORIA WOOD, while in this case the court pieces together circumstantial evidence (**D**'s advertisement, a clause in the **K** which contemplated increases in the FSR, a non-competition clause in the **K**)to show that the reasonable expectations of both parties that the subject matter of the contract was land for building condominiums. The Court also found that there was nothing in the **K** to say how allocates the risk was allocated as the exemption clause was too general. |
| RATIO | Circumstantial and contextual evidence can be used to determine   1. what the parties reasonably thought was the subject matter of the agreement, and 2. whether that was radically altered by the intervening event. |

**POSSIBLE CRITICISMS**

* When a party buys property, risk is allocated to the buyer – especially for a big developer.
* The judgment ignored the express allocation of risk – could argue that the risk was sufficiently contemplated by clauses 4.2 and 7.2 of the **K.**
* All that the **P** would have lost was the deposit, specific performance could not have been used. Even expectation damages could have been argued against since the **K** was not complete, consideration flowing etc.

## KESMAT INVT INC v INDUST MACHINERY CO & CANADIAN INDEMNITY CO [1986] NS CA

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| FACTS | Fairly complicated land deal suddenly requires environmental assessment and attendant costs. |
| RULING | No frustration found because the cost of the environmental assessment was not so great that it rendered performance of the **K** impractical. Moreover, the parties could have foreseen that an environmental assessment might have been required, as it was not an unheard of request. |
| RATIO | The intervening event that frustrates the K must be objectively unforeseeable, not simply unforeseen because the parties are dumb. |

How to deal with cases of frustration? **LINE UP THE FACTS** - look for factual patterns between cases where frustration was found and between cases where frustration is not found. In doing so, an intuitively plausible line appears: ordinary course of events vs something extraordinary. Whether something is extraordinary is dependent on a combination of how radically the event changes the **K** and how likely the event was.

Would it be reasonable to assume, given all the context, that the two parties would not have expected the change that happened?

Does that change go to the heart of the **K**'s subject matter?

1. **REPRESENTATIONS AND TERMS**

### MISREPRESENTATION

In contrast to mistake and frustration, where neither party is at fault, in cases of misrepresentation **one party is at fault**. While it falls short of fraud because there isn't a deliberate attempt to deceive, there is negligence or recklessness in creating the false impression. By its nature, misrepresentation falls into a murky area between fraud and *caveat emptor*. **Misrepresentation** is less than fraud because it lacks the full intent to deceive - rather, you should have known but you didn't intentionally deceive. The common law has traditionally tended to favor the principle of *caveat emptor* and be fairly unsympathetic to the **P** in such cases - they are in the best position to discover the misrepresentation.

The **P** wants to argue that there was no *consensus ad idem*, so both parties should walk away (and equity agrees). Because equity doesn't offer a cause of action, it can't award damages, but can rescind the contract.

If the misrepresentations are actually part of the **K**, the common law can step in.

But what if the misrepresentation precedes the **K**? Then equity steps in.

## REDGRAVE v HURD [1881] UK CA

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| **FACTS** | **P** advertised to sell his business premises and a share in his business, representing that it brought in between £300 and £400 a year when it truly grossed less than £200 a year. The **D** purchased the property and a partnership in the law practice on the basis of this representation. However, when he discovered that the law practice was "utterly worthless" as a matter of fact, he refused to complete his payments. The **P** sued for specific performance. **D** sues for rescission and damages. **P** was successful at trial and **D** appealed. |
| **REASONING** | The **P** argues that the **D** cannot rescind the contract because he simply should have used due diligence and sought more information before purchasing the premises. However, the judge rejects this and says that the only limitation on suing for a misrepresentation is the limitation period, which starts when the fraud reasonably should have been discovered. Falsehoods were created by the sloppiness of the **P**. Therefore, equity can step in, but it can only offer rescission because the **K** was entered into on false bases created by the **P**.    How do we know that the **P**'s misrepresentation induced the **D** to enter the **K**? The court holds that if it is shown that a representation was made in an attempt to induce a party to enter into a contract, and the contract was in fact formed, then there is a presumption that the representation was relied upon. This can only be refuted by proving that the party hearing the representation had definite knowledge to the contrary, or by explicit evidence that they did not rely on the representation. Where you have neither evidence that he knew the facts showing that the statement was untrue, or that he did anything to show that he did not rely upon the statement, the inference remains that he relied upon the statement as being a material statement (condition) in the contract. Therefore, its being untrue is sufficient ground for the rescission of the contract. This comes from the courts of equity; common law takes a different approach.  In this case the judge finds the misrepresentation to have been innocent. Therefore, the contract can be rescinded but damages are not awarded. |
| RATIO | Even if the misrepresentation is due to the buyer's negligence, it will not negate the option of rescind the K.  There is a presumption that a material representation induced the party to enter the K, and the representor bears the burden of rebutting it by proving knowledge to the contrary of the statement, or express proof that the representee did not rely on the statement.  In innocent misrepresentations you can only ask for damages if you cannot rescind the contract. |

**Q:** Can a representor's opinion be a misrepresentation?

**A:** Sometimes – when there is a sufficient information asymmetry between the two parties, an opinion *implies a certain set of facts.*

## SMITH v LAND AND HOUSE [1884] UK CA

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| **FACTS** | **D** contracted with **P** to buy the title of the Marine Hotel. Smith had advertised that it was let to Fleck, "a most desirable tenant". **D** agreed to buy the hotel however Fleck, who had been overdue with rent, went bankrupt just before transfer of title. **D** refused to complete the transaction, defending against the **P's** action for specific performance on the basis that the description of Fleck's virtues was grounds for misrepresentation. |
| **REASONING** | The court disagrees that the **P**'s statements were not misrepresentations because they were opinions - in some instances, a statement of opinion intrinsically the existence of a certain set of facts. In cases where both parties have the same knowledge, then it is of no consequence. If there is an information asymmetry between the parties, then the one's opinion implies a certain set of facts. Any RP is going to presume that given **D**'s opinion implies a set of facts. |
| RATIO | A statement of opinion between a knowledgeable party and one who is not is a contractually binding statement of fact. |

**Q:** Can an omission be a misrepresentation?

## BANK OF BRITISH COLUMBIA v WREN [1978] BCSC

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| **FACTS** | Smith and Allan were directors of Wren. They wanted a loan, so they put up shares in another company that Wren owned as collateral with the Bank. Smith had the bank cash in shares without Allan knowing, who thought that the shares were still in place. Allan went to the bank to ask about them and they said they would "get back to you later on the details". The bank claimed the balance owing in place of the collateral from Allan. |
| **REASONING** | The court held that Allan had labored under the mistaken belief that collateral security pledged by the company was still at the bank. He had not been informed of any sale or exchange, his signature was required for banking transactions, and neither he nor the company had ever authorized Smith to act as agent. Allan had been materially misled by the words, acts and conduct of the Bank. Satisfied that Allan would not have signed the second loan guarantee if he had known all the facts, the court found his unilateral mistake was induced by misrepresentation (failure to disclose facts) to sign the second agreement. In the circumstances, he is not liable for repayment of the second agreement. |
| RATIO | Failures or omissions can qualify as a misrepresentation - bank should have disclosed crucial information.  Negligent misrepresentation permits rescission. |

**Q:** What if rescission is the appropriate remedy, but one of the parties has done something to the property to make that impossible?

**A:** In that limited scenario, the factual impossibility of returning things to the way they were allows damages to be awarded.

## KUPCHAK v DAYSON HOLDINGS [1965] BCCA

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| **FACTS** | The Kupchaks bought the shares of a motel company from Dayson Holdings, giving in exchange for two properties in the West End (on Haro St) and North Vancouver and a mortgage for $64,500 on the motel. Two months after the Kupchaks take possession of the hotel, it becomes obvious that past earnings of the hotel were false and they stop paying the mortgage. Both sides launch lawsuits. Dayson subsequently (on October 19) sold half of their interest in the Haro Street Property to Marks Estates Ltd. and the existing building was torn down and an apartment complex erected, substantially increasing the value of the property. The Kupchaks commenced their action against Dayson for rescission; in the meantime they had continued to live in and operate the motel. At trial the judge found there was fraud but denied rescission, and awarded only damages and the Kupchaks appealed. |
| **REASONING** | It is impossible for Dayson to return the Haro St property because (1) they sold half of their interest and (2) the property is no worth significantly more. It would be unjust to Dayson and Marks Estates to return the property to the Kupchaks. Instead of returning both properties, the Court requires Dayson to pay Kupchaks the value of the property on the day after the sale plus interest. Rescission is an equitable remedy, and this includes jurisdiction to order payment when restoration of the original position is impossible. *Laches* isn't an issue here because Dayson wasn't prejudiced by any delay - they were aware of the Kupchaks issue at the time of the sale to Marks Estates Ltd. |
| RATIO | Monetary compensation may be granted under rescission where it is impossible or inequitable to restore the original property. |

**Doctrine of *laches***: party that might deserve remedy can be denied remedy if they unreasonably delayed the process such that it prejudiced the opposing party.

[not examinable - maybe work it in if there's space]

Situations where the misrepresentee is not entitled to claim rescission:

1. When *restitutio in integrum* (restoration to original condition) is not possible
2. When third party rights intervene
3. When there is election or affirmation
4. When there is laches or delay
5. When rescission would cause radical injustice to misrepresentor
6. When there is innocent misrepresentation and the contract has been executed

How far are the courts willing to go in construing a statement as material to the negotiation of the **K**? Depends on the court and its sympathies… Looking at the lower court cases, it's all over the map.

### REPRESENTATION & RESCISSION

**Collateral Contract**

A collateral contract or warranty is a contract to enter a contract – a contract where the consideration is the entry into another contract, and co-exists side by side with the main contract. For example, a collateral contract is formed when one party pays the other party a certain sum for entry into another contract. A collateral contract may be between one of the parties and a third party.

## HEILBUT, SYMONS AND CO v BUCKLETON [1913] UK HL

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| **FACTS** | Respondent is a broker who buys a large number of shares from the appellant. Respondent believes that the company is a rubber company based on the appellant's representations. But it turns out that the company was not a rubber company, and once this fact became widely known the share price of the company dropped quickly. The respondent claimed that this was a collateral warranty – he had entered **K** as consideration in exchange for the appellant's representation that the company was in the rubber business. |
| **REASONING** | Court cautions against the use of collateral warranties based on a slippery slope argument. Court draws a very bright line between the four corners of the **K** and everything else that's going on. If the respondent wanted the contract to include that the company was a rubber company, that should have been included in the original **K**, rather than in a collateral contract. Collateral contracts that are to vary or add to the terms of the principal contract are viewed suspiciously and therefore must be proved strictly. There is no *animus contrahendi* (intention to contract) for the respondent's claimed collateral warranty to be found on the evidence here. There was no evidence of intent to deceive on the appellant's part, so the respondent is out of luck. |
| RATIO | 1. Acknowledges the existence of collateral contracts. 2. Collateral contracts require clear evidence of intention to create the K. 3. The burden of proof is on the person alleging the collateral K. |

## DICK BENTLEY PRODUCTIONS v SMITH [1965] UK CA

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| **FACTS** | This case revolves around a consumer transaction, rather than a financial one. Bentley purchased a car from Smith, relying on the representation (made on more than one occasion) that it had only traveled 20,000 miles after it had its engine and transmission replaced. Subsequent to the purchase it became clear that the engine had been driven much farther and repairs were required. Bentley spent money to fix the car back up and so brought an action for breach of warranty to get his money back. Bentley was awarded damages of £400 at trial, which Smith appealed. |
| **REASONING** | Denning, writing for a unanimous court, holds that it is an objective test to determine whether a collateral warranty was intended. Denning also states that there is a *prima facie* assumption that a representation made in the course of dealings for a contract for the very purpose of inducing a party into the contract is a warranty. It was intended to be acted upon, and it was in fact acted upon.  This presumption **cannot be rebutted** by a party that made a false statement because of their carelessness. *This comes awfully close to making innocent representations contractually liable.* The appellant was a car salesman and therefore he should have taken the diligence to discover how far it had traveled or at least he should not have made a false representation if he did not know the exact distance. Denning agrees with the trial judge that the representation was not fraudulent; however, it was stated as a fact and was a warranty in the contract for the sale of the car. Therefore, breaching it gives rise to a cause of action for damages. |
| RATIO | 1. It is an objective test that is used to determine if a representation was a warranty – if it was intended to be acted upon, and was acted upon, then it is a warranty. 2. A representation made during negotiations of a K for the purpose of inducing another party to enter into the K is presumed prima facie to be a collateral warranty, thereby reversing burden of proof from **HEILBUT**. 3. This presumption of contractual liability cannot be rebutted if the party's false statement was made carelessly. |

This is a real shift from HEILBUT– Denning wants courts to protect buyers and force sellers to be a lot more careful about what they say, because their statements can much more easily attract contractual liability unless they can prove that they were duly diligent and produce sufficient evidence to rebut the presumption of a collateral contract.

How to distinguish HEILBUTand DICK BENTLEY?

* Finance/business v consumer transaction
* Both exist in a pre-information economy - could a contemporary case be distinguished in this way?

**Q:** What happens when the buyer buys goods, realizes they've been induced to buy by a misrepresentation, wants to get their money back, but much time has passed?

## LEAF v INTERNATIONAL GALLERIES [1950] UK CA

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| **FACTS** | Buyer bought a painting under the understanding it was a Constable. 5 years pass before he realizes it's not and attempts to pursue action against the seller. |
| **REASONING** | Held for the **D –** too much time has elapsed since the sale to pursue action on this basis. The **P** should have had the painting appraised shortly after he bought it. The **P** asked for the wrong remedy, as there should have been a claim for damages instead. |
| RATIO | 1. If a warranty is breached then there is action in damages. 2. If a condition is breached then there is action in repudiation and in damages. 3. Repudiation is unavailable if sufficient time has passed that it would be unreasonable to order repudiation. |

**Repudiate**

To reject a contract because of a breach in the contractual terms.

**Rescission**

To reject a contract because of innocent misrepresentation that doesn't rise to the level of a contractual term.

STATUTORY REFORM

Because of the confusion in the common law, this has been an area of statutory reform.

In NZ, the NZ Contractual Remedies Act 1979 treats representations as a contractual term (similar to Denning's approach in DICK BENTLEY).

In Ontario, unenacted report recommended all statements by business sellers inducing consumer sales should be treated as warranties. This was enacted in Saskatchewan. In Alberta this area of the law is also extensively codified.

So generally, legislative intervention has endorsed the BENTLEY approach of protecting consumers because they are at an informational disadvantage and there is a resulting inequality of bargaining power.

ADVANTAGES OF LEGISLATION OVER COMMON LAW

1. Legislation can be more explicit and extensive in setting the standard.
2. Legislation can create enforcement mechanisms that are more accessible than a court of law.

# REMEDIES

Won't be a part of the hypothetical, but will be the focus of an essay question.

**Q:** What is the victim being compensated for?

**Reliance interest**: restore money lost as a result of relying on a party's representation (as in the McRAE salvage case). Backward-looking.

**Restitution interest**: restore money paid for failure of performance of contractual obligations. Backward-looking.

**Expectation interest**: can be specific performance order to perform contractual obligation, or damages to the extent of money that would have been earned/not lost. A future interest. Forward-looking.

**Q:** What are the boundaries of damages?

**A:** They are defined by case law and *stare decisis*.

**Q:** What about issues of causation?

**A:** Everything has a million causes - which are sufficient to merit consideration? Courts struggle with when to cut off the chain of causation (HADLEY v BAXENDALE).

**Q:** What kinds of opportunities will be recognized?

**A:** In McRAE, the court finds the opportunity was too uncertain to merit compensation. But in some situations, lost opportunities were certain enough that courts will be willing to make restitution for them.

## CHAPLIN v HICKS [1911] UK CA

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| **FACTS** | Aspiring actor, the **P**,sent photos to the **D**, a theatre manager, to win casting competition. 6000 photos initially submitted, cut to 50 by public voting, then a final cut to 12 by judges working for the **D**. **P** was voted number 1 in her district, made it to first cut of 50. But meeting with the **D** never took place because the **D** did not take reasonable steps to set it up. **P** sued on the basis that the **D** did not do enough to contact her and thereby breached the **K**. How to assess damages? |
| **REASONING** | Held for the **P** - there is sufficient certainty to make restitution for the **P**'s lost opportunity. She had *at least* a 25% chance of making it to the final cut. The stakes were also sufficiently high - the winners got a 3 year contract worth $450-750/week. So damages should be roughly 1/4: $100/week for 3 years. |
| RATIO | Expectancy damages can be awarded where there is sufficient and ascertainable probability. Damages are determined by multiplying the value of the stakes by the probability of their occurrence. |

**Q:** What about intangible interest, like emotional suffering?

**A:** Normally, courts are compensating loss of money with money (apples to apples). But courts can also compensate the loss of oranges with apples - they do it all the time in tort actions.

## JARVIS v SWAN TOURS [1973] UK CA

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| **FACTS** | **P** buys a holiday package that does not live up to its brochure AT ALL - clearly a breach of contract. How is the **P** compensated? TJ took view that **P** got half of the vacation contracted for, so **P** gets half his money back. |
| **REASONING** | Held for the **P** - it's not enough to give him half his money back. The **P** is also entitled to damages based on his lack of enjoyment and emotional distress. Lord Denning grants him twice the cost of the trip as compensation. |
| RATIO | Claimants can recover damages in contract for loss of enjoyment and other intangible interests. |

The court is willing to compensate people for mental harm (disappointment, emotional distress, etc.), similar to torts (JARVIS). JARVIShas been followed by Canadian courts routinely. No real formula here, and thus highly dependent on the court's discretion. The court's concern with these intangible interests stems from the fact that in a number of consumer transactions, the consumer is contracting for an emotional experience (along with the ever-present information asymmetry).

**AGGRAVATED & PUNITIVE DAMAGES**

Aggravated and punitive damages apply in cases where the **K** is breached in a particularly nasty way.

**Punitive damages** are additional to what is necessary to compensate the aggrieved party for the breach, and are granted to punish the perpetrator of the breach for their bad behaviour. This is outside the box of what courts normally consider as the ambit of contractual damages.

**Aggravated damages** are designed to compensate the victim for the additional harm they suffered due to the bad behaviour of the perpetrator.

Traditionally, contract law is concerned with costs. Therefore, parties are free to break contracts, so long as they pay for it. The breach of a **K** is not morally wrong or tortious, it just merits restitution. You are allowed to buy your way out of the **K**.

According to VORVIS, in order to get punitive damages, have to find an actionable wrong (which does not include merely breaking the **K**).

## VORVIS v ICBC [1989] SCC

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| **FACTS** | **P** was wrongfully dismissed from work. At work supervisor was oppressive and made life horrible. **P** found work 7 months later. **D** paid one month severance |
| **REASONING** | Held for the **D**. Role of aggravated damages is compensatory (for **P**) – increased over and above the normal economic loss. Punitive damages may only be employed in circumstances where the conduct giving cause for complaint is of such a nature that it merits punishment. |
| RATIO | **The claim for compensation (aggravated damages) for mental distress must be grounded in an independently actionable conduct. NOTE: due to** WHITEN **you no longer need an actionable wrong.** |

## WHITEN v PILOT INSURANCE CO [2002] SCC

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| **FACTS** | **D** denied an insurance claim by **P** after her house burns down. **D** refuses to pay, baselessly alleging that the family burned their own house down. This was a strategy to try to coerce the **P** into accepting a settlement below market value. CA awarded **P** punitive damages. Was the claim for punitive damages properly pleaded? |
| **REASONING** | As long as there is an actionable wrong, it doesn't need to rise to the level of a tort. There is an obligation, impliedly, on the insurance company to act in good faith. No test to determine which **K**s have similar implications (possibly employment **K**s as well). Punitive damages are designed to punish the **D**, rather than compensate the **P**, and this is how they should be calculated - based on the nastiness of the **D**'s behaviour, rather than the consequences suffered by the **P**. |
| RATIO | 1. Punitive damages can be awarded in the absence of an actionable wrong. 2. Some *K*s (like insurance *K*s) carry additional implied conditions (such as a duty of good faith & fair dealing). This isn't going to apply to every *K*, but those *K*s where there is an inequality of bargaining power and sufficiently high stakes. |

It will be very rare that even a wrongful dismissal will lead to punitive damages. Generally, it is not an actionable wrong to fire someone.

## WALLACE v UNITED GRAIN GROWERS [1989] SCC

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| **FACTS** | **P** was fired after 14 years with the company. Each of these 14 years, the **D** had been a top salesman. Rumors started that he had been involved in wrongdoing, and **P** was unable to get new work. As a result, **P** developed mental illness and requiring hospitalization. |
| **REASONING** | Before awarding punitive damages, the firing must be harsh, vindictive, reprehensible and malicious (a high standard). The **D**'s conduct doesn't rise to this level. The court declined to find any implicit obligations to employment relationship- this would fly in the face of sound employment policy as freedom of contract. No one should be forced to stay in an employment **K** they hate. The court does not want to undermine the freedom of contract principle. Damages will not flow if injury occurs after the **K** is broken.  Employment has a unique nature: there are power imbalances at the heart of the employer-employee relationship and high stakes to keeping or losing a job. These factors weigh against the freedom of contract principle outlined earlier. To find a balance between these factors, the Court will find a remedy for the **P** in aggravated damages based on the **D**'s bad faith conduct and the intangible injuries to the **P**. While the C of A's argument that bad faith conduct on the **D**'s part can lead to difficulties in the **P**'s finding new employment qualifies as a tangible loss is accepted, the SCC finds that the intangible injuries are sufficient to merit compensation. Bad faith conduct doesn't refer to the core of the **K** and the fact of the dismissal, but only to the manner of the dismissal itself. |
| RATIO | In employment *K*s, the manner of dismissal is relevant – bad faith conduct on the part of the employer can lead to intangible injuries and therefore aggravated damages. |

COST OF COMPLETION vs DIFFERENCE IN VALUE

Imagine you are renovating your bathroom. You specified that your contractor use tiles from Italy, but they use tiles from Spain. The tiles don't look that different. How to remedy the situation? Two approaches:

**Cost of completion**: the cost to rip up the Italian tiles and replace them with the Spanish ones.

**Difference in value**: the difference between the value of the Italian tiles and the Spanish ones.

In most scenarios, it will be more costly to make things right than just to merely compensate for the difference in value. It is also possible (though only in special circumstances) to pursue the cost of buying substitute performance.

Victims of breach (particularly in the construction context) will want to recover the cost of completion, rather than the difference in value.

## NU-WEST HOMES v THUNDERBIRD [1975]

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| **FACTS** | Building not in accordance with plans and specs that had originally been promised. Relationship deteriorates and work is stopped. **P** sues for payment. Counter suit to compensate third party. Thunderbird has done self-help to remedy the situation and that help costs 16K. TJ awards $4K, which is not the cost of completion, just the difference in value. |
| **REASONING** | CA says TB should get 16K. The damages should cover the cost of completion. General principle in this case: the owner of the building is entitled to recover the damages to get the just the building you contracted for  2 caveats  1. @ P823: Where the cost of rectification is minimal in comparison to the nature of the defect, but the cost to change is high, there may be argument for not awarding costs for completion. “Specifications called…hardly appreciable.” — That kind of situation, no award for cost of completion.  2. If you take self-measures that aren’t reasonable to rectify the situation, you may not be able to recover. |
| RATIO | In general, the owner of the building is entitled to recover the cost of completion unless (1) the cost of rectification vastly outweighs the nature of the mistake, or (2) unreasonable steps are taken to rectify the mistake. |

**Way to frame arguments on exam:** To avoid the presumption that damages will be awarded on the basis of completion as opposed to the difference in value, the **D** needs to show the defects were trivial and innocent (ie. that there’s no difference between Vermont and New Hampshire granite) **OR** that the actions taken to remedy the defect were not reasonable.

In terms of the factors the court will find most persuasive: lead with the market value of the item you wanted but didn’t get (not just price, also degree to which that factor influenced your choice to purchase). This inflates the size of the supposed loss.

## HADLEY v BAXENDALE [1854] UK

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| **FACTS** | **P** operated a mill, and a component of their steam engine broke causing them to shut down the mill. **P** then contracted with **D**, common carriers, to take the component to W. Joyce & Co. to have a new part created. When delivery was delayed due to **D**’s neglect, causing **P**’s mill to remain closed longer than expected, **P** sued to recover damages. |
| **REASONING** | Held for the **D**. While the breach by **D** was the actual cause of the lost profits of **P**, it cannot be said that under ordinary circumstances such loss arises naturally. There is a multitude of reasons for a miller to send a crank shaft to a third party. **D** had no way of knowing that their breach would cause a longer shutdown of the mill, resulting in lost profits. Further, **P** never communicated the special circumstances to **D**, nor did **D** know of the special circumstances. |
| RATIO | Claimants are only entitled to damages arising naturally from the breach itself or those that are in the reasonable contemplation of the parties at the time of contracting. |

## VICTORIA LAUNDRY v NEWMAN INDUSTRIES [1949] UK

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| **FACTS** | **P** expanding capacity in in anticipation of getting bigger contracts. **D** fails to deliver boiler on time. Real issue becomes one about what do they get in terms of that several month delay – should they get the amount they would have gotten if they would gotten the new and lucrative contracts (these are special circumstances). Propositions 2, 3 and 4 (from the notes in the text) are the ones to focus on… |
| **REASONING** | Two points made explicit that were implicit in HADLEY:   1. Test has to be objective - there is a general and particular test, but they are both objective. Particular test can include special knowledge and circumstances relevant to the context, but the test is still based on the reasonable person. 2. The test is not what would certainly have resulted, but what would be the likely reasonably foreseeable consequences of breaching the contract?   Court sends the case back to an arbitrator to determine what the damages would be. The P should be able to recover for lost profits due to not having the boiler. But there can't be recovery for losing the specific set of contracts that the P had - the D *didn't know about them*, there was no communication. These contracts were thus special circumstances. All that the D is liable for is the loss of profits that they could have reasonably foreseen based on their knowledge. |
| RATIO | Both tests are objective. Awarding damages is based on RF losses based on the D's context - can't provide restitution for a specific lost K if the D didn't know about it. |

## SCYRUP v ECONOMY TRACTOR PARTS [1963] MB CA

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| **FACTS** | **P** contracts with **D** to provide him with an attachment for his tractor. **P** makes it known that he needs it in a hurry, it needs to be functional, and he needs it for a particular job. The attachment turns out to be defective. **P** can't do the job, contract is lost, and **P** sues the **D** for the loss of profits for losing the contract. |
| **REASONING** | Held for the **P** fairly easily. It was reasonable foreseeable that profit would be lost. Found that there was sufficient knowledge of special circumstances to qualify for the particular test. Facts are read such that the **K** is typical. |
| RATIO | Awards damages for a specific lost K, even with just imputed knowledge. |

**DISSENT**

If freedom of contract means that you have the freedom to leave a **K** as well as enter one, then need to lower consequences for breach of **K**. Consequences of breach need to be determinate, and not uncertain. Not clear that there was sufficient knowledge of the particular **K** on the part of the **D** to incur liability. Harsher than VICTORIA LAUNDRY – because of insufficient evidence that the equipment would be used in a profitable way at all, the **P** should get no expectation damages, only restitution, perhaps reliance damages.

**Q:** How to reconcile SCYRUP and VICTORIA LAUNDRY?

**A:** There was actual knowledge in the first case, but not the in the second.

Problem: SCYRUP court is willing to impute knowledge to the **D** as to the uses of the tractor attachment and then award profits from a particular **K**.

## KOUFOS v CZARNIKOW (THE HERON II) [1969] UK HL

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| **FACTS** | **P** contracted with **D** (a shipping company)to deliver sugar. Option not exercised, ship went to Basrah but made some deviations and arrived 9 days later. When dealing with a commodity, markets are volatile and being late can have significant consequences in terms of profits. In this case, it resulted in a loss. If the ship had arrived on time, the **P** would have made significantly more off the sugar. So the **P** sues for the difference. |
| **REASONING** | Question then, from the perspective of RF - when the **D** enters the **K**, what are the RF consequences of a breach? Could be good OR bad. How liable then is the **D**? The court holds that there is sufficient probability of a loss ("not very unusual") to hold the **D** liable for the difference in profits caused by the breach of the **K**. The **D** should have known that there was at least a significant probability of a loss caused by a breach, even without special knowledge. Held for the **P**. |
| RATIO | Don't need certainty of negative consequences for RF consequences, just some measurable probability. |

KOUFOS is generous to **P**s.

Common thread in these cases is what is going to happen in the ordinary case of events, or, when there is a special loss, did the **D** have special knowledge such that the **P**'s special loss was RF to a RP in the **D**'s position? What about unforeseen changes in commodities prices (ie. sugar is banned, sugar wars, etc.)? KOUFOS seems concerned with "ordinary course of events", and so the **D** would likely **not** be liable in that case.