LAW 110: Contracts

# II. Excluding and Limiting Liability and Standard Form Contracts

## 1. Contract Interpretation Principles

## 2. Unsigned Documents

* Four variables to think about in these cases:

1. **Nature of the circumstances**
   * *Was the transaction hurried or did the person signing it have lots of time to think about it?*
2. **Nature of the document**
   * *Could you reasonably presume that the issuee read and understood it?*
3. **Nature of the clause** 
   * *How onerous was the clause from the consumer’s perspective?*
4. **Nature of the parties**

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| Thornton v Shoe Lane Parking |
| Facts – Thornton was injured in Shoe Lane Parking’s garage. Thornton had taken a ticket from a machine, which said in small print that it was issued subject to the conditions of issue as displayed on the premises. Thornton would have had to be in the garage in order to see the conditons. One of the conditions talked about insurance and attempted to exempt Shoe Lane from liability for damage to the car and customer.  Plaintiff – Thornton  Defendant – Shoe Lane Parking  Who won? Thornton  Issue – Can Shoe Lane avail themselves of the exempting condition?  Holding – The exempting condition does not apply.  Ratio – Where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party.  The relationship between the severity of the notice and the degree of effort the issuer has to go to is considered in order to see if the reasonable sufficiency test is met.   * More severe 🡪 more effort the issuer has to put out to bring it to the notice of the consumer   If you can’t draw a reasonable inference that D should have known because P took reasonable steps to draw his/her attention to it, D must prove that P knew of the conditions.  Reasoning – Ticket cases do not apply to tickets issued by an automatic machine (the ticket is a merely a receipt for the money that has been paid on terms that have been offered and accepted before the ticket was issued).  If ticket cases did apply:  The exempting condition was so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. Shoe Lane  Test – *Parker v South Eastern Ry Co*  Customers would be bound by the terms on a ticket if   1. They knew that there was writing on the ticket and that the writing contained condition, or 2. They knew that there was writing on the ticket and had received reasonable notice that the writing contained conditions\*   \*Denning LG qualifies “conditions” to mean either “condition” or “exempting conditions” |

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| Interfoto v Stiletto Visual |
| Facts – Stiletto Visual sent Interfoto 47 transparencies with a delivery note that stated as one if its conditions that the transparencies must be returned within 14 days to avoid being charged a holding fee of 5*l*/day for each transparency. The transparencies were not returned within 14 days, and Interfoto invoice Stiletto Visual for 3,783.50*l*. The invoice was rejected, and Interfoto brought an action.  Plaintiff – Interfoto  Defendant – Stiletto Visual  Who won? Stiletto Visual  Issue – What the condition sufficiently brought to Stiletto Visual’s attention?  Holding – The condition never became part of the contract and the judgment should be reduced to the reasonable charge.  Ratio – The three factors (nature of transaction, nature of document, nature of clause) can be considered in corporate cases and cases not involving an exclusion clause as well as consumer cases involving an exclusion clause.  Reasoning – The condition was a very onerous clause and nothing was done by Interfoto to draw Stiletto Visual’s attention to it.  Nature of transaction: Thrown in a jiffy bag  Nature of document: Four columns at the bottom of a chit  Nature of clause: Very onerous |

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| McCutcheon v MacBrayne |
| Facts – McSporran sent McCutcheon’s car by vessel. McSporran entered into an oral contract, but did not sign a risk note because the purser forgot to ask him to. The vessel sank due to negligent navigation and McCutcheon sued David MacBrayne Ltd.  Plaintiff – McCutcheon  Defendant – MacBrayne  Who won? McCutcheon  Issue – Did the conditions form part of the oral contract?  Holding – The conditions do not apply.  Ratio – If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions, it may be that those conditions ought to be implied. However, previous dealings are relevant only if they prove knowledge of the terms (actual and not constructive) and assent to them.  Implication cannot be made against a part of a term that was unknown to him.  Reasoning – There was no constant course of dealing (sometimes McSporran was asked to sign and sometimes not) and he did not know what the conditions were. |

## 3. Signed Documents

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| L’Estrange v Graucob |
| Ratio – Where a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. |

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| Tilden Rent-a-Car v Clendenning |
| Facts – Clendenning rented a car and asked for additional coverage. He signed the contract in front of the clerk and did not read it. It contained a clause (on the back in small and faint type) that “The customer agrees not to use the vehicle in violation of any law, ordinance, rule or regulation of any public authority” and that “The customer agrees that the vehicle will not be operated by any person who has drunk or consumed any intoxicating liquor, whatever be the quantity”. He later drove the car into a pole while trying to avoid a collision and pleaded guilty to a charge of driving while impaired on the advice of counsel, although at the time of the impact he was capable of the proper control of a motor vehicle. The clerk had previously told him that the additional coverage provided full non-deductible coverage, and Clendenning had assumed that he would be covered unless damage was caused by his being so intoxicated as to be incapable of the proper control of the vehicle.  Plaintiff – Tilden Rent-a-Car  Defendant – Clendenning  Who won? Clendenning  Issue – Is Clendenning liable for the damage caused to the car by reason of the exclusionary provisions in the contract?  Ratio – **A signature will not always equal consent, even if the signature is not the result of fraud or misrepresentation.**  If the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions the standard form contains, the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party.  Reasoning –   1. Clendenning did not read the contract and the clerk could not have helped but to have known this. 2. A consumer would think from looking at the front of the contract and talking to the clerk that he/she was getting complete coverage, but he/she would actually be getting extremely limited coverage. 3. Clendenning said he wouldn’t have entered into the contract if he had known about the clause (subjective), and it’s reasonable that he wouldn’t have entered into the contract (objective). 4. The contract was entered into in haste. 5. Tilden didn’t take any steps to alert Clendenning to the onerous provision. 6. It was a consumer transaction.   Test – Six factors to consider to determine whether a signature equals consent   1. Is it reasonable to assume that the representative of the company knew/didn’t know that the signer hadn’t read it?    * Nature of the document 2. Is the condition that the company is relying on completely inconsistent with the express terms that they are providing?    * Nature of the clause 3. Would the signer have entered the contract if they knew the full terms?    * Nature of the clause 4. Was the contract entered in haste?    * Nature of the circumstances 5. Did the representative take steps to alert the signer of the onerous provision?    * Nature of the circumstances 6. Was it a consumer transaction as opposed to a commercial transaction?    * Nature of the parties |

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| Karroll v Silver Star Mountain Resorts |
| Facts – Karoll broke her leg in a recreational skiing competition at Silver Star. She signed a release with “RELASE AND INDEMNIFY—PLEASE READ CAREFULLY” at the top without reading it, but does not recall if she was given an opportunity to read it. The document would have taken one or two minutes to read, but Karroll could not recall if she was given an opportunity to read it. Karoll had participated in the race four times before. She sued Silver Star alleging they were negligent. She contends that the release is not binding because she was not given a reasonable opportunity to read and understand it.  Plaintiff – Karroll  Defendant – Silver Star Mountain Resorts  Who won? Silver Star Mountain Resorts  Issue – Was Karroll bound by the terms of the release?  Holding – Karroll was bound by the terms of the release.  Ratio – **The exception that “where the party seeking to enforce the document knew or had reason to know of the other’s mistake as to its terms, those terms should be enforced” is entirely in the spirit of the two recognized exceptions in *L’Estrange v Graucob*.** Where a party has reason to believe that the signing party is mistaken as to a term, then the signing party cannot reasonably have been taken to have consented to that term; the signature that purportedly binds him to it is not his consensual act. Similarly, to allow someone to sign a document where one has reason to believe he is mistaken as to its contents is not far distant from active misrepresentation.  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.  Reasoning – A reasonable person should not have known that Karroll did not intend to agree to what she signed and in the alternative, Silver Star took reasonable steps to discharge any obligation (by placing a heading at the top of the document, whith a capitalized admonition to read it carefully).  **Nature of circumstances:** Signing such releases was a common feature of this ski race (Karroll had signed such releases on previous occasions)  **Nature of document:** Release was short, easy to read, and headed in capital letters  **Nature of clause:** Release was consistent with the purpose of the contract (the purpose of the contract was to permit Karroll to engage in a hazardous activity)  Test – The signer is bound by the release **unless**   1. In the circumstances a reasonable person would have known that he/she did not intend to agree to the release he/she signed\*, and 2. In these circumstances issuers failed to take reasonable steps to bring the content of the release to the signer’s attention   \*Relevant factors:   * + Effect of exclusion clause in relation to the nature of the contract (nature of the clause)     - If it runs contrary to the party’s normal expectations it is fair to assume that he does not intend to be bound by the term.   + Length and format of the contract (nature of the document)   + Time available for reading and understanding (nature of the circumstances) |

## 4. Fundamental Breach

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| Karsales v Wallis |
| Facts – Wallis agreed to buy a car from Stinton, which he found in excellent condition. Stinton arranged financing for the car through Karsales. About a week later, Wallis found the car to be badly damaged and unable to run. Wallis said he would not accept the car from Stinton, and Karsales sued Wallis for ten months’ installments. Karsales relied on an exempting clause that stated that no one was liable for anything that happened to the car.  Plaintiff – Karsales  Defendant – Wallis  Who won? Wallis  Issue – Can Karsales rely on the exempting clause?  Holding – Karsales cannot rely on the exempting clause.  Ratio – The rule of law approach to fundamental breach:  A breach that goes to the root of the contract disentitles the party from relying on the exempting clause.  Reasoning – It’s not fair for a company to contract out of liability for completely failing at what it contracted to do. |

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| Photo Production v Securicor |
| Facts – Securicor provided security services to Photo Production at a low cost of 26*p*/visit. An employee of Securicor deliberately started a fire in the factory of Photo Production, which burnt down a large part of the premises. It was not established that he intended to destroy the factory. Securicor relies on a condition limiting the liability.  Plaintiff – Photo Production  Defendant – Securicor  Who won? Securicor  Issue – Can the conditions be invoked at all in the events that happened? If so, can the exclusion provision, or a provision limiting liability, be applied on the facts?  Holding – Liability is excluded because the clause covers deliberate acts.  Ratio – Rule of construction approach to fundamental breach:  Whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matte of construction of the contract.  **Courts must look to the construction of the contract for what the parties agreed should happen if a fundamental breach occurs.**  It is wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied obligations.  Reasoning – Commercial actors do not need the protection of Parliament or the courts – freedom of contract must be preserved. |

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| Hunter Engineering v Syncrude Canada |
| Facts – Syncrude contracted with Allis-Chambers for extraction conveyer systems (priced at $4.1 million), which included four extraction gearboxes. The contract contained a clause that contained a warranty that expired within 24 months after delivery or 12 months after the gearboxes entered service, and that contract was governed by the Ontario Sale of Goods Act. Two years later, defects were discovered in the gearboxes (requiring repairs of $400,000). Allis-Chalmers denired responsibility relying on the expiry of the contractual warranty. Syncrude sued.  Plaintiff – Syncrude Canada  Defendant – Allis-Chambers  Who won? Allis-Chambers  Holding – Allis-Chalmers is not held liable.  Ratio –  Wilson J: A “reasonableness” requirement should be imported into law so that courts can refuse to enforce exclusion clauses in strict accordance with their terms if to do so would be unfair and unreasonable. Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. But, the court must still decide, having ascertained the parties’ intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts.  To dispense with the doctrine of fundamental breach and rely solely on the principle of unconscionability would require an extension of the principle of unconscionability beyond its traditional bounds of inequality of bargaining power.  Dickson CJC: The doctrine of fundamental breach should be replaced with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable.  Test – Wilson J’s “fair and reasonable” approach   1. Did a fundamental breach occur? 2. If so, is it fair and reasonable in the context of this fundamental breach that the exclusion clause continues to operate for the benefit of the party responsible for the fundamental breach?   Relevant factors:   * + Whether the parties are of roughly equal bargaining power   + Whether the party who seeks to rely on the exclusion clause was guilty of any sharp or unfair dealing   + Whether a party was “deprived of substantially the whole benefit” of the contract (whether the breach was a better or worse fundamental breach)   Dickson CJC’s unconscionability approach   1. Interpret the terms of the contract in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. 2. Only where the contract is **unconscionable**, as might arise from situations of **unequal bargaining power between the parties**, should the courts interfere with agreements the parties have freely concluded.   Reasoning –  Wilson J:  The breach did not undermine the entire contractual setting nor did it go to the very root of the contract—it was not fundamental.   * Allis-Chalmers breached only one aspect of its contract * The gears’ inferior performance did not deprive Syncrude of substantially the whole benefit of the contract * The cost of repair was only a small part of the total cost   However, if the breach was fundamental:  There would be nothing unfair or unreasonable (and even less so unconscionable) in giving effect to the exclusion clause.   1. The contract was made between two companies in the commercial market place who are of roughly equal bargaining power 2. There is no evidence to suggest that Allis-Chalmers was guilty of any sharp or unfair dealing 3. Syncrude was not deprived of substantially the whole benefit of the contract   Dickson CJC:  The warranty provision of the contract clearly limited the liability of Allis-Chalmers to defects appearing within one year from the date of placing the equipment into service.  Unconscionability is not an issue in this case   * Both parties are large and commercially sophisticated companies * Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract * There is no suggestion that Syncrude was pressured in any way to agree to terms to which it did not wish to assent |

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| Fraser Jewelers v Dominion Electric Protection |
| Facts – Fraser Jewelers entered into a contract with Dominion Electric Protection (ADT) for a burglar alarm system and monitoring system. Gordon (Fraser Jewelers) did not know about the clause that provided that ADT is not an insurer; that insurance should be obtained by the customer; that amounts payable by the customer are based on the value of services; and that the scope of liability is unrelated to the value of property. Robbers escaped from Fraser Jewelers with $50,000 of jewelry when ADT failed to respond to an alarm signal for about 10 minutes.  Plaintiff – Fraser Jewelers  Defendant – Dominion Electric Protection  Who won? Dominion Electric Protection  Issue – Was ADT entitled to limits liability to the amount of the annual monitoring charge ($890)?  Holding – ADT was entitled to limit its liability.  Ratio – **The difference in practice between Dickson CJC’s test and Wilson J’s test is unlikely to be large.**  Whether the breach is fundamental or not, an exclusionary clause of this kind, should, *prima facie*, be enforced according to its true meaning. Relief should be granted only if the clause, seen in the light of the entire agreement, can be said, on Dickson CJC’s test, to be “unconscionable” or, on Wilson J’s test, to be “unfair or unreasonable”.  Reasoning – ADT’s negligence cannot be equated to a fundamental breach.  The limitation clause is not rendered unenforceable.   * The fact that Gordon chose not to read the contract is not sufficient to vitiate the clause. * Mere inequality of bargaining power does not entitle a party to repudiate an agreement; the question is whether there was an abuse of bargaining power.   + There is no evidence of any such abuse (ADT did not obtain the contract by any unfair use of its stronger position or sought to take advantage of Gordon) * The rational underlying the limitation clause is apparent and makes sound commercial sense.   + ADT has no control over the value of its customers’ inventory and can hardly be expected, in exchange for a relatively modest annual fee, to insure a jeweler against negligent acts on the part of its employees up to the value of the entire jewelry stock; the exemption clause cannot be said to be unusual; |

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| Solway v Davis Moving |
| Facts – Akler and Solway contracted with Kennedy Moving (cob Davis Moving) to have their household goods stored and moved. The trailer containing their goods was left on a public street and stolen. Kennedy Moving represented that their goods would be secure and parked in their yard. Kennedy Moving was aware that the goods were not ordinary. Kennedy Moving relied on a liability clause and a regulation of the *Truck Transportation Act*, which limits claims to $0.60/pound. Akler and Solway were aware of this clause and had bought additional insurance.  Plaintiffs – Akler and Solway  Defendant – Davis Moving  Who won? Akler and Solway  Issue – Should Kennedy Moving be permitted to invoke the limitation of liability clause?  Holding – Kennedy Moving should not be permitted to invoke the limitation of liability clause.  Ratio – An exclusion clause will not be applied if it is unconscionable or unfair or unreasonable.  Reasoning – The limit the loss of the plaintiffs to $7,089.60 would, in the words of Dickson CJC be “unconscionable”, or in the words of Wilson J be “unfair or unreasonable”.  Carthy JA (dissenting):  Dickson CJC would conclude that there was no unconscionability in the terms of this contract. The liability clause was imposed by statute, and in this case upon knowledgeable and sophisticated persons. Wilson J would have looked as well at the outcome, but surely would have concluded that all policy concerns pointed to enforcement of a provision born in legislation which itself was driven by policy.  Note – The Court collapses the whole inquiry into one inquiry: unconscionable. |

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| Plas-Tex v Dow Chemical |
| Facts – Dow Chemical sold defective resin to Plas-Tex. The contact 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 the resin was defective and that it was dangerous. Plas-Tex was eventually forced to undertake major remedial operations and their reputation was damaged. Plas-tex eventually petitioned into bankruptcy.  Plaintiff – Plas-Tex  Defendant – Dow Chemical  Who won? Plas-Tex  Issue – Can the liability-limiting clause be enforced?  Holding – Dow’s conduct was unconscionable.  Ratio – Unconscionability might arise from situations of unequal bargaining power. Failure to disclose risks is a feature of unconscionability.  Test – D will be prohibited from relying on the limited liability clause if D,   1. Knew of a possible risk associated with its product 2. Failed to disclose important assumptions within its knowledge thereby preventing the other party from properly measuring the consequences and risks they were undertaking 3. Deliberately withheld information and induced the claimant to enter the agreement on the basis that the other party had “scientifically done their homework”   Reasoning – The resin was completely unsuitable for use as natural gas pipeline. Dow knew that defects in its product would cause the pipe manufactured from it to fail, that the respondents and others would be burying the pipe in order to supply natural gas all over rural Alberta, and that cracking of such pipe could result in potential danger to property and persons. |

# III. Protection of Weaker Parties

## 1. Duress

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| Greater Fredericton Airport Authority v Nav Canada |
| Facts – Greater Fredericton Airport Authority (GFAA) asked Nav Can to relocate an instrument landing system (ILS). Nav Can wanted to replace a portion of the existing ILS with new distance measuring equipment (DME) rather than relocating entire system, and refused to relocate ILS unless GFAA paid for new equipment. GFAA said they were not responsible for paying for equipment, but promised, by way of a letter signed under protect, to pay the acquisition costs of the equipment. Nav Can installed the equipment but GFAA refused to pay.  Promisor – Greater Fredericton Airport Authority (respondent)  Promisee – Nav Canada (appellant)  Who won? Greater Fredericton Airport Authority  Issue – Had the plea of economic duress been established?  Holding – The plea of economic duress was established.  Test – A finding of economic duress is dependent *initially* on two conditions precedent:   1. The promise (the contractual variation) must be extracted as a result of the exercise of “**pressure**”, whether characterized as a “demand” or a “threat”  * If the variation comes at the instance of the promisor (the so-called victim), it cannot be credibly argued that variation was coerced  1. The exercise of that pressure must have been such that the coerced party had **no practical alternative** but to agree to the coercer’s demand to vary the terms of the underlying contract  * If the evidence establishes that other practical alternatives were available to the victim, the plea of economic duress must fail at the threshold stage   Once these two threshold requirements are met, the legal analysis must focus on the ultimate question: whether the coerced party “consented” to the variation. To make that determination three factors\* should be examined:   1. Whether the promise was supported by **consideration**  * If the variation is not supported by consideration, the court may be more sympathetic to the plea of economic duress, but even if there is consideration for the contractual variation, it may still be unenforceable under the doctrine of economic duress  1. Whether the coerced party made the promise “**under protest**” or “without prejudice”  * A failure to “object” to the variation is not necessarily fatal to a plea of economic duress, but the failure of the promisor to voice any objection at the time that contractual variation was extracted may ultimately prove fatal  1. If not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable  * In the absence of a promise made under protest, the law insists that the victim take reasonable steps to repudiate or disaffirm the promise as soon as practicable * The law will reject a plea of economic duress where commercial parties make deliberate decisions that they later regret   \*The last two factors are more likely to have a bearing on the ultimate outcome of case than the first   * Access to independent legal advice on the part of the victim is not sufficient to overcome the finding that he/she had no alternative but to submit to the contractual variation * That the promisor was not acting “opportunistically” does not have an impact on a finding of economic duress, but the good faith of the supposed coercer may be a reason why the supposed victim consents to the variation   Reasoning –   1. Nav Can exerted pressure to obtain what amounts to a contractual modification. 2. Airport Authority was left with no practical alternative. 3. Consent  * The promise was not supported by fresh consideration. * Airport Authority did not acquiesce to Nav Can’s demand and pressure by virtue of the lapse of time. |

## 2. Undue Influence

## 3. Unconscionability

* The unconscionability excuse is available where two elements are present:

1. An improvident bargain
2. An inequality in the positions of the parties

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| Morrison v Coast Finance |
| Facts – Morrison, an elderly widow, was persuaded by two men to borrow $4,200 from Coast Finance on a first mortgage on her home (her only asset) to lend them so they could repay Coast Finance and pay for automobiles. She had no independent advice, and the bank knew full well what was going on. The men failed to pay her and she commenced action to have the mortgage set aside as having been procured by undue influence.  Plaintiff – Morrison  Defendant – Coast Finance  Who won? Morrison  Issue – Was the whole transaction unconscionable?  Holding – It was unconscionable for the two men and the companies to have Morrison mortgage her home in order to secure money to lend to the two men.  Ratio – The traditional approach to unconscionability includes an **exceptional circumstance** and **bad behavior** on the part of the perpetrator.  Test – Traditional doctrine of unconscionability\*   1. Proof of inequality in the position of the parties arising out of the ignorance, need, or distress of the weaker, which left him in the power of the stronger. 2. Proof of substantial unfairness of the bargain obtained by the stronger.   \*This creates a presumption of fraud that the stronger must repel by proving that the bargain was fair, just and reasonable, or perhaps by showing that no advantage was taken.  Reasoning – There was inequality in the position of the parties, and for the companies to take advantage of Morrison’s obvious ignorance and inexperience to further their respective businesses raises a presumption of fraud. |

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| Lloyds Bank v Bundy |
| Facts – Bundy and his son were customers of Lloyds Bank. The son’s company was in difficulties, and Bundy guaranteed the company’s overdraft and charged his home to secure it. The company had further problems and Bundy was asked to guarantee 11,000*l* (more than the house was worth), in exchange for the bank cutting down the overdraft, but allowing the company to draw money on the overdraft up to the existing level of 10,000*l*. The bank manager did not leave the forms with Bundy, and he did not receive any independent advice. The company again had problems and the bank insisted on the sale of the house.  Plaintiff – Lloyds Bank  Defendant – Bundy  Who won? Bundy  Holding – The case falls within the second class of the category of undue influence.  Ratio – In the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. Yet there are exceptions to this general rule.  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 grievously impaired by reason of his own need or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other.  **The principle does not depend on proof of any wrongdoing (unlike in *Morrison*).**  Test – Unconscionability   1. Is there an improvident deal? 2. Is there inequality in the positions of the parties? 3. Is there an external pressure?   Reasoning –   1. The consideration moving from the bank was grossly inadequate (this is an improvident deal) 2. The relationship between Bundy and his son was one where Bundy’s natural affection had much influence on him (an external pressure) 3. There was a conflict of interest between the bank and Bundy, yet the bank did not realize it nor suggest that Bundy should get independent advice (Bundy trusted the bank and the bank failed in that trust).   Note – This case moves the common law forward in three ways:   * Parties can be relieved of deals even if they walked into them with their eyes open and consented * The perpetrator doesn’t necessarily have to have had malice, or done anything fraudulent * The victim doesn’t have to be extraordinarily vulnerable |

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| Harry v Kreutziger |
| Facts – The RESP purchased a boat for $4,500 (that he knew was worth $16,000) from the appellant, whom he knew was partially deaf, easily intimated and ill-advised, by a process of harassment. The RESP assured the appellant that he would be able to get a license for a new boat, but this was not the case.  Who won? Appellant  Issue – Should the court rescind the contract?  Holding – The whole circumstances of the bargain reveal such a marked departure from community standards of commercial morality that the contract of purchase and sale should be rescinded.  Ratio – **Unconscionability rests on deliberate wrongdoing.**  Reasoning – The appellant was so dominated by the RESP that he was within the power of the RESP in these dealings.  Note – *Hunter* and *Plas-Tex* suggest that the SCC favours the traditional approach founded on inequality of bargaining power. *Plas-Tex* also provides the idea that even when you have two parties punitively of equal bargaining power, the way the transaction unfolds may put them in unequal bargaining positions. |

Exam approach:

1. If you can find wrongdoing 🡪 use traditional approach
2. If the vulnerability of the victim isn’t exceptional and the perpetrator didn’t act maliciously, but there is **inequality of bargaining power and some external factor** 🡪 use *Lloyds Bank v Bundy* approach

# IV. Mistake and Frustration

## 1. Mistake

* **Common mistake** – the parties make the same mistake
  + Example:
    - One party contracts to sell a vase to another when unbeknown to both, the vase was destroyed
* **Mutual mistake** – both parties are mistaken, but their mistakes are different
  + Example:
    - A believes he has agreed with B on terms X and B believes she has agreed with A on terms Y
* **Unilateral mistake** – only one of the parties operates under a mistake
  + If the other party is not aware of the one party’s erroneous belief 🡪 the case is one of mutual mistake
  + If the other party knows of the one party’s erroneous belief 🡪 unilateral mistake
  + Example – *Smith v Hughes*

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| Smith v Hughes |
| Facts – A farmer sold oats to a trainer (providing him a sample beforehand). There was a conflict between the parties as to whether anything was said on the subject of the oats being old. The trainer said that all trainers used old oats, but the farmer denied having known that. The price was very high for new oats, but oats were scarce at the time.  Plaintiff – Farmer  Defendant – Trainer  Who won? Farmer  Issue – Should the contract be rescinded?  Holding – The contract should not be rescinded.  Ratio – Responsibility is on the buyer, as opposed to the seller to specify in the contract for what they want or do their research.  Reasoning – The two minds were not ad idem as to the age of the oats, but they certainly were ad idem as to the sale and purchase of them.  Test – Whether the court will imply a condition   * If parties are mistaken about the actual existence of something **(difference in kind)** 🡪 Court will imply a condition * If parties are mistaken about the quality of something **(difference in quality)** 🡪 Court will not imply a condition |
| Bell v Lever Brothers Ltd |
| Facts – Lever Bros appointed Bell and Snelling to their Board of Directors. Unknown to Lever Bros, Bell and Snelling committed breach of duty that would have justified termination. When no room was left for Bell and Snelling in the company, Lever Bros negotiated their termination, paying them compensation. Lever Bros claimed that the agreement was reached under a mistake of fact.  Plaintiff – Lever Brothers Ltd  Defendants – Bell and Snelling  Who won? Bell and Snelling  Issue – Is the contract rescinded because of mutual mistake?  Holding – The contract is not rescinded because the subject matter was not destroyed by mutual mistake.  Ratio – Mistake as to quality of the thing contracted for will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality that makes the thing without the quality essentially different from the thing as it was believed to be.  Reasoning – The identity of the subject matter was to rid the company of Bell and Snelling. Although the quality was different (Lever Bros had to pay compensation), the subject matter was the same. |

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| McRae v Commonwealth Disposals Commission |
| Facts – The Commission entered into a contract to sell McRae an oil tanker wrecked on Jourmand Reef. McRae fitted out a salvage expedition at considerable expense but found no tanker. McRae sought damages.  Plaintiff – McRae  Defendant – Commonwealth Disposals Commission  Who won? McRae  Issue – Was there a contract?  Holding – There was a contract, and since there was no tanker, there has been a breach of contract.  Ratio – A party cannot rely on mutual mistake where the mistake consists of a belief that is (1) entertained by him without any reasonable ground and (2) deliberately induced by him in the mind of the other party.  Reasoning – Even if the Commission had a real belief in the existence of a tanker, they were guilty of the grossest negligence. |

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| Solle v Butcher (Eng CA) |
| Facts – Butcher owned five flats, which he repaired with his business partner Solle. Solle advised Butcher that the flats would not be subject to rent control, and the parties entered a 7-year lease at a rate of 250*l*/year. Solle also let four of the flats at this rate. In fact the rent was fixed by statute at 140*l* (unless formalities were complied with). Solle sued to recover his overpayment.  Plaintiff – Solle  Defendant – Butcher  Who won? Butcher  Issue – Can equitable mistake render the contract voidable?  Holding – By reason of the common mistake, this lease can be set aside, and the court should impose terms that will enable the tenant to stay on at the proper rent or to go out.  Ratio – Common law mistake renders a contract void; equitable mistake renders a contract voidable.  **A contract is liable in equity to be set aside if the parties were under a common misapprehension either as to the facts or as to their relative and respective rights, provided that the (1) misrepresentation was fundamental\* and (2) that the party seeking to set it aside was not himself at fault.**  \*Fundamental – the misrepresentation has to be really important  Reasoning – The parties agreed in the same terms on the same subject matter, but the 35-40% difference in price is fundamental within this context, and Butcher is not at fault (Solle is).  Note – The equitable doctrine of mistake was trashed by the Eng CA, but in Canada the weight of the opinion is in favour of the doctrine. |

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| Great Peace Shipping v Tsavliris (Eng CA) |
| Facts – A vessel suffered damage and Tsavliris (a salvor) sought assistance from Marint in locating a tug. Marint advised that The Great Peace was closest to the vessel. Tsavliris negotiated with Great Peace Shipping for The Great Peace to come to the vessel. The agreement included a five-day cancellation fee. When it became apparent that The Great Peace was 410 miles, rather than the estimated 35 miles, away from the vessel, the vessel owners argued that the agreement had been entered into on the basis of a shared fundamental assumption and was void or voidable, and refused to pay the cancellation fee.  Plaintiff – Great Peace Shipping  Defendants – Tsavliris and the vessel owners  Who won? Great Peace Shipping  Issue – Were the services that The Great Peace was able to provide something essentially different from that to which the parties had agreed?  Holding – The parties entered into a binding contract and the vessel owners became liable to pay the cancellation fee.  Ratio – *Solle v Butcher* is not reconcilable with *Bell v Lever Brothers* and should not be followed.  Reasoning – The fact that the vessel owners did not want to cancel the agreement until they knew they could get a nearer vessel to assist indicates that the fact that vessels were considerably further apart than the vessel owners believed did not mean that the services The Great Peace could provide were essentially different from those which the parties had envisaged when the contract was concluded. This was a mistake as to the quality of the thing contracted for. |

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| Miller Paving v Gottardo (ONCA) |
| Facts – Miller contracted to supply materials to Gottardo, and signed an agreement in which Miller acknowledged that it had been paid in full. After discovering deliveries for which it had not billed Gottardo, Miller rendered a further invoice. Gottardo resisted the claim, although the owner had paid it for most of the materials.  Plaintiff – Miller Paving  Defendant – Gottardo  Who won? Gottardo  Issue – Should the agreement be set aside by applying the doctrine of common mistake?  Holding – The agreement should not be set aside.  Ratio – *Great Peace Shipping* should not be adopted in Canada, but provides one useful reminder – in considering whether to apply the doctrine of common mistake either at common law or in equity, **the court should look to the contract itself to see if the parties have provided for who bears the risk of the relevant mistake, because if they have, that will govern.** The court will only need to look at the doctrine if it’s unclear who bears the risk.  Reasoning – The agreement requires Miller to bear the consequence when the risk transpires, rather than allowing it to invoke the doctrine of common mistake. But even if Miller could resort to the doctrine of common mistake, neither the common law doctrine nor the equitable doctrine would result in the contract being set aside because the subject matter is not changed and Miller was at fault.  Test – Equitable doctrine of mistake   1. The misrepresentation was fundamental 2. The party seeking to set it aside was not at fault 3. Other factors make it unjust |

## 2. Frustration

* The doctrine of frustration raises the same kinds of issues as the doctrine of mistake, but they differ in an important respect.
  + Example – Two people contracting to buy/sell a horse:
    - If the horse died **before** the contract was entered into, but the parties thought it was alive 🡪 mistake
    - If the house died **after** the contract was entered into 🡪 frustration

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| Paradine v Jane |
| Facts – Paradine leased land to Jane during the Civil War and brought action in debt for rent. Jane pleaded that an enemy of the King invaded and expelled him from the lands let unto him, and argued that he ought not to be charged with rent because he could not enjoy the land, and it was no fault of his own.  Plaintiff – Paradine  Defendant – Jane  Who won? Paradine  Holding – Jane ought to be charged with rent.  Ratio – When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.  Sanctity of contract view – It doesn’t matter what happens, the contract still stands  Reasoning – As the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon the lessor. |

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| Taylor v Caldwell |
| Facts – The defendants agreed to let the plaintiffs have use of gardens and a music hall at 100*l*/day. Various stipulations in the agreement show that the existence of the hall and gardens in a state fit for a concert was essential for the fulfillment of the contract. Before the first concern, the Hall was destroyed by fire.  Who won? Plaintiffs  Issue – Is the loss that the plaintiffs sustained to full upon the defendants?  Holding – Both parties are excused; the plaintiffs from taking the gardens and paying the money; the defendants from giving the use of the hall and gardens.  Ratio – Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for fulfillment of contract arrived some particular specified thing continued to exist, so that, when entering the contract, they must have contemplated such continuing existence as the found of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing **without default** of the contractor.  Reasoning – The parties contracted on the basis of the continued existence of the hall at the time when the concerts were to be given; that being essential to their performance. |

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| Can Govt Merchant Marine v Can Trading |
| Facts – Can Govt Merchant Marine contracted with Can Trading to transport lumber in two vessels. Because of a dispute between Can Govt Merchant Marine and the shipbuilders, the vessels were not ready in time and the contracted voyage could not be made. Can Govt Merchant Marine claimed that their contract had been frustrated because the ships were unfit for sailing at the time set for performance.  Who won? Can Trading  Issue – Could the parties, as reasonable men, have contracted on the footing that Can Govt Merchant Marine should assume the risk of what subsequently happened?  Holding – Reasonable people would have assumed that Can Govt Merchant Marine assumed the risk of the ships not being ready in time in this case.  Ratio – If reasonable persons situated as the parties were must have agreed that the promisor’s contractual obligations should come to an end if that state of circumstances should not exist then a term to that effect may be implied. But, no such term should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances being what they in fact proved to be when the time for performance arrived.  The contingency that relieves a party from performing a contract on the ground of impossibility of performance is an **unforeseen event**. If the event that causes the impossibility could have been anticipated and guarded against in the contract, the party in default cannot claim relief because it has happened. |

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| Davis Contractors Ltd v Fareham UDC |
| Facts – Davis Contractors entered into a contract to build 78 houses for Fareham (municipality) within 8 months for a fixed price. Owing to unexpected circumstances, and without fault of either party, adequate supplies of labor were not available in the post-War market and the work took 22 months. The contractors claimed that the contract was frustrated and that they were entitle to a sum of money on a *quantum meruit* basis in addition to the contract price.  Plaintiff – Davis Contractors Ltd  Defendant – Fareham UDC  Who won? Fareham UDC  Issue – Can the principle of frustration be applied?  Holding – The principle of frustration cannot be applied.  Ratio – Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.  The implied term approach is a bit of a disservice because it’s not about what the parties reasonably anticipated, but about what the court thinks people in that position could have foreseen.  Reasoning – Two things prevent the application of the principle of frustration:   1. The cause of the delay was not any new state of things that the parties could not reasonably be thought to have foreseen.   This is a normal business scenario, and something the parties could have known might have happened.   1. It is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. It is a misuse of legal terms to call in frustration to get him out of his unfortunate predicament. |

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| Claude Neon General Advertising v Sing |
| Facts – Sing rented a neon sign. The sign was constructed for Sing, and was erect on Sing’s premises and was operated for some time before lighting restrictions were introduced when Canada entered WWII.  Plaintiff – Clause Neon General Advertising  Defendant – Sing  Who won? Claude Neon General Advertising  Issue – Is Sing relieved from further rental payment on the principle of frustration?  Holding – Sing is not relieved from further rental payment.  Ratio – The Court will place a fairly high burden on those who say they received a radically different thing than they contracted for.  Reasoning – The monthly rental was for the purpose of paying the cost of construction and erection as well as maintenance over a period of 60 months. No part of the contract between the parties became impossible. Sing certainty gets very much less benefit from the sign, but it is not entirely useless as a daylight sign. |

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| Capital Quality Homes Ltd |
| Facts – The purchaser agreed to purchase 26 building lots within a subdivision from the vendor. The vendor knew that the purchase was buying the lots with the intention of selling several homes by way of separate conveyances. Before the closing date, legislation came into effect that restricted an owner’s right to convey a lot within a registered plan of subdivision and made necessary the obtaining of a consent form. On the closing date the purchaser insisted that the vendor deliver conveyances for each lot with the consents necessary, but the vendor insisted that it was the purchaser’s responsibility to obtain the necessary consents. The purchase repudiated the agreement and demanded the return of the balance.  Plaintiff – Purchaser  Defendant – Vendor  Who won? Purchaser  Issue – Can the doctrine of frustration apply?  Holding – The doctrine of frustration can be invoked to terminate the agreement.  Ratio – There can be no frustration if the supervening event results from the voluntary act of one of the parties or if the possibility of such event arising during the term of the agreement was reasonably contemplated by the parties and provided for in the agreement.  Test – Doctrine of frustration   1. Could the parties have reasonably anticipated the change, and should they therefore have put it in the contract? 2. Did the change radically alter the nature of the contract?   Reasoning – The parties would not have reasonably contemplated the legislation, and the legislation destroyed the foundation of the agreement (which was for the purchase of 26 lots, not simply a piece of land). |

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| Victoria Wood Development Corp |
| Facts – Victoria Wood entered into a contract to purchase land from the defendants. To the knowledge of the defendants, Victoria Wood intended to subdivide and develop the land. Amendments to Ontario legislation passed after the contract was entered into precluded the property’s subdivision development. Victoria Wood sought a declaration that the contract was frustrated and return of the deposit.  Plaintiff – Victoria Wood Development Corp  Defendant – Ondrey  Who won? Defendants  Issue – Can the doctrine of frustration apply?  Holding – The doctrine of frustration cannot apply.  Ratio – A developer in purchasing lands is always conscious of the risk that zoning or similar changes may make the carrying out of his intention impossible, or may delay it. He may attempt to guard against such risk by the insertion of proper conditions in the contract and thereby persuade the vendor to assume some of the risk.  Reasoning – The agreement is not conditional upon the ability of Victoria Wood to carry out its intention.  This case can be distinguished from *Capital Quality Homes* because here, the land was sold in an undivided plot, whereas in *Capital Quality Homes* the agreement was for the purchase of 26 lots.  Note – This case, like *Claude Neon General Advertising*, sets a high bar for defining the quality of the thing contracted for as radically different. |

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| KBK No 138 Ventures Ltd |
| Facts – Safeway owned a property zoned for a maximum floor space ratio of 3.22, which they advertised as a “prime redevelopment opportunity” and listed the price at $8.5 million. KBK entered into a contract for the sale of the property and paid an installment. After the contract entered into, a bylaw was passed to rezone the property and decreased the floor space ratio to 0.3. KBK demanded return of the installment, arguing that the contract had been frustrated. Safeway later sold the property for $5.4 million.  Who won? KBK No 138 Ventures Ltd  Issue – Has the agreement been frustrated?  Holding – The agreement has been frustrated.  Ratio – Whether the quality of the thing contract for is radically difference will depend on what the thing is as defined by the contract.  Reasoning – This case can be distinguished from *Victoria Wood* because Safeway had more than “mere knowledge” that KBK had the intention of developing the property. This is suggested by the advertisement placed by Safeway and clauses in the contract itself (the definition of “development” and the non-competition clause). The contract cannot be interpreted as allocating the risk to KBK, and the change in zoning was not foreseeable. |

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| Kesmat Invt Inc |
| Facts – In exchange for an easement from Kesmat, Industrial undertook to obtain a rezoning and subdivision of Kesmat’s land and pay Kesmat $50,000 if it was unsuccessful. It became clear that before the rezoning application would be granted, Industrial would have to conduct an environmental study (costing $25,000 to $50,000). Industrial failed to obtain the rezoning and Kesmat brought action.  Plaintiff – Kesmat Invt Inc  Defendant – Industrial Machinery Co  Who won? Kesmat  Issue – Is the contract frustrated?  Holding – The contract is not frustrated and Kesmat is entitled to judgment.  Ratio – Hardship, inconvenience or material loss or the fact that the work has become more onerous than originally anticipated are not sufficient to amount to frustration. However, impossibility of performance encompasses not only absolute impossibility, but also impossibility in the sense of impracticality of performance due to extreme and unreasonable difficulty, expense, injury or loss.  **There must exist something that is unexpected and changes the thing of the contract to apply the doctrine of frustration.**  Reasoning – The environmental impact report was not an unknown requirement, so the parties could have put it in the agreement through pricing, and the cost of the study is not so onerous or unreasonable as to render performance of the contract impractical (the transaction isn’t now of a radically different nature, it is just more expensive). |

# V. Representation and Terms

## 1. Misrepresentation and Rescission

* A misrepresentation is a statement that’s made with no contractual force.
  + The law cannot do anything about misrepresentations, but equity can help the victim by allowing the contract to be rescinded.

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| Redgrave v Hurd |
| Facts – The plaintiff (a lawyer) advertised that he would take a partner who would purchase his home. The defendant entered into negotiations with him, and was advised that the practice amounted to 300-400*l*/year. The plaintiff produced summaries of business which indicated receipts of ~200*l*/year, and when asked how the difference was made up, showed papers which he said related to additional business. The defendant did not examine the papers and agreed to purchase the house and a share in the business (and paid a deposit and moved his family). On learning that the practice was “utterly worthless”, he refused to complete the transaction and counterclaimed for rescission and damages after the plaintiff sued.  Plaintiff – Redgrave  Defendant - Hurd  Who won? The defendant (Hurd)  Issue – Can the contract be rescinded?  Holding – The contract can be rescinded, but damages are not available, as equity does not create causes of action.  Ratio – When a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation. **If it is a material representation calculated to induce him to enter into the contract, it is presumed that he was induced by the representation to enter into it. To rebut this presumption, it must be shown either that the party to whom the representation is made had knowledge of the facts contrary to the representation, or that he states in terms or showed clearly by his conduct that he did not rely on the representation.**  If there’s a misrepresentation, negligence on the part of the party to whom the representation is made (the buyer) is not fatal to the claim for rescission.  Reasoning – The defendant was induced to enter into the contract by a material misrepresentation made to him by the plaintiff, and the fact that the defendant could have found out that the representation was false does not negate his claim for rescission, even if his failure amounted to negligence.  Test – Finding that a misrepresentation should entail rescission  **Did the alleged representative induce the buyer to enter into the contract?**   * If the seller makes a material representation calculated to induce the buyer to enter into contract 🡪 presumed that the buyer was induced by the representation to enter into it * The seller can rebut this presumption by proving that:  1. The buyer had knowledge of facts contrary to the representation, or that 2. The buyer did not rely on the representation  * The fact that the buyer could have found out that the representation was false does not negate his/her claim for rescission. |

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| Smith v Land and House |
| Facts – The plaintiffs offered a hotel for sale, stating that it was currently leased to “a most desirous tenant”. Shortly after the defendants bought the hotel, the tenant went into bankruptcy. The defendants refused to complete the transaction on the basis that the misdirection of the tenant’s virtues amounted to a misrepresentation. The plaintiffs argued the their statement was a mere expression of opinion and not a statement of fact.  Who won? The defendants  Issue – Did the plaintiffs’ statement amount to a misrepresentation?  Holding – The misdirection of the tenant’s virtues amounted to a misrepresentation.  Ratio – A statement of opinion **can** involve a statement of fact. In a case where the facts are equally known to both parties, what ne of them says to the other is frequently nothing but an expression of opinion, but if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involved very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.  Reasoning – The vendors statement is not a guarantee that the tenant will go on paying his rent, but it is an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. This was an assertion of a specific fact, on a subject that *prima facie* the vendors know everything and the purchasers nothing, and it was untrue. |

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| Bank of British Columbia v Wren |
| Facts – As collateral security for a loan, Wren Developments Ltd deposited with the Bank of British Columbia shares of companies. Smith (the president and managing director of Wren) requested that the bank release shares without the knowledge or consent of Allan (a director, secretary, and minority shareholder of Wren), and the bank released the shares. Allan had signed the first guarantee when the original loan was made. After the shares had been released, the bank asked Allan to sign another guarantee because the bank was not prepared to carry the loan in its unsatisfactory condition. Allan was surprised that the loan payments were in arrears, and when he inquired of the credit supervisor as to the shares held by the bank he was told that the particulars were not known, but an investigation would be made. Allan was also told that the signing of a new guarantee was a routine procedure. Allan was reasonably certain that the shares pledged by the company were still held by the bank at the time, and in that mistaken belief he executed and delivered the new guarantee.  Plaintiff – Bank of British Columbia  Defendant – Allan  Who won? Allan  Issue – Is Allan liable for the balance of the amount claimed under his guarantees?  Holding – Allan is not liable upon the second personal guarantee.  Ratio – **Silence is not necessarily an answer to a misrepresentation claim.** When the circumstances might lead a party to falsely believe in a certain state of affairs, and when the other party is in a position to know what that state of affairs is an how important it is, a misrepresentation may be found.  Reasoning – Allan was misled by the words, acts, and conduct of the bank when he signed the second guarantee, and otherwise he would not have signed it. There was a unilateral mistake on the part of Allan that was induced by the misrepresentation of the bank in failing to disclose material facts to him. |

## 2. Representations and Terms

* Certain kinds of statements that are made prior to entering a contract will be seen as “collateral warranties”
  + Collateral – not actually in the contract itself
  + Warranties – terms of the contract that guarantee a state of affairs
* Failure to comply with a representation can have contractual force, creating a breach of contract that can lead to compensation for the victim.

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| Heilbut, Symons and Co v Buckleton |
| Facts – Rubber merchants (appellants) underwrote shares in Filisola Rubber. Johnston, the manager of their Liverpool business, obtained applications for shares. He had seen a prospectus, but had no copy of it. He mentioned the company to Wright (the respondent’s broker), who then asked for a prospectus. Wright asked if it was all right and Johnston replied, “We are bringing it out”. The respondent took shares. He said he was willing to do this because “any company [the appellants] should see fit to bring out was a sufficient warranty” to him. It is not contested that Johnston represented that the company was “rubber company”. It was later discovered that there was a deficiency in the rubber trees in the prospectus and that Filisola could not be properly described as a rubber company, and the shares fell in value. The respondent brought an action for fraudulent misrepresentation.  Who won? Rubber merchants (appellants)  Issue – Was a warranty (a contract collateral to the main contract) made between the parties?  Holding – There is no evidence to support the existence of a collateral contract.  Ratio – There may be a contract the consideration for which is the making of some other contract (a contract collateral to the main contract), but such collateral contracts must be rare.  An innocent representation gives no right to damages.  Test – **An affirmation at the time of the sale is a warranty, provided** **it appears on evidence to be so intended.**   * The intention of the parties can only be deduced from the totality of the evidence. * The person claiming there was a collateral contract must prove the intention.   Reasoning – Johnston’s reply was a mere statement of fact, and the existence of any intention other than as regards the main contracts was not shown. |

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| Dick Bentley Productions v Smith |
| Facts –Smith found and bought a Bentley car for Bentley. Smith had earlier told Bentley that he could find out the history of cars. When Bentley went to see the car, Smith told him that the car had been fitted with a replacement engine and gearbox, and had done 20,000 miles only since then. Bentley bought the car, and it turned out to be a considerable disappointment. Bentley brings action for damages for breach of warranty.  Plaintiff – Dick Bentley Productions  Defendant – Smith  Who won? Dick Bentley Productions  Issue – Was the representation an innocent misrepresentation or a warranty?  Holding – Smith gave a warranty to Bentley, and it was broken.  Ratio – The question whether a warranty was “intended” depends on the conduct of the parties, on their words and behavior, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.  Test – What words and behavior lead to the inference of a warranty?   * If a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for **inferring** **that the representation was intended as a warranty**. * The maker of the representation can rebut this inference if he can show that **it really was an innocent misrepresentation, in that he was not negligent in making it, and that it would not be reasonable in the circumstances for him to be bound by it.**   Reasoning – Smith was in a position to know, or at least to find out, the history of the car. He did not do so, and his statement turned out to be quite wrong. He ought to have known better; there was no reasonable foundation for it.  Note – Denning LJ is trying to incentivize more cautiousness on the part of sellers, but this situation is very close to what the House of Lords tried to avoid in *Heilbut*. This case could be reconciled with *Heilbut* by saying that this is a consumer contract, and *Heilbut* was a business contract. |

# VI. Remedies

* Three types of damages:

1. **Expectation** – this measure aims to put the innocent party in the position she would have been in had the contract been fulfilled
   * This is the ruling principle to be applied in awarding damages for breach of contract
2. **Reliance** – this measure aims to put the innocent party in the position she would have been in had she not entered into the contract
3. **Restitution** – this measure aims to give back what the innocent party transferred to the contract breaker

* **Cost of completion** versus **difference in value**
  + **Cost of completion:** puts the victim of the breach in the position he/she should have been in
  + **Difference in value:** awards the victim the difference in value between what he/she got and should have gotten
  + **Example**
    - An unpainted house is worth $500,000 and a painted house is worth $501,000 but the cost to paint is $15,000
      * Cost of completion - $15,000
      * Difference in value - $1,000
  + Generally, victims want cost of completion, and that’s what they are awarded

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| Chaplin v Hicks |
| Facts – The defendant held a competition for aspiring actresses. Newspaper readers would select 50 women, and then the defendant would make appointments with the women and choose 12 winners who would receive 3-5*l*/week for the three-year contract. When the plaintiff was selected, the defendant’s secretary wrote to her asking her to call to see the defendant, but the plaintiff did not receive the letter in time, and was not selected as a result. The plaintiff sued.  Who won? The plaintiff  Issue – Can damages be awarded?  Holding – Damages of 100*l* can be awarded.  Ratio – The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract. In such a case the jury must do the best they can, and the amount of their verdict may be a matter of guesswork.  Reasoning – The plaintiff had a great enough chance of being selected (approximately 1 in 4) to say that there is an assessable loss. |

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| Nu-West Homes v Thunderbird |
| Facts – Nu-West contracted to build a house for Thunderbird for $51,219. Thunderbird began to complain about serious deviations from the specifications, and Nu-West ceased work and Thunderbird hired Larwill Construction to complete the house. Nu-West sued Thunderbird for $16,000 in addition to what they had already been paid ($10,600), and Thunderbird counterclaimed for the cost of rectifying the deficiency in construction and the difference between the cost of completing the house and the original contract price.  Who won? Thunderbird  Issue – Is the proper measure of Thunderbird’s damages the cost of completion or the difference in value?  Holding – Thunderbird must be allowed the cost of completion damages.  Ratio – A court will award cost of completion damages, unless:   1. The cost of rectification is very high in comparison to the difference in value    * Example – If black plastic piping was installed instead of white plastic piping    * Also, if it is a trivial difference, the court will be less likely to award cost of completion 2. The steps the victim took to rectify his/her situation were not reasonable    * Example – If the victim hired a contractor that charged exorbitant rates    * The victim doesn’t have to find the cheapest alternative, but he/she must act within the bounds of what is reasonable   Reasoning – Thunderbird’s conduct was reasonable and the defects and deficiencies are not trivial and innocent. |

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| Jarvis v Swans Tours |
| Facts – Jarvis bought a holiday package from Swans Tours. The brochure had provided various assurances, but the holiday did not live up them by a long stretch (the house party was small one week and nonexistent the second, the owner did not speak English, the skiing was disappointing, etc.) Jarvis sued for damages, including the material distress and aggravation he experienced on the holiday and in its wake.  Who won? Jarvis  Issue – What is the amount of damages?  Holding – Jarvis should be awarded twice the amount he paid for the trip (as restitution and compensation for his loss of enjoyment).  Ratio – In a proper case (a contract for a holiday, or any other contract to provide entertainment and enjoyment) damages for mental distress can be recovered in contract.  While this mental distress is difficult to assess in terms of money, it is not more difficult than the decisions the courts have to make in personal injury cases.  Reasoning – Jarvis’ winter holiday was a grave disappointment, and he did not enjoy himself with all the facilities which Swans Tours said he would have. |

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| Vorvis v ICBC |
| Ratio – **Punitive damages may be awarded in cases of breach of contract, however, it will be rare.** Punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its **harsh, vindictive, reprehensible and malicious nature** – the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment. |

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| Whiten v Pilot |
| Facts – The Whitens discovered a fire in the addition to their house and fled. The fire totally destroyed their home. They rented a cottage for $650/month. Pilot made a single $5,000 payment for living expenses and covered rent for a couple months, then cut off rent without telling the family, and pursued a hostile and confrontational policy which the jury concluded was to force the Whitens to settle at substantially less than was fair (alleging that they had torched their own house, with no evidence whatsoever of arson; which they late conceded was untrue).  Who won? Whiten  Issue – Should punitive damages be given?  Holding – The jury’s award of $1 million punitive damages should be restored.  Ratio – **An insurer is under a duty of good faith and fair dealing.**  Reasoning – Mortgage agreements, loan agreements, employment, insurance, etc., are cases where the stakes are very high and the party is very vulnerable.  The insurance company acted unfairly and in bad faith. |

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| Wallace v United Grain Growers |
| Facts – Wallace had worked for a printing company for 25 years when Public Press, a subsidiary of UGG, lured him away with various inducements including an assurance of job security provided he performed to expectations. From 1972 until 1986 when he was dismissed, Wallace was the top salesperson every year. In firing Wallace, the company purported to have cause, a position it maintained until the trial. Wallace was unable to secure similar employment and needed psychiatric assistance.  Who won? Wallace  Issue – What damages should be awarded?  Holding – The equivalent of 24 months’ salary in lieu of notice should be awarded.  Ratio – What applies in an insurance context doesn’t apply in an employment context – the law recognizes the mutual right of employers and employees to cancel the contract at any time.   * Freedom of contract should prevail – employers should be free to fire; employees should be free to resign   + A requirement of good faith for dismissal would be overly intrusive.   But, **there is a remedy to deal with nasty firings. The manner of dismissal may be considered generally in defining the notice period for wrongful dismissal**, because if an employer has damaged an employee, it will make it harder for the employee to find another job.  Test – If you can find that there has been bad faith in the way that the firing has happened, and can show that that has led to harm, then that can go to compensatory damages (lengthening the notice period), and if you can show that the firing made it less likely that the employer can find another job, will lengthen it more.  Reasoning – In light of Wallace’s advanced age, his 14-year tenure as the company’s top salesman and his limited prospects for re-employment, a length period of notice is warranted. The inducement factor (in particular the guarantee of job security) supports this conclusion.  There is no foundation for an award of punitive damages because the firing was not harsh, vindictive, reprehensible and malicious. |

## Remoteness

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| Hadley v Baxendale |
| Facts – The plaintiffs’ mill was stopped by a breakage of the crankshaft, and it became necessary to send the shaft to Greenwich as a pattern for a new steam engine. The plaintiffs’ servant told the clerk of the carrier office that the shaft must be sent immediately, and was told that it would be delivered the following day. The delivery of the shaft was delayed by some neglect, and the plaintiffs did not receive a new shaft for several days after they otherwise would have, and they lost profits.  Who won? Defendants  Issue – Are the damages too remote?  Holding – Loss of profits ought not to be taken into consideration in estimating damages.  Ratio – Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally (i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.)  If special circumstances under which the contract was actually made were communicated to the plaintiffs by the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplated, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.  But, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury that would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.  Test –   1. What would we expect normal people to think would have happened in result of a breach?    * **Objective standard** 2. Were there any communications of special circumstances?   Reasoning – These circumstances do not show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to a third person. The loss of profits cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. |

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| Victoria Laundry v Newman Industries |
| Facts – The plaintiffs purchased a boiler from the defendants to expand their laundry. The defendants knew the plaintiffs were laundered and dyers and they required the boiler. The plaintiffs agreed to take delivery on June 5th, but the boiler was damaged while it was on the defendants’ premises. Repairs caused a lengthy delay and it was not delivered until November 8th. The plaintiffs sued for loss of business profits. If the boiler had been punctually delivered, the plaintiffs could have taken on a very large number of new customers, and they could have accepted a number of highly lucrative dyeing contract.  Who won? Plaintiffs  Issue – What damage is recoverable?  Holding – The issue should be referred to a referee as to what damage is recoverable in addition to the 110*l*.  Ratio – In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. What was at the time reasonably foreseeable depends on the knowledge possessed by the parties or by the party who later commits the breach.  Two rules:   1. **Everyone is taken to know the “ordinary course of things”** and consequently what loss is liable to result from a breach of contract in that ordinary course. 2. There may be added in a particular case knowledge that he **actually possesses**, of special circumstances outside the “ordinary course of things,” of such a kind that a breach in those special circumstances would be liable to cause more loss.   In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result.  Nor, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. **It is enough if he could foresee it was likely so to result** (a “serious possibility.”)  Reasoning – Of the uses or purposes to which boilers are put, the defendants would clearly know more than the uninstructed layman. They knew they were supplying the boiler to a company carrying on the business of laundrymen and dyers. The obvious use of a boiler, in such a business, is to boil water for washing or dyeing clothes. The delay in delivering the boiler was likely to lead to loss of profits. In order that the plaintiffs should recover specifically the profits expected on the particularly lucrative dyeing contracts, the defendants would have had to know of the prospect and terms of such contracts. They did not know these things, but the plaintiffs are not precluded from recovering some general sum for loss of business in respect of dyeing contracts to be reasonably expected. |

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| Scyrup v Economy Tractor Parts |
| Facts – The plaintiff entered into a contract, requiring the use of his tractor, with Supercrete. The plaintiff needed a hydraulic dozer attachment, and purchased it from the defendant. The plaintiff made it known to the defendant that the attachment was to be used on a job with Supercrete, and that he needed it in a hurry and that it had to be in good working order. The attachment was delivered, but did not measure up. In consequence, the caterpillar could not function and Supercrete cancelled the contract. The plaintiff’s loss of profit represents the main item of damages he claims.  Who won? The plaintiff  Issue – Is the defendant liable?  Holding – The defendant is liable as claimed.  Reasoning – The test of reasonable foreseeability operates in favour of the plaintiff. **Imputed knowledge –** It is not unrealistic to ascribe to the defendant an awareness that his breach of contract would in the ordinary course of events result in damages in the form of loss of profits as here sustained.  **Actual knowledge of special circumstances –** The defendant had such knowledge.  Note – The majority makes a presumption that the amount of the contract the plaintiff entered into with Supercrete is within the ordinary course of events the vendor could reasonably foresee. |

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| Koufos v Czarnikow (The Heron II) |
| Facts – The respondents chartered the appellant’s vessel to carry a load of sugar. The length of the voyage was about 20 days, but the vessel had in breach of contract made deviations that caused a delay of 9 days. The respondents intended to sell the sugar promptly after arrival. The appellant did not know this, but was aware that there was a market for sugar at Basrah. The sugar was sold at Basrah, but the market price had fallen. The respondent claims the difference as damage for breach; the appellant denies that fall in market value can be taken into account.  Who won? The respondents  Issue – Can the plaintiff recover as damages for breach of contract a loss of a kind which the defendant, when he made the contract, ought to have realized was not unlikely (a degree of probability considerably less than an ever chance but nevertheless not very unusual and easily foreseeable) to result from a breach of contract causing delay in delivery?  Holding – The loss of profit was not too remote to be recoverable as damages.  Ratio – A result that will happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but a result that, though foreseeable as a substantial possibility, would only happen in a small minority of cases should not be regarded as having been in their contemplation.  Test – Can the plaintiff recover?  Crucial question – Whether, on the information available to the defendant when the contract made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it properly to hold that the loss flowed naturally from the breach or that loss of that kind should have been within contemplation.  Reasoning – The ship-owner must have realized at least it was not unlikely that the sugar would be sold in the market at market price on arrival. And he must have known that **in an ordinary market prices are apt to fluctuate from day to day: be he had no reason to suppose it more probably that during the relevant period such fluctuation would be downwards rather than upwards.**  Note – This case suggests that, in situations where we just don’t know (because of the fluctuation in markets) you can assume that markets are as likely to go up as go down, and if a breach of contract leads to selling a softer market than would have if the breach didn’t happen, you can recover. |