**Effect of a clause**

Cases

* Traditional rule found in *L’Estrange*,
* Signature is consent, shown in *McCutcheon*, *Karrol*, (describe cases briefly)
	+ “Wholly immaterial whether he has read the document or not” (*L’Estrange*)
	+ Rationale for this stems from the objective theory of contract law
		- Concerned with what people are thinking we are concerned with their behaviour
	+ *Karroll* B.C. Supreme Court, 1988
* On other hand, *Tilden*, if we are really looking at objective contract law we should look at all the evidence, not just the act of signing, to try and find consent
	+ Signature is only one way of manifesting assent to contractual terms
	+ Modern commercial practice many standard form printed documents are signed without being read or understood
	+ Was an Ontario Court of Appeal Case, 1978
* Reconcile *Tilden* and *Karroll*, how McLachlin’s two questions can involve factors analyzed in *Tilden*. The mistake as to the existence of the onerous clause can fall under misrepresentation. Probably would have been treated the same by each court. Note both were consumer cases.

1) Discuss the effect of a signature

* A party who signs a contract is bound by what he/she signs unless signed as a result of fraud or misrepresentation
* Freedom of Contract (enforcement of signature): *Lestrange*, *Karrol, McCutcheon*
* Objective Contract law to involve context and evidence: *Tilden, Thornton, Interfoto*
	+ Should only be in exceptional circumstances (argument for company)
1. Is it a standard form agreement?
	* Only one party drafts a standard form agreement
2. Would a reasonable person anticipate the clause?
	* *Karroll, Tilden*
	* Is it an exclusion clause? Write: As a matter of principle there is nothing in the cases read that means they could only apply to exclusion clause
	* McLachlin states that a signature is binding unless fraudulent or misrepresented
		1. Can it be inferred that a reasonable person would conclude that the customer was not consenting to the onerous clause
			+ Was the release consistent with the purpose of the contract?
		2. If not, were reasonable steps taken to enforce the clause?
	* Four factors (*Tilden*)
3. The nature of the document (Small print, on back etc.)
4. The nature of the transaction (How was the contract received? Hurried? Everyone present? *Thornton*)
	1. Silent in the face of knowledge of the onerous clause is misrepresentation by omission (*Karrol*)
5. The nature of the clause, was it unusual, onerous, contrary to the overall thrust of the contract? (Surprise? Reasonable person in that position?)
6. The nature of the parties (consumer vs. commercial, inequality of bargaining power)
7. Sum up using questions from *Karrol*

**Fundamental Breach/Unconscionability**

Cases:

* *Karsales*, 1956, C.A. of England, Denning, sets out fundamental breach
* *Photo Production*, 1980, House of Lords, overruled Denning, set out construction approach, after the *Unfair Contract Terms Act 1977*, enables exception clauses to be applied with regard to what is just and reasonable in consumer cases, this is commercial
	+ There is no such legislation in Canada to protect consumer cases
	+ Must construe the contract based on intention of parties, requires interpretation of contract
* *Hunter*, 1989, SCC, Wilson accepts FB, denies using solely unconscionability since it would “require an extension of the principle of unconscionability beyond its traditional bounds of inequality of bargaining power”.
	+ Dickson- rejects FB and adopts unconscionability, construction approach
		- Not all exclusion clauses are unreasonable
* *Fraser*, 1997 O.C.A., used Wilson and Dickson’s approach, avoided making a choice, as later cases have done
1. Fundamental Breach?
	* Only for exclusion of liability clauses
	* Does the clause deprive the party of substantially the whole benefit? If so, ends K
	* Construe the contract to see what the parties intended should there be a FB
* Includes factors such as price
	+ Willson in *Hunter*
* In light of the breach, is it fair and reasonable that the exclusion clause should apply
* Looks at inequality of bargaining power as a part of fairness and reasonableness
* Behaviour of parties: sharp or unfair dealing?
* Allows someone to go beyond the threshold of unconscionability
* Dickson in *Hunter*
	+ Unconscionability – was there unequal bargaining power? Was the power abused?
1. Unconscionability

Cases

* Traditional, narrower doctrine, involves 1) improvident bargain and 2) an inequality in the positions of the parties (*Morrison* 1965, *Marshall* 1968)
* *Bundy*, Denning,1975 English C.A. expands doctrine
	+ In the case there is no wrongdoing, or bad faith, but there is pressure
* Does NOT involve *Fraser*, *Plas-tex*, *Hunter*
* Goes beyond consent, looks at fairness
* Was there an inequality of bargaining power?
	+ Vulnerability, not being aware of things, disabilities
* Did the more powerful party take advantage of a weaker party?
	+ A lot of pressure in *Bundy* coming from blind love and loyalty to son
* Was it an improvident, unfair deal?
	+ Are the victims of the unconscionability getting nothing for their risk (as in *Bundy* handing over his home, no return consideration)
	+ Did they seek independent advice? (point in *Bundy*)
	+ \*\*Is this outside the normal course of events?
		- No guarantee that in a market economy you will succeed
* Could the risk have been insured?
	+ *Fraser*, *Photo Productions*, should have been insured

**Mistake**

* Mistake- event that no one should have known of, then contract signed

Cases

Common Law:

* Set out in *Bell* 1932 H.L.
* There is in general no duty to inform someone that their belief is mistaken prior to entering a contract (caveat emptor)
* If you want something more specific, put it in the contract
* The courts want to enforce what the contract agrees to
* Must be something different in kind

Then,

Equitable mistake

* Denning introduces equitable mistake in *Solle*, 1949 UK C.A.
* Allowed relief on much less restrictive grounds than the common law doctrine
* If the contract is maintained after finding no common law mistake, then still look to see if it would be unjust to enforce the agreement because of the mistake
* *Great Peace Shipping*, 2002 UK C.A. case overrules *Solle*
* Still some question to whether it exists in BC
* *Miller Paving* allows doctrine of equitable mistake, but is an 2007 Ont. CA case
	+ Three scenarios:

1) The parties must be mistaken in the identity of the contracting parties

2) Mistaken about the subject matter of the contract at the date of it

3) Mistaken about the quality of the subject matter of the parties

* + - Must be a mistake of both parties
		- The quality must be changed to be essentially different from the thing it was meant to be
	+ NO FAULT (no one can be negligent or at fault, should have known)

**Frustration**

* *Taylor v Cardwell* 1863 QB sets out frustration
* *KBK No. 138 Ventures v Canada* 2000 BCCA
	+ Affirms English position in BC on frustration, distinguishes itself from *Victoria Wood* in that the frustration “radically altered” the foundation of the contract
* Contract signed and then an event no one could have/should have foreseen
* Must be something radically different from normal activity
* What would have been reasonably implied in the Contract? (*Taylor v Cardwell*)
* Did it change the contract in kind?
* If they could have, a provision should have mentioned what happened in the contract
* The test of what the parties likely perceived is objective
	+ Courts do not care and cannot know what the parties were thinking when they entered the contract

**Collateral Warranty**

Cases:

* Guarantee a certain state of affairs in a contract
* Generally believe that if you are making an agreement the entire agreement should be within the four corners of the contract
* An exceptional situation is when animus contrahendi exists, has to be clear evidence
	+ Burden of proof rests on the buyer
* *Heilbut* 1913 UK HL case, freedom of contract
	+ A person should not be held liable for an innocent misrepresentation
	+ If you want something, put it in the agreement
		- Perhaps he got less for the shares as a result of not specifying (got what you paid for)
	+ Commercial transaction
* *Dick Bentley*, 1965 UK CA, Denning
	+ One ground the two cases are reconcilable is that this is a consumer case
	+ Different burden than *Heilbut* (seller instead of buyer)
* **Would a reasonable person have known that the representation was on the table?**
* **Was the statement made to induce the buyer/ be contractual? Was there reasonable foundation for the statement?**
* If you are a buyer, you are going to want to argue that the statement was part of the contract
* If you are the seller, you are going to say that it was not part of the contract
* Carelessness is not an excuse (*Dick Bentley*)

**REVIEW OUTLINE**

* Standard form agreements
	+ Question over whether conditions are binding?
* **Exam it is going to be a signed agreement**
* What do we look at?
	+ Traditional rule is from Lestrange and Grauco
		- Also Silverstar case
		- Lays out rule that if there is a signature that is assumed to be consent
		- McCutcheon and Mcbraine, enforces signature is consent
			* If there is a signature then you're bound by everything
			* **A rationale for this is that it flows from the objective theory of contract law**
				+ **We are not concerned about what people are thinking we are concerned with their behaviour**
	+ Tilden, if we are really looking at objective contract law, we should look at all the evidence, not just the act of signing, to try and find consent
		- Court is willing to presume that not every signature equals consent, depends upon the broader context
		- Is it reasonable to presume that that signature evidences consent
		- Was the contract entered into in haste?
		- Commercial vs. Consumer
		- Is the clause reasonable?
		- **Four fundamental factors:**
			* The nature of the document (was it small print, was it on the back?)
			* The nature of the transaction (how was the contract received? *Thornton*)
			* The nature of the clause, was it unusual? Onerous? Contrary to the overall thrust of the contract
				+ Think you're getting one thing but you're really getting another
			* The nature of the parties -- consumer vs commercial
	+ Carroll, court says when you look at lestrange it says signature equals consent, unless it is the result of fraud or misrepresentation
		- McLachlin says that misrepresentation is what is happening inTilden
			* Various factors at play effectively come down to misrepresenting what is going on
		- Reconciles Carroll and Tilden with Lestrange
		- **McLachlin asks two questions:**
			* On the basis of all the facts, can it be inferred that a reasonable person in D's position would conclude that the consumer was not consenting to the form
			* If the answer to the first question is no, if it appears that it is reasonable to conclude that the plaintiff was not agreeing to the terms, were reasonable steps brought to bring the plaintiff to be aware of the term?
	+ Tilden, Carroll-- Tend to look at same set of factors, 4 factors
		- Do that analysis of 4 factors
		- Where there might be a difference is the spirit of the two decisions
			* McLachlin states that we only depart from signature= consent in exceptional circumstances
			* Bar might be lower in Tilden situation
		- Two cases would have probably been treated the same by each course
	+ If you are defending a company, you might want to argue that it is only in exceptional circumstances

* Fundamental Breach
	+ **Only exclusion clauses in contracts**
	+ **Tilden/Carroll analysis**
		- **In the alternative, can we do a fundamental breach analysis**
	+ Different approach than Tilden/Carroll
		- Basically begins in the notion that when you have an exclusion clause in the contract, and there is a fundamental breach, that brings to an end of the entire contract
	+ Not as dependant on consumer vs. commercial conduct
	+ Defined in Canada by Syncrude
	+ Carsales started it
		- Rule of law approach laid down by Denning
		- A breach that is so bad that it denies the other party the benefit of the contract
	+ Photo productions holds that the Carsales approach is incorrect
		- Depends on what the parties intended to happen
			* Rule of Construction approach rather than the rule of law approach
			* Must construe the contract based on intention of parties, requires interpretation of contract
		- Includes factors such as price
	+ Hunter and Syncrude
		- Splits decision
		- Dickson decides he is going to abolish the doctrine of fundamental breach
			* Was all about wanting things to be clear
			* States they can be dealt with through the doctrine of unconscionability
			* Only need to protect exclusion clauses where there is unequal bargaining power
		- Wilson says that the doctrine should survive but creates her own test
			* If a FB has occurred, then is it fair and reasonable to allow the exclusion clause to operate?
			* States in this case there was not a fundamental breach
				+ Even if there had been, there was nothing unfair or unreasonable in the clause
		- **Difference between approaches is that Dickson says that it is only going to be in situations of unconscionability, Wilson says that it can apply to two commercial**
	+ Don't want to be too rigid in what appears to be commercial transactions
		- Two painting company students vs. Wal Mart = unequal bargaining power
		- Real issue is unequal bargaining power
	+ Fraser Jewellers
		- Trial judge runs together Dickson and Wilson's judgment
		- First looked at fundamental breach, didn't find any, was "a lapse or error on the part of an ADT employee"
		- The provision was highlighted in bold black letters, and was one page
		- CA rejects this on the grounds that there was no inequality of bargaining power or unreasonable clause
		- ADT could not be liable to insure the value of all the jewellery, clause stated it was not insurance
		- When we are dealing with commercial actors there is an expectation that the commercial actor knows what they're doing
			* Less sympathetic than we would be as a consumer
			* It is a small business vs. big business
		- If unconscionability is to be found, need to distinguish from this case
		- **Factual comparison to Fraser Jewellers for unequal bargaining power**
	+ Plastex
		- Unconscionability can be applied here since lack of knowledge can be unconscionability
	+ Solway
		- Unconscionability can be applied where there are really bad circumstances

* Protection of weaker parties
	+ Duress, Undue Influence
	+ Duress
		- Was the promise extracted under pressure?
		- Was there no practical alternative but to make it?
		- Factors include:
			* Offer to pay more from which party? Roffey vs. Navcan
			* Person who made the promise quickly retracts or protests (within reasonable time)
			* Question of good faith is relevant (were they trying to exploit the circumstances to get money)
	+ Undue influence
		- **Isn't really going to figure into the hypothetical on the exam**
		- **Could come into freedom of contract essay**
		- **La forest is prepared to intervene if he believes that advantage was different**
		- **Wilson says that even if one party has taken advantage it has to be very lopsided, sets higher bar**
	+ Unconscionability (*Morrison, Harry,* vs *Bundy*)
		- Was traditionally held only in exceptional circumstances
		- Vulnerability has to be significant
		- Stronger party had to act wrongfully
		- Almost fraudulent, bad faith
			* They are designing to try and exclude the party
		- Morrison- bank had knowledge and duty and did not act with integrity
		- Perpetrator acting in a wrongful way, have a victim for various reasons was vulnerable
		- Lloyds Bank- Bundy is not being pressured by the bank
			* Worst that can be said of the bank is that it should have been more proactive
			* Doesn't appear that they were acting in bad faith
			* He is in an extraordinary situation
	+ Mistake and Frustration
		- What happens to the contract when events make it impossible to perform or receive something fundamentally different
		- When it happens before signing (Mistake)
			* Common law mistake
				+ Makes it something different in kind (*Bell v Lever*)
				+ Leads to contract being void, was void from the very start
			* Equitable mistake
				+ Exists in Canada
				+ Starts with (*Sol v Butcher*), overruled in UK (Say this)
				+ If it seems really unfair that a contract be enforced in light of a mistake, then it can kick in
				+ Look at (*Sol v Butcher*), where he was not in any way at fault
				+ Could distinguish *Miller*, where the company was partly at fault
		- When it happens after it is signed and before it is performed (Frustration)
		- Doctrines are treated differently but principles are somewhat the same
			* Depends on subject matter, kind v quality
			* Depends on specifications in contract (if it is for a horse, any horse will do)
		- Bell v Lever Brothers
			* Must be something different in kind (Dead horse v lame horse)
			* Company was mistaken about the fact that they could have gotten rid of the directors
				+ Contract was to get rid of them, and they did (even though they had to pay 50000 more)
		- McCrae
			* The commission should have known, it was their fault that they were mistaken
			* If you should have known, mistake is not valid
		- Equitable doctrine of mistake
			* May be cases where doctrine from Bell leads to unfair results
			* May not be a difference in kind but it seems really unfair
			* **After going through doctrine of mistake, we can go through doctrine of equitable mistake**
			* Sol v Butcher
				+ Equity enables butcher to get out of the contract
			* Miller- nothing inequitable, since Miller was at fault
			* Bookend cases
			* **Denning overrules these two cases, but they are still valid in Canada, mention this**
	+ Frustration
		- Must not have been able to anticipate what happened
			* If they could have, a provision should have mentioned what happened in the contract
			* **Nod to freedom of contract**
		- Building burns down could not have been anticipated
		- Construction of companies ships are not completed on time, could have been predicted
		- Nice book-end cases
		- Cases concerning changes in law:
			* Could it have been anticipated
			* Neon sign, legislation comes in ruling that you can't illuminate it at night, still got sign
			* Victoria woods, got a piece of land, subdivision wasn't express part of contract,
			* Kesmat, envrionmental assessment could have been expected home
			* Package of 26 lots sold as this to build on, and law makes you get something radically different
				+ Distinguished from Victoria woods
			* KDK Ventures, all the evidence suggests that the sale of land was for development of condiminiums
				+ Now the law changes, frustration, got something radically different
	+ No innocent misrepresentation on the exam
	+ Halibut Symons may be
		- We believe that if people are making an agreement then it should be within the four corners of the contract
		- An exceptional situation where it is clear that this animus contrahendi exists
		- Has to be some evidence
		- Burden of proof that there is that intention rests upon the buyer
		- Rests more on freedom of contract
	+ If you are arguing for buyer, Dick Bentley case helps, seller, Halibut
		- Bentley, stresses objective approach
		- Don't need a brain scan
		- Marshall the evidence, look at behaviour and words spoken
		- Would you think that the person making the statement meant for it to be contractual
		- The other party has to prove that it was not contractual
		- Switches the burden of proof to the party making the statement
		- Where a statemenet is made to induce a party to enter a contract, the buyer does not have to prove that the statement was meant to be contractual, the seller has to prove that the statement was not meant to be contractual
		- If there was a false statement because of carelessness on the part of its maker, even if it is honest, then there will be a warranty
		- When a seller makes a statement that is wrong, that induces a party to enter agreement, negligent then it creates a warranty and remedy for buyers
		- **Paternalistic approach vs buyer beware approach (classical contract)**
	+ Halibut is a commercial, Bentley is consumer
* Remedies
* Not really concerned about reliance and restitution losses
* Matter of lost opportunity/chance (Chaplin v Hicks)
	+ Where there is a very tangible, pretty high probability, then courts are willing to say you get that percent
		- 25 percent in Chaplin
	+ Has to be quite a calculable probability
* How do you quanitify enjoyment
	+ We can compensate people for loss of enjoyment (Holiday)
	+ Expected enjoyment and suffered emotional harm by not getting it
		- So court says he should get double the price of the holiday
* If it is more efficient to break the contract then you should be able to do it
* You can breach a contract if you're willing to break the price
* Punitive damages - you'll actually be punished for breaking contract
	+ If the person in breach is acting in a really wrongful way then it will be seen as a reason for compensating the victim of the breach
	+ Whitten, in some contracts there is a duty of good faith and fair dealing
	+ Wasn't just that the insurance company breached the contract, they breached it in a nasty way
	+ Really horrific
	+ Will rarely be awarded in a firing, but only if it is very malicious
		- Even if there is harm, then it may be compensating
* Freedom of contract means you are as free to enter and break contracts so long as there is compensation
* Goes against punitive damages
* Wallace states that even if it falls short of maliciousness then harm can be compensated too
* If there is a trivial difference but a massive cost for compensation they are not going to get that much recovery

**CASE NOTES**

Thornton v Shoe Lane Parking

* Automatic dispenser, ticket just says subject to conditions in small print that are displayed on the premises
* Signs are not that apparent on the premises
* Apportioned fault but Mr. Thornton is awarded at trial for his injury
	+ The parking garage is saying that this clause is a full answer to Mr. Thornton's claim
* The customer cannot protest here, acceptance takes place when the customer puts the money in the machine
	+ **All the terms that appear inside are not binding because the contract has already been made**
* The nature of a clause claiming exclusion of all liability, injury etc. is very onerous, and must be made very apparent
	+ The more sever the clause, the more effort the issuer has to go to
* **The defendant has to prove that the plaintiff should have known because the defendant took all reasonable steps**
* Customer is bound by the exempting condition if he knows that the ticket is issued subject to it OR if the company did what was sufficient to make him notice it
	+ Should Mr. Parker have known? Did the company do what was sufficient? If the answer to question 2 is yes then he should have known
* Judges rule that it would have been impractical to get out of the car to view the signs
	+ Contract had already been made

1. The nature of the transaction (is it hurried etc)
2. The nature of the document (size, prominence)
3. The nature of the clause (the more onerous the clause, the more steps the company has to take)

Interfoto Picture Library

* Clause says that all transparencies must be delivered back to the dealer if retained longer than 14 day period
* 11 days late for 3700 pounds
* Court holds that plaintiff cannot sue that much for late fees
* **This is very onerous**, must practically be in the face of the person renting
	+ Very little was done to bring it to the attention of the advertising company
* **This case is not an exclusion, it's an attempt to impose liability** (same logic applies)
* It was four columns printed across the foot of a delivery note (not very much)
* Defendant took some transparencies and did not pay a holding fee after delivering them late
* It was found that the defendants were not brought to attention of the clause and therefore are not liable to pay the fee

Signed Agreements

* Objective theory of contract law: idea that a signature is objective indication that a party is agreeing
	+ Putting that person into the circumstances that were surrounding, can we really say objectively that it is reasonable to assume that any reasonable person would have meant to agree to the document while signing it?

McCutcheon v David Macbrayne Ltd

* Car is taken across the loch and the barge sinks after it hits a rock
* Macbrayne states that the clause exempts them from liability
* There were 27 paragraphs and 4000 words in the legal document
* McCutcheon had never read the document and did not understand the terms, but had previously signed the form
* Had Mr. McCutcheon signed the form, he would have been bound by the agreement
* If a condition is accepted consistently in the past, it may be not need to be ascertained in the future
	+ Depends on the circumstances
* **Importance of a signature,** if there is no signature then no contract, there cannot be a contract without a signature

Tilden Rent-A-Car Co. v Clendenning

* **A signature doesn't always constitute an agreement**
	+ All depends on the circumstances which the signature was affixed to the document
* One year after the UK has passed its unfair contract act
	+ When consumer protection started to become an issue
* **Would a reasonable person** expect this clause? No
	+ Clause said that **no** alcohol must have been consumed
	+ It is an unexpected clause
	+ It is **buried on the back of the document and his hardly legible**
	+ Nothing is said of the clause by the employer
	+ **A reasonable person would not have paid extra money for such a clause**
* **The contract was entered in haste**
	+ Done in an airport in a kiosk in a rush
	+ Hurried, informal manner
	+ Quick manner is said to be part of the attractiveness of the service
* **There was inconsistency between the onerous term and what the person would be expecting**
* **If he had known that he wasn't allowed to have any drink at all, he would not have bought the coverage**
* **The clerk for the issuer of the contract did not bring forward any steps**
* **This is a consumer transaction and not a commercial one**
* He was not intoxicated, and not impaired
* Did the defendant read the contract? Did the company know that?
	+ **Defendant did not bring forward any of the onerous clause**
* Part of being a good business person is reading contracts, however consumers need more protection for numerous reasons
	+ No power or authority to negotiate
	+ Do not understand legalese
	+ In a position of take it or leave it
	+ Cannot be expected to have the same kind of knowledge or understand what is going on
* The complainant thought that he had complete coverage, what he is actually getting is very limited coverage
* Take the objective theory of contract law a step further and ask about the circumstances under which a contract is signed
* Defendant rented a car, crashed it after a few drinks
* Judge ruled that the clause in the contract was onerous and no one could or would read it
* **Omission can be representation**

Karroll v Silver Star Mountain Resorts

* **Lestrange and Grouco - A signature is binding unless contract was fraudulent or misrepresented**
* Tilden should be held to only exceptional circumstances
* There is no general requirement that a party tendering a legal document to ensure
	+ Unless it is known that the party signing is not consenting to the document
	+ If a reasonable person knows that another party is not consenting, then that party needs to take some steps to draw attention
	+ Basically then becomes representation
* **It follows that Karroll is bound by the contract unless:**
	1. **A reasonable person would agree that she did not agree to the onerous conditions in the contract**
	2. **That in these circumstances the clerk failed to take the steps to enforce the clause**
* The kinds of factors we should look into are similar to the factors in Tilden
* It runs contrary to the parties normal expectations
* Policy would mandate that this clause is effective
	+ If the mountain did not have this clause, then insurance would charge more, the hill would charge more, and less people would ski
* Reminds us why we shouldn't always be on the side of the consumer
* **Misrepresentation can happen in omission (failing to show the clause properly)**
* When you take the three circumstances, the nature of the clause, the nature of the circumstance, and the nature of the document, she should have known about that release
* There was some evidence that she had told this friend of hers about this clause
* The court decided that the clause was not onerous or displayed incorrectly
* In the alternative, had this not been the case, there were no further steps needed to show the clause
* It was not hurried, it was not an unusual exclusion clause

Fundamental Breach

* Standard form contracts, exclusion clauses
* Doesn't seem to be limited to consumer transactions (could be business to business transactions)
* Does it deny the very thing it was supposed to provide? If yes, fundamental breach
	+ Destroys the very foundation of the contract
	+ If it does, is it right to say that the party should be able to rely on the exclusion clause

Karsales v Wallis

* Wrecked Car
* Wallis inspected a second hand buick, car was in excellent condition, bought the car
* About a week later the car was left in front of the defendant's garage, but wrecked
* This was a fundamental breach and goes to the root of the contract, destroyed the whole thing
	+ Trying to protect the little guy
	+ Once destroyed, the exclusion clause should be destroyed too
		- Rule of law approach to fundamental breach
			* If A happens, then B will follow, it is a **rule**
			* Becomes quite an effective approach in governing these situations
* It's not fair for a company to contract out of liability for completely contradicting what it undertook to do
* Quite a major incursion on previous contract law
* There has been hampering of freedom of contract in order to maintain an unhampered free society
* Car was a complete failure, the thing that was supposed to provided not

Photo Production Ltd v Securicor Transport Ltd

* Fire in respondent's factory
* Why didn't they sue in tort for negligence?
* **Disagrees with doctrine of fundamental breach as a rule of law, states it is a rule of construction (affirms *Swiss Atlantic*)**
	+ Rule of construction says the question of what happens to an exclusion clause in the event of a fundamental breach is what the parties said should happen in the contract (what does the contract imply?)
* Does away with the doctrine of fundamental breach as Denning states it, sets table for supreme court
* Ask what did the parties want? What did they agree would happen in the context?
	+ Basically no longer fundamental breach, just looks closely at the contract
* Not a big deal about when the contract was formed, it's more about the contract was breached
* When it was breached, was the consideration completely undermined
* Distinction of whether it is a consumer or commercial contract is less important when involving rule of construction
* Can't use the Tilden method with big commercial companies because they can be expected to look over the contract thoroughly
	+ This is a main reason why the court denies the argument of fundamental breach
	+ Business people are presumed to be confident and capable
* Ruled that given its plain construction, the exclusion clause stands
	+ There was no fundamental breach, but had there been, the clause still would have stood

Hunter Engineering co Inc. v Syncrude Canada Ltd

* Operation involved scooping and loading sand onto conveyor belts
* The conveyor belt in this situation has to be very heavy duty
	+ Motors that drive the conveyor belts need to be heavy duty
* Gearboxes fail, and it is found that they are simply too weak for this use
* Syncrude sues to repair the gearboxes, which would cost almost as much as brand new gearboxes
* "Warranty will be 12 months from date of first use, or 24 months after shipment"
	+ Failure happened outside of warranty period
	+ Question is over this clause, Syncrude needs to get itself out of this clause
* Syncrude claims that giving completely inadequate gearboxes was a fundamental breach and therefore the clause should not apply
* Much inclined to lay the doctrine of fundamental breach to rest and deal with these problems on the basis of unconscionability
	+ Unconscionability is based on inequality of bargaining powers
* Two reasons: first is that not all exclusion clauses are unreasonable
	+ **The idea that the exclusion clause reflects the purchase price (i.e. securicor only getting paid 25 pence a visit with liability exclusion)**
* Must maintain a balance between the obvious desirability of allowing the parties to make their own bargains and have them enforced through the courts and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves
* Not agreeing with fundamental breach, or just what the parties were saying (photo production and Wilson), but merely look at whether in the light of the breach whether it's still fair or still reasonable to assert the exclusion
* Wilson finds that there was not fundamental breach, but even if there was
* Fundamental breach- depriving the party of substantially the whole benefit
* No fundamental breach in this contract- only 10 percent of the contract failed
* Wilson: if it is not fundamental breach then no further inquiry is needed as to the nature of the contract
	+ Then says if there is a fundamental breach, there would be nothing unfair or unreasonable in giving effect to the exclusion clause
	+ Equality of bargaining power is a part of fairness and reasonableness
	+ Behaviour of parties, was there sharp or unfair dealing? In this case no
	+ There was no fundamental breach of contract
	+ Allows one to go beyond threshold of unconscionability
* Dickson: no bargaining inequality here because there is no unconscionability, if all criteria of unconscionability fit, fundamental breach does not matter
* Must look at both Dickson and Wilson

**Fundamental Breach/ Unconscionability Post-Hunter**

Fraser Jewellers Ltd v Dominion Electric Protection Co- Not bad way to look at ruling from syncrude

* Plaintiff operated a jewelry store in Cornwall, Ont. And entered into a contract with ADT
* Mr. Gordon had not read the agreement, and was unaware of the exclusion clause
* He was not insured
*
* Yes there was a breach, not fundamental though
* There was negligence
* Robbers escaped from the plaintiff's premises with 50 000 worth of jewellery
* It was found that the robbers could have been caught if it weren't for the negligence of ADT
* Question over whether the clause applied and reimbursement limited to $890
* The failure of ADT was not a fundamental breach
	+ Was a lapse or error
* The fact that Mr. Gordon, as a business man, chose not to read the contract should not help him
	+ Was printed on one sheet of paper, highlighted in block letters
* No abuse of bargaining power
* To make ADT liable would fundamentally change the contract agreed to by both parties
* You get what you pay for
* **Clause says that exclusion clause is based on value of service, not value of products**
* The fee is too low to reasonably make ADT completely liable
* **Issue of price contributes to expectations of contract**
* Failure to read a contract as a business man, with lots of time, is no legal excuse
* Business people are held to a higher standard than consumers

* Must do an unconscionability analysis
* Must do a fundamental breach analysis
	+ Bargaining power
	+ How bad the breach was
		- If it is a fundamental breach, then it means that it is really bad
	+

Solway v Davis Moving & Storage Inc

* Plaintiffs signed with the moving company to move valuable goods, which then got stolen as the truck was left on a public road
* Decided after Fraser Jewelers
* Moving company wants to plow its parking lot, so they move the trailer to a public street, and the trailer is stolen
* Tries to find a balance with the interests of the industry and the interests of the consumer
* Legislation designates a point of balance, states that consumer should have insurance, and that movers need to include in their standard form contract a limitation of liability for 60 cents per pound
	+ Not specific to goods being transported
* Bill of lading stated that *Truck Transportation Act* would limit the claim to 0.60 per pound for a total of 7089.60
* Company was negligent and reckless to the nature of those goods
* Plaintiffs were aware of the limitation and had taken steps with an insurer
* The defendant gave false assurances that the goods would be secure, and that these induced the plaintiff to agree with the limitation clause
* Seems to be straight misrepresentation (however a different approach is taken)
* Left with the general statement that an exclusion clause won't apply if it is unfair, unconscionable, or unreasonable (little concern of fundamental breach and more of a Dicksonian approach)
* Probably not a fundamental breach (not really addressed)
* **It would be unconscionable, unfair, or unreasonable** to assert the exclusion clause
* Ruled in favour of Solway

Plas-Tex Canada Ltd. v Dow Chemical of Canada Ltd

* Plaintiffs built oil pipes, used defendant's resin
* Dow Chemical makes resin that it sells to Plas-Tex
* It is possible that one party makes the relationship unequal by holding back information
	+ That is an imbalance of bargaining power
* Dow had exclusion clause on liability
	+ Excludes all liability for any defects that may be in the resin
* Court finds that the clause is unconscionable and won't be in force
* Trial judge concluded that there had been a fundamental breach, the resin was **completely** unsuitable for the purpose
* **Concluded that two big companies can be in a position of unequal bargaining power due to the distribution of information**
* Dow knew that the resin it provided was defective, would likely cause pipes to fail, and that it would lead to damaging results
* **There was sharp-dealing, inequality of bargaining power, and this was a really bad fundamental breach (Wilson)**
* Definitely not reasonable and fair to apply the exclusion clause
* Both Dickson and Wilson's approaches work nicely, the problem is that they get mushed together
* Plas-Tex suffers substantial damages
* Their conduct was plainly unconscionable and the exclusion clause should not hold
* Different from Syncrude in that the breach was fundamental, the consequences completely undermined the purpose of the contract
* Can't just presume that two parties are equal just because they look equal
* The unconscionability here was because Dow knew, and there was no way for Plas-Tex to know

**On exam, go through Wilson, and go through Dickson**. Probably the most coherent is Fraser Jeweler case

* Wilson: Fundamental breach
* Dickson: fundamental breach is a non-issue, determined on unconscionability
* There are cases where there may not be a fundamental breach, but it would be unconscionable to enforce the exclusion clause

**UNCONSCIONABILITY**

* Caveat Emptor and Capitalism free market vs. Protection of the buyer due to relative bargaining power
* Even if the other party did consent to the agreement then it could still be revoked under unconscionability
* Duress, no consent
* Undue influence, consent but something
* Don't have to find that there was bad intent, if there was an imbalance of power, unique relationship, something "outside the ordinary play of forces"
* More the nature of the circumstances than the nature of the parties

The Traditional Doctrine

* Narrow sense
* Two elements present:
	1. An improvident bargain
	2. An inequality in the position of the parties

Morrison v Coast Finance Ltd.

* Old lady taken advantage of when Lowe and Kitely (relative strangers) persuaded her to take out a loan for their benefit
* Was the coast finance company involved in bad behaviour
* There is nothing wrong with the relationship between the finance company and the woman
	+ Have to look at the broader concept and look at the relationship between all three parties
* She was not present at the initial proceedings with the bank
* The bank received the application not from the lady but from the con artists
* There was a significant lack of consent, there was evidence that she was looking for some sort of advice
	+ The bank was conscious of her distress
* Sometimes there is a failure in the voluntariness to enter a contract, this is one of those exceptional cases
* In a way, many transactions are unfair or unequal, if unconscionability was allowed to extend too far there would be far too much paternalism on the hand of the courts
* The companies sort of went around her back to secure the payments and security

Marshall v Can Permanent Trust Co.

* Man trying to take advantage of elderly man in home by purchasing land for 7000 dollars
* The defendant is entitled to rescission if it is established that:
	1. Walsh was incapable of protecting his interests
	2. That it was an improvident transaction for Walsh
* It does not matter whether Marshall was aware of Walsh's incapacity
* Onus rests with the plaintiff to establish that the price was fair
* In this case both questions go against Marshall
* Walsh was mentally incapable of business operations
* The value was much less than it was supposed to be

Wider View

Lloyds Bank v Bundy

* Poor old gentlemen mortgaged his house to the bank after the house had been in his family for 300 years
* Lord Denning finds that they were in a position of inequality
	+ The dad trusted the bank, did not look elsewhere for assistance
	+ The relationship with his son was such that he would be willing to do anything for his son
* He was a kindly man and had a heart attack at the stand
* The circumstances here are so exceptional (outside the boundaries of normal capitalism)
* Lord Denning agrees that this was an unconscionable deal
* Bundy was one of those affable people who wants to please people, he was not totally incompetent
* There was not gross abuse (as there was in Morrison) by the defendant here
* The Bank Manager operated in good faith and was not trying to con Mr. Bundy
	+ This case does not depend on wrongdoing
* Four reasons:
1. Consideration moving from the bank was grossly inadequate (it was a bad deal), Bundy was not gaining anything
	* It was clear that all was happening was paying off the existing overdraft and there was no extension of credit
2. The relationship between the bank and Bundy was one of trust and confidence (sort of an undue influence type of situation)
	* He was placing trust in the bank to pursue both their interests and Bundy's interest, protecting him
3. The relationship between the father and son was one of natural protection and affection, he trusted his son when he probably shouldn't have
4. If Bundy had sought business advice the businessperson would have said absolutely do not do this
	* **He was under influence by some factors which led him to enter an agreement that was against his own interests**
* This case differs from homelessness in that homelessness is a normal function of capitalism
	+ This case is not a normal case of capitalism and can be said to exceptional
* **Bundy is unique in that there was no bad guy**
* **EXAM: the best way to approach this is if you can find wrongdoing in the traditional sense, wrongdoing, improvident deal, inequality of bargaining power**
	+ **In the alternative, if there isn't an exceptional relationship, that there isn't a bad guy, then it goes to Bundy**

Harry v Kreutzinger

* Native sold his boat worth 16000 for 4500
	+ This fact alone cannot be enough for unconscionability
* The crucial fact is not only the price, but that the buyer had assured the appellant that the appellant would get another licence easily, when in actuality it is very difficult
* **The stronger party took advantage of the weaker party**
* The respondent proceeded aggressively when the appellant did not wish to sell
* **The buyer knew that what he was doing was wrong and even reckless**
* If the buyer was being perfectly honest and acting on good faith, we may not have this case
* He was partially deaf, easily intimidated and ill-advised by a process of harassment
* Like Bundy, he is an agreeable person with some experience in business
* This case is slightly more like Morrison in that the perpetrator was arguing in a way that was more wrongful
* More in the stream of traditional unconscionability
* It is easy to find unconscionability because of the actions of the party

**MISTAKE**

* There is in general no duty to inform someone that their belief is mistaken prior to entering a contract (caveat emptor)
* If you sign a contract that does not explicitly say what you are getting it is at your own risk
* Mistake as to motive (outside the agreement) vs. unilateral mistake as to terms (inside the contract)
* If you want the painting to be a Picasso, put it in the contract
	+ The hurdle for triggering the doctrine of mistake is difficult
	+ The "thing" must be explicitly stated, the courts want to enforce what the contract agreed to
	+ This is the **Common Law Doctrine of Mistake**
* **May be on exam**, **this is a good example of freedom of contract**
	+ Freedom of contract is not concerned necessarily about justice, it is about asserting the contract
		- Looks to consideration etc.
* Denning comes along and says we need equity
	+ There may still be a mistake that makes it unfair
* Even if the common law doctrine doesn't come into effect, the equity will

Smith v Hughes

* Sale of oats from farmer to racehorse breeder, farmer knew they were new, breeder thought they were going to be old
* The contract just specifies oats, not new oats or old oats
* Courts are trying to incentivize proper contract behaviour by laying out the terms specifically
* The two minds were not ad idem as to the age of the oats, they were ad item as to the sale and purchase of them
* Depends slightly on whether the word "old" was used
* Court will not allow implied terms, sticks with traditional contract view

Arguments Made Under Mistaken Assumptions

Bell v Lever Brothers Ltd.

* Defendants appointed Bell and Snelling as chairman and vice-chairman of the board of directors
* The directors were in breach of duty when they speculated the company's interests to their private advantage
* Later, the defendants released them with compensation, and are no claiming that they didn't have to pay comp.
* They want to say that they were mistaken, they paid that money on the mistaken belief that they had to
* Bell and Snelling were not fraudulent, did not have any duty to inform
* The "thing" is getting rid of Bell and Snelling, paid way too much for it on the basis of their mistaken assumptions
* The quality was the price they had to pay
* Caveat emptor, look into it and see if there is a way they could get rid of them for free

McRae v Commonwealth Disposals Commission

* Commission promised tanker which did not exist
* McRae spends a lot of money on going out for the expidition
* Argues that there is an explicit contract between them stating there was a tanker
* Not a matter of quality, whether it was there
* Commission was at fault for the mistake
* The commission had no real reason to believe the tanker was there
* They were guilty of the grossest negligence
* Even if McRae took all steps, they could not know that there was a tanker there
* Plaintiff sues for breach of contract, wins

* If the ship existed and got swallowed by a seismic event
* Both parties would have been innocent to the subject matter of the contract (disappearance of the ship)
* Both parties could claim mistake and say that there was never
* If ship was swallowed after contract would be frustration and both would still walk away

Courtier v Hasting

* Cargo was rotting in the hold of the ship that was trying to deliver the goods
* Was not a difference in quality because it had become something entirely different
* Neither of them knew or could have known what was going on
* They still entered an agreement for a sale
* No fault to anyone, couldn't have been known by a buyer or a seller

Mistake in Equity:

Solle v Butcher

* Butcher leased a flat to Solle in return for 250 pounds over 7 years
* Solle advised Butcher that the rebuilt flat would not be subject to rent control
* In fact, the rent was fixed by statute at 140 pounds
* It is a mutual, innocent mistake
* Had Butcher known, he could have executed a fairly straight and simple procedure to charge 250 pounds a year
* Lost his opportunity to rent his flat without rent control and now has to reduce it to pounds
* Can't say that a contract never came into existence
* Difference in quality not a difference in kind
* Denning- contract is not void but is voidable
* Two analysis:
1. Do we engage the common law mistake, if not
2. Would it be unjust to enforce the agreement because of the mistake
* Butcher must not be at fault in order for this to work
* Misapprehension must be fundamental
	+ Can't mean that it has to be as fundamental as Bell and Lever Brothers
	+ Fundamental does not mean root of contract, just really important
* Must be mutual or it is misrepresentation
* Butcher completely reasonably relied upon Solle because Solle was the expert here
* Market value for the property is 250 pounds, but for this mistake
* Denning ruled that this was unjust and Solle is entitled to stay on the proper rent or go out

Great Peace Shipping v Tsavliris Salvage

* The Cape Providence, on route from Brazil to China, suffers serious structural damage with consequent risk to both its vessel and crew
* Salvor (Defendant) was retained to provide assistance
* Defendant sought assistance from Marint, in locating a tug
* Marint advised that The Great Peace, a tug, was closest to The Cape Providence, about 12 hours away
* The great peace was actually 410 miles away, and not 35 miles away
* Marint then cancelled because there was a closer tug, the Nordfarer
* Tug would have got to the vessel, they would have got the job done
* Salvage company decided to go with the other tug, and the Great Peace sues demanding cancellation fee
* Defendant claims mistake
* Court finds that it would be
* In Canada we are still stuck with the doctrine of Equity

Miller Paving Ltd. v B Gottardo Construction

* Gottardo, construction company, promises to pay for supply materials
* Miller supplies materials as consideration
* Miller signs a later contract stating that they had been paid in full once final payment has been made
* Gottardo says that it was really Miller's obligation to keep accounts of the money
* Seems like it would be the kind of injustice that Denning lays out
* Judge Goudge says that the contract should stand as it is
* Even before getting into the doctrine of mistake, if you look at the contract on its true construction
* To apply common law, the subject matter must be completely different from the agreement implied
* Subject matter has not changed here
* Court rejects the approach in Great Shipping, and sees some benefit in equity mistake
* To engage the equitable doctrine of common mistake Miller must show that it was not at fault
	+ Due to unexplained errors in Millers accounting ability
* The court decides not to enforce equitable principles
* **Primary issue is that Miller was at fault, Butcher was not at fault**
* Gottardo was assuming that it didn't have to pay more, final payment was sufficient, since they weren't billed earlier and Miller never let them know
* Real reason here is fault
* Bakkan suggest that if Miller was not at fault, if for example it had a negligent clerk or software system that messed up, case would have been different
* **If I'm in BC, then you could make the argument that the doctrine of equitable mistake should not exist**

* **Must not be at fault**
* **Must be fundamental, an important mistake**
	+ **A substantial difference in price constitutes**
* **A general proof of unfairness**

**FRUSTRATION**

* Frustration- Contract then event that no one could foresee
* Mistake- Event then contract
	+ Get into issues around fault, maybe they should have known
* Provides another example of an excuse from performance obligations
* Literalist vs Interventionist approach
* Must be something radically different

Paradine v Jane

* Defendant and his cattle was run from his house by Prince Rupert during the English Civil War
* Judge ruled that the lessee (renter) did have to pay rent, even though he was not on the property by no means of his own fault
* Argues sanctity of contract
* If there is a chance you might be booted off the land, put it on the contract
* If there is a chance that the house might be burned down, put it in the contract

Taylor v Caldwell

* Plaintiffs were to perform a concert in the defendant's concert hall
* After the agreement fire burned the place down
* Court rules that the contract is voidable and both parties are excused
* Court argued that the
* If you followed the Paradine v Jane different result would happen
* Believed that fairness must be allowed
* Nothing in the contract explicitly to deal with the falling of the concert hall
* Implied term- there is a term in this agreement that it was the mutual intention of the parties at the time of the agreement, so obvious that it didn't need to be written, that if something happened to the hall the contract would cease to exist
* Contract was subject to an implied condition
* Find that the contact was made on the basis of the hall existing
* **Test of what the parties likely perceived or implied is objective**
	+ We do not care and cannot know what the parties were thinking when they entered the contract

Can Govt. Merchant Marine Ltd. v Can Trading Co.

* Appellants contracted with the Canadian Trading Company to transport lumber from Vancouver to Australia
* The ships were under construction for the appellants
* Because of dispute between the appellants and the shipbuilders, the vessels were not ready in time
* Appellants claimed frustration after respondent sued
* Stuff happens and you know there are going to be problems
* Court ruled that the arguments between the appellants and the shipbuilders was within the scope of the nature of the contract, not completely unrelated, and therefore they were responsible
* Have to look at all the circumstances in the case, is this something that could have been reasonably foreseen by the parties
	+ Ordinary course of events vs something that was outside the ordinary, extraordinary
* **If it's in your control then you can most likely anticipate it**
* **ON EXAM FACTS TO PLAY WITH**

Claude Neon General Advertising Ltd v Sing

* Defendant rented a neon sign, then lighting restrictions were introduced when Canada entered the second world war
* Court rules that the "kind" of contract was not for an illuminated sign, but for a sign, and that is what he got
* Court rules in favour of the sign company

Davis Contractors v Fareham UDC

* Plaintiff contractors entered into a building contract to build 78 houses for the defendant municipality within a period of eight months
* Contract price was 92425
* No fault to either party the contract took 22 months
* Court rules no frustration for two reasons
	1. The cause of the delay was not a new state of things that was unforeseeable
	2. The impossibility of delay was not equally significant for each side
* What is reasonable?!
	+ **It isn't what the parties reasonably anticipated, it is what could the parties reasonably have foreseen**
	+ **If they could have anticipated it, no frustration, if they couldn't have, then frustration**
* If you lease some premises to build widgets, but a law comes in for no industry
* Regulatory change most likely constitutes frustration
* If you were following the neon sign approach they would say you're still getting the land
* Court here says that the kind is different, it is a matter of judgement
	+ They got something entirely different

Capital Quality Homes Ltd. v Colwyn Construction Ltd

* Plaintiff agreed to purchase from the defendant 26 lots each comprising parts of lots within a registered plan of subdivision
* Before closing new legislation came into effect which drastically altered the contract
* Plaintiff claimed deposit back
* Vendor required to convey a marketable title in fee simple
* Legislation destroyed the very foundation of the agreement
	+ Legislation said that each of those 26 lots had to get permission to be sold
	+ Fundamental change
* Vendor ordered to refund the purchaser the deposit
* If you buy 26 plots of land the **only** thing you can do with that is build homes on it
* **Usually the thing has to be radically different**

Victoria Wood Development Corp v Ondrey

* Plaintiff agreed to purchase 90 acres of land next to QE highway in Oakville
* New legislation came into effect which disallowed subdividing (her plan)
* Vendors only thing was to sell the property
* Purchasers only thing was to buy the property
* It was not made conditional, unlike previous case where a package of 26 lots was being sold,
* Court rules that unlike Capital Quality Homes, the foundation of the agreement was not to subdivide
* Rules that frustration does not apply

KBK Ventures v Canada Safeway

* KBK enters agreement to purchase property from Safeway
* Safeway has knowledge of KBK's intent to use the property as a redevelopment
* Court distinguishes the case from Victoria Wood since Safeway did have this knowledge
	+ Both parties are agreeing that the sale is contingent on the development
	+ More than "mere knowledge"
* Safeway was saying "buy this, and you can convert it into a condo"
* The subject matter here was the sale of a property for the development of condos
* Neither party could have foreseen the Directors application for a change in Zoning
* Change is square footage was so radical 231,800 sq ft. to 30,230 sq. ft. that it fundamentally changed the contract

Kesmat Invt Inc v Industry Machinery Co & Canadian Indemnity Co

* Plaintiff entered into a contract with defendant to allow the defendant to gain an easement to his property for a sewer line
* Defendant agreed to pay 50000 dollars in case it couldn't get it for any reason
* It was subject to an environmental survey and Defendant didn't pay, now Kesmat sues to get 50000
* Court ruled that the cost of the survey was not one where "no man of common sense would incur the outlay"
* Found that the request for a survey was not unheard of and was foreseeable
* Harder work or more onerous conditions does not amount to frustration
* What is the balance of extreme and unreasonable economic difficulty and foreseeability?

**ON THE EXAM THE HYPOTHETICAL PART (65 percent) ESSAY (35-30)**

**Hypothetical part will have nothing on remedies**

**Four choices on essays, one of those essays will be on remedies**

**COLLATERAL WARRANTY**

* If you are arguing for the buyer, you are going to want to argue that the statement that was made was part of the contract
	+ So that you can get damages in common law and not use equity
* Certain statements called collateral warranties that guarantee a certain state of affairs in a contract

Heilbut, Symons & Co. v. Buckleton

* Defendant bought shares in the plaintiff's rubber company after their acquisition of two estates
* Value of shares went down and plaintiff sued
* A person should not be liable in damages for an innocent misrepresentation
* Here the statement was made in answer to an inquiry for information
* Buyer suggests that there was a collateral warranty, pre-contract words was a contract
	+ He bought because of the promise
* **Courts don't want to start looking at the intentions of the party, want to enforce the contract**
	+ **If you want a rubber company, put it in the agreement**
	+ **All of these defences deal with things that are somewhat outside of the contract**
	+ **Why didn't you just say it in the contract?**
		- **Perhaps you paid less for the shares as a result of not specifying (got what you paid for)**
* No intention to create a collateral warranty
* No point opening the doors to where any pre-contractual statement counts
* House of lords is saying that there is a theoretical possibility to have a contract to make a contract, but it is going to be exceptional and rare, and actual proof is required of intention to enter a contract
* There was nothing as evidence of intention for contractual liability in respect to the accuracy of the statement
* It was an innocent misrepresentation
	+ All he was doing was stating facts of the company, never intended to enter a contractual relationship
* Inference here was rebutted

**THESE CASES: would a reasonable person have known that the representation was on the table?**

Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd.

* One ground as to which these two cases have been reconcilable is that Bentley is a consumer transaction
	+ Heilbut was a commercial transaction
* Sale of a car
* Plaintiff was looking for a Bentley, defendant found one and sold it to him
* Defendant made some statements about the car, Plaintiff sues and calls this warranty
* Turns out car has quite a lot more than 20000 on it, car was a disaster
* Was the 20000 km statement a warranty? Was there intention for it to have contractual force or was it a mere representation
* This is an objective inquiry
* When the statement is meant to induce another party to enter into entering it, the onus is on the seller to prove it wasn't
	+ Different burden than Heilbet
* Seller has to be completely innocent as to the representation, in this case he wasn’t
* If the person relied on the statement, then there is an inference that it was meant to be contractual
* If the representor can show that he is innocent then that will rebut the burden
	+ Carelessness is not an excuse
* If a person makes a statement that isn't true which induces a person to enter an agreement, and that person made the statement carelessly without diligence, then that person is liable
* **Depends on the conduct of the parties rather than on their thoughts**
* Court rules there was no reasonable foundation for these statements
* In this case it was not an innocent representation and was a false warranty

**REMEDIES**

* Sometimes it is more efficient to break a contract, law wants to reward this
* Simple remedies should be awarded
* Loss of profits must be calculated with some degree of certainty in order to award expectancy damages
* **Reliance** damages: damages incurred from relying on a promise
* **Restitution**: buy something and don't get product, get back your money
* **Expectation** loss: money you would have got had the contract been completed (most complicated and used)
	+ Harder to quantify
	+ What kinds of interests are better protected?
	+ How remote do we go?
		- Every action has an infinite effects until the end of time
* How do you compensate for an intangible loss?
	+ Can you find that expectations were not met?
	+ Denning states that one should be compensated for loss of enjoyment
		- Compensates twice of what he paid for the trip (holiday ski case)
		- Arbitrary but necessary
	+ Shows that you can think about the emotional side
	+ If your self-esteem is completely lowered, abused, due to an employer
		- Reasonable solution is to add notice period
		- Judicially created resolution to harsh firings
* The breach itself is not considered a wrong in moral terms
	+ Something additional to the breach itself
	+

Chaplin v Hicks

* Competition for actresses for three year contracts
* Court approaches situation with probability of obtaining outcome
* Plaintiff became one of the fifty eligible for selection by the defendant
	+ Was ranked number one in her district
	+ Was given a pretty good chance of being selected 1 of 12
* At the time of the call, the plaintiff was in Dundee, and sued for loss of chance of selection
* Court finds as a matter of fact that there were insufficient steps to contact the plaintiff
* **There is a strong possibility** in this case
	+ They are going to say she had a 1/4 chance of getting that, and give her 100 pounds/yr in 3 years
* If there is a fairly quantifiable, assessable chance, then you will get damages
* Defendant appealed trial decision which awarded her 100 pounds since he didn't give adequate time
* Court ruled that there was the opportunity of competition, which was something of monetary value

Nu-west homes Ltd v Thunderbird Petroleums Ltd

* Nuwest contracted to build a house for Thunderbird
* There were serious problems with the house, work stopped, plaintiff sued, defendant coutner-claimed
* Question over whether the costs to Thunderbird to correct all the mistakes warrant award
* Court ruled that thunderbird acted reasonably and can be awarded damages for lifting up the basement
	+ Was acting on expert advice
* Punitive damages have to be awarded in exceptionally harsh and malicious situations
* This case has been criticized as being unduly harsh to employees
* **This case is important because it establishes two caveats to the "put the claimant in original position" rule**
	+ **Where the cost of rectification is minimal in comparison to the nature**
	+ **Where the cost of rectification is very high, it is unlikely that the court will award difference in value**
		- Ripping out stone from New Hampshire to put in stone from Vermont
		- As opposed to plastic vs. copper piping (substantial difference), will justify the costs
	+ **Second caveat, kind of rectification is going to make a difference**
		- Say that Jarvis goes to Whistler instead of Austria
		- That would not be reasonable in their position
		- Just has to act reasonably, not perfectly
* **Does the law favour the victim of the breach or the perpetrator of the breach? Exam!**
	+ Favours the victim, but not without consideration of the actions of the victim
		- They must have been reasonable
		- Will not allow trivial matters
	+ Does not allow the victim of the breach to run wild
	+ There is an aura of reasonableness around the situation
	+ Usually cost of completion will be awarded

Vorvis v Insurance Corp of British Columbia

* Holiday ski case
* Denning rules that you should be compensated for expectations that are not met
* Has to be pretty bad, almost fundamental difference
* Asks for the amount that he had to spend to get himself out of first situation and into second
	+ Vs. value in difference of the two vacations
* If you are a victim you want to get cost of completion
* If you are the party in breach you want to argue the difference in value

* Cost of completion vs. difference in value
* Cost of completion
	+ Put victim of breach in position they should have been in
* Difference in value
	+ Difference in value between what they got and what they should have got
* Example: painting
	+ Spending 15k on paint which raised value 1k
* Cost of completion is typically more
* Usually the person who has been wronged wants cost of completion
	+ Generally they get cost of completion
* If you are the party in breach you want to argue for difference in value

Hadley v Baxendale

* Shaft case where shaft broke, transportation company messed up
* Since the factory was closed down led to losses of 300 pounds
* Want expectation of losses
	+ Claim that the lack of delivery on time led to loss of 300 pounds
* They lose, lose because the court says they can't sue for loss of profit because it could not have been reasonably anticipated by the defendant
* They knew they had a crankshaft, new they had to get it in on time, but didn't know that not having it at the mill was essential to its operation
* Not ordinary knowledge in the view of the court
* If it had been communicated to the company they may have been able to recover
* **What would we expect them to expect would happen**
* **Court tries to solve the butterfly effect problem**

Koufos v Czarnikow

* Ship owner was late in delivering sugar, as a result profit was lost
* What was reasonable that the shipper knew?
* Markets vary
* Recipient could have made more if the market had gone up as a result of delay
* Ship owner was not given any information, but he knew there was a market in sugar at the location
	+ If he had thought about the matter, he should have known that the sugar would be sold
* In these situations where we just don't know, the house of lords says in the absence of special knowledge you can assume that markets are as likely to go up as they are down
* You can get the difference as if the breach had not happened

**FREEDOM OF CONTRACT**

**Standard Form Contracts:**

*L'Estrange v Graucob*

*McCutcheon*

*Tilden* (dissent)

*Karroll*

**Fundamental Breach**

*Photo Productions*

*Syncrude* (Dickson)

*Fraser Jewellers*

*Solway* (dissent)

**Unconscionability**

*Morrison*

*Harry v Kreutzinger*

**Mistake**

*Smith v Hughes*

*Bell v Lever*

*McCrae*

**Frustration**

*Paradine v Jane*

*Davis Contractors*

*Merchant Marine*

*Claude Neon*

**Representation**

*Heilbut*

**PATERNALISM**

**Standard Form Agreement**

*Interfoto*

*Unfair Contracts Act*

*Tilden*

**Fundamental Breach**

*Karsales*

*Syncrude* (Wilson)

*Solway v Davis*

*Plas-Tex*

**Unconscionability**

*Lloyd's Bank*

**Undue Influence**

*Geffen v Goodman* (LaForest)

**Equitable Mistake**

*Solle v Butcher*

**Frustration**

*Taylor v Caldwell*

**Representation**

*Dick Bentley*