X likely wants [remedy]. To get [remedy], X can rely on [doctrines]. However, before X can argue these doctrines, s/he must establish first that a k exists, s/he is party to it, and that the k is enforceable.

Offer/acceptance

Privity

Certainty

Consideration

THEN MOVE ON TO CONTENT OF K, EVEN IF THERE ARE PROBLEMS AT PRELIMINARY ESTABLISHING K

If X wants [remedy], his/her best chance of obtaining it is through [doctrine]. ARGUE MOST LIKELY DOCTRINE.

ARGUE LESS LIKELY DOCTRINES

**VOID**

1. **MISTAKE - (MacDougall, ch. 15)**

WHY LEGALLY OPERATIVE MISTAKE IS RARE

* + parties have to be responsible for the mistake they make—mistake is a personal thing
    - excusing a party for their own incompetence is against fundamental idea of k
  + upsets the risk allocation factor
  + only comes into play when parties did not contemplate the mistake within the k
  + can’t attribute mistake to a third party
  + caveat emptor: parities have to bear any risk at their own expense (except for special relationships)

COMMON MISTAKE in common law—K IS VOID (**BELL**)

* + both parties mistaken about the same thing but not contemplated in the k
  + elements of common mistake
    - common assumption to existence of a state of affairs
    - no warranty that the state of affairs exists (if there is, go to misrepresentation)
    - non-existence not the fault of either party (if yes, go to misrepresentation)
    - nonexistence renders k impossible
    - state of affairs is existence/vital attribute of consideration provided or circumstance that must subsist if perforce and is impossible

Mistaken assumption as to title

* + buyer is already owner of what seller is trying to sell

Mistaken assumptions as to existence of subject matter

* + thing might have been destroyed or never existed (**McCrae**)
  + distinguish between misapprehension as to the substance of what was bargained for (affects k) and misapprehension to quality (does not affect k)

mistaken assumption as to quality

* + **Bell and Lever** gives narrow reading—only operative if it is both parties and mistake relates to fundamental quality of the thing (ie the thing is totally different from what it was believed to be)

COMMON MISTAKE in equity

* + **Solle** (Denning): equity can affect an ongoing k even if CL said no mistake (unconscientiousness)
    - test permits mistake if has to do with the facts or rights as long as they are f**undamental and they are unconscientious (gives other party a legal advantage)**

**Acceptance in Canada**

* + Solle applied in Canada

**BUT: Great Peace rolls back mistake to pre-Solle stage**

* + shrivels mistake in equity and CL
    - impacts CL only in instances of impossibility or where vital attribute was at issue
  + **Miller Paving** takes a less stern approach to Solle in Canada
    - common mistake very difficult to argue in CL or equity, so maybe Solle is still good law in Canada

MUTUAL MISTAKE

* + parties both mistaken but about different things: one party meant A, other meant B and A + B are reasonable
  + possibility that mutual mistake can be better dealt with in certainty of terms or consensus ad idem
  + court may have to interpret k to read in terms
    - will try to find a k wherever possible
  + person cannot get out of k by claiming mistake—always have to take reasonable care when entering a bargain and understanding the risks

UNILATERAL MISTAKE

* + only one party is mistaken either about terms or assumption that is not a term
  + legally relevant in “snapping up” (offeree is aware of the mistake) or mistaken identity

**Mistaken Assumption**

* + irrelevant unless it amounts to perpetration of fraud (**Smith v Hughes**)
    - k only avoided if other person know if mistake and its conduct in proceeding with k was fraudulent
  + unilateral mistake in the motive behind the offer but not in the offer itself: no mistake
  + **Solle**: court can rescind the k if it is unconscientious for other party to benefit

**Mistake as to terms - “Snapping Up” an offer**

* + one party knows the offer contains a miscalculation and snaps up offer because it is a good deal
    - non-mistaken party does not have to have subjective knowledge—enough if they ought to have known
  + “P could no reasonably have supposed that offer contained the offeror’s real intention”—snapping up

**Mistake as to Terms —The Tendering Context**

* + Canadian courts limit the scope of mistaken terms in tendering process
  + contractor’s tender contains a mistake that owner is aware before having to accept KB, mistake relates to important matter under KB
    - where mistake not known after KA was formed, unilateral mistake has no effect
    - if mistake was obvious on face of tender was obvious, might be operative mistake

**Mistake as to Terms — Unavailability of Equitable Remedies**

* + unilateral either operative under assumption or terms or Solle unconscientiousness (maybe)
    - equity may set aside k
  + if there is a k and there is an operative unilateral mistake, specific performance may not be available against mistaken party (obviously)

**Mistake as to Identity (SHOGUN)**

* + k either exists or it does not, distinction between remote ks and meeting face-to-face
    - where parties deal personally, presumption that they intended to deal with one another
    - formal written system of negotiations: person setting up system can rely on identity of named parties
  + if mistake at all relevant, it has to be to the very identity and not to characteristic/attributes

***Smith v Hughes* (1871) QB p. 546**

* **F:** buyer wanted old oats, seller only had new.
* **I:** was it a mistaken assumption, or a mistake as to a term or warranty?
* **R:** if it was just an assumption, no remedy, if a warranty, no k
* **A:** important “distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old" If the former, the d is out of luck, but if the latter, they were not ad item and the k is void (there is no k)
* **C: New Trial:** seems like the plaintiff never mislead the d or knew of his mistaken idea, so k can’t be voided

1. Mistaken Assumption

**Bell v Lever Bros. 1932 HL p. 560**

F: Agreement reached under mistake of fact

I: Operative common mistake?

H: No

R: Mistake operates to negative or nullify consent. K is void if seller was ignorant of the destruction of a chattel. **Mistake as to quality will not effect k unless both parties have made the mistake.** If the k expressly or impliedly contains a term that a particular assumption is a condition of the k, the k is void if the assumption is not true.

**McRae v CDC 1951 Aus HC p. 565**

F: Oil tanker did not exist

I: Operative common mistake?

H: No

R: **A party cannot rely on mistake where the mistake consists of a belief which is entertained by him without any reasonable ground and/or deliberately induced by another party.** P relied upon and acted upon the notion that a tanker existed. D made an assumption, but P did not because they knew nothing except what D had told them.

**Solle v Butcher 1949 ENG CA p 571**

F: Renting an apartment

I: Operative mistake?

H: Yes

R: Mistake either voids the k or renders is voidable. **A k will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even if not fraudulent. K set aside if it would be unconscientious to permit non-mistaken party to benefit.**

**Great Peace Shipping v Tsavliris Salvage 2002 Eng CA p. 574**

F: Ship was thought to be near a certain location, and it was actually super far away.

I: Operative mistake?

H: No

R: **There must be common assumption as to the existence of a state of affairs, no warranty by either party that the state of affairs exists, nonexistence of state of affairs not the fault of either party, must render k impossible, may the vital attribute of the consideration provided.** Determine whether one party is responsible for the state of affairs.

**Miller Paving v B Gottardo Constr. 2007 ON CA p. 582**

F: Sign a k saying gravel was paid in full, but there were unpaid deliveries mistakenly ignored

I: Operative mistake?

H: No

R: **Must be shown that the subject matter of the k was essentially something different from what it was believed to be.** GPS eliminates equitable doctrine, but not accepted in Canada. Court should look to k itself to see if parties have provided for who bears the risk of the relevant mistake. Signed agreement precludes recovery for mistake.

1. Mistake as to Terms

**Smith v Hughes p. 546**

1. Mistake and Third-Party Interests

*a. Mistaken Identity*

**Shogun Finance v Hudson 2003 UK HL p. 583**

**Shogun Finance**

F: Rogue steals someone’s drivers license, then sold car fraudulently obtained to BFPV

I: Operative mistake?

H: Yes

R: **Strong presumption in face to face dealings that parties intended to k with one another.** Shogun had a way to ascertain identity—approach problem through construction. Rogue took no title from the k, because he had no authority—also no authority to sell it to BFPV so car belongs to Shogun.

1. *Non Est Factum: that is not my doing*
   * Cl doctrine in context of written k where one party disputes that s/he responsible for anything under k because their signature was forged

Forgery or justifiable mistake

* + D not in fact party to the agreement, someone forged their signature
  + D may have signed the k, but did not know and could not have known that the document was a k or that it was the type of k it turned out to be
    - rare b/c carelessness will vitiate

Absence of carelessness

* + P must establish that there was a difference between document and P’s belief in what the document was supposed to be (**Saunders, approved in CAN by Marvco**)
    - difference has to fundamentally, radically, or totally different

Characteristics of mistaken person

* + historically restricted to those blind or illiterate, HOL broadens application

Impact on 3rd Parties/Other remedies

* + can render k void: no title passes to buyer or other person under k
    - contrast with voidable: third party buys under k with original buyer before original k is avoided, new buyer takes good title

**Saunders v Anglia Bldg. Socy 1971 En HL p. 591**

F: Old lady breaks her glasses and signs a document she can’t read

I: Non est factum?

H: No

R: **A person who had signed a document differing fundamentally from what he believed it would be would be disentitled from successfully pleading on est factum if he was negligent (careless).** If something is non est factum, it is not the same of estoppel by negligence.

**Marvco Color v Harris 1982 2 SCR p. 593**

F: Action in foreclosure disputed through non est factum.

I: Non est factum?

H: No

R: **Any person who fails to exercise reasonable care in signing a document is precluded from relying on the plea of non est factum as against a person who relies upon that document as BFPV.** Exception to rule: if document signed was a bill of exchange and signor intended to sign a bill of exchange, no non est factum. Law must take into account the fact that innocent party was not negligent, careless, but other party did bad things to inflict wrongdoings. **Negligence, even if it proceeds from good intentions, precludes Ds from claiming non est factum.**

1. Rectification: mistake in the written record of the k
   * both parties generally agree there is a k, ask court to amend mistake in k
     + wiriting meant to contain whole k, but something is inaccurate or left out
   * not just about intention, but documentation—party claiming rectification must produce prior agreement, if they can’t then court won’t grant rectification
2. Common Mistake
   * D argues against existence of mistake, P bears onus of showing the mistake exists
     + P must prove what was executed was not the agreement are and prove what the outwardly expression continuing common mistake was
3. Mutual Mistake
   * neither party content with written record, but have different arguments to make an accurate record
   * burden is same as common mistake, court may have to rectify k because both parties agree in mistake
4. Unilateral Mistake
   * one party is content, other party is not
   * Binnie criteria from Sylvan Lake
     + existence of prior oral k that was determinable and ascertainable
     + P must establish oral terms not recorded properly (error can be fraudulent or innocent)
     + D knew or ought to have known of the error at time of execution
     + D’s attempt to rely on written document must amount to fraud

**Bercovici v Palmer 1966 (Sask QB) p. 601**

F: Error in sale of land

I: Rectification?

H: yes

R: All the evidence points to fact that the piece of property was not meant to be in the agreement, even though it was in writing.

**Bercovici v Palmer 1966 (Sask CA) p. 603**

F: See above

I: Rectification?

H: Rectification

R: An action for rectification reliance may be placed upon considerations arising from conduct of the parties. Trial judge’s decision was right.

**Sylvan Lake Golf v Performance Industries 2002 SCC p. 604**

F: Someone did not read a written k that contained an error.

I: Rectification?

H: Yes

R: Rectification an equitable remedy whose purpose is to prevent written document from being used as an engine of fraud or misconduct. Available for unilateral mistake provided certain demanding preconditions were met—**existence of prior oral k, terms of oral k not written down correctly, D knew or ought to have known of the error and P did not. Attempt to rely on written error must be fraudulent or equivalent of fraud.** Court’s purpose is to restore original bargain. If claimant was negligent in not review the bargain, court may refuse remedy. Court’s jurisdiction is limited to only putting the words that parties had already agree to in the k.

MISTAKE

Legally operative mistake is rare. Mistake upsets risk allocation. Excusing a party for its own incompetence violates fundamental principles of k law. Caveat emptor requires parties to bear any risks at their own expense. Mistakes are not attributable to third parties.

**COMMON MISTAKE**

Common mistake occurs when both parties are mistaken the same thing not contemplated in the k. There must be a common assumption to the existence of a state of affairs. If the mistake results from fault from either party, misrepresentation applies. The nonexistence of the state of affairs must render the k impossible. Common mistake to title is when the buyer already owns what the seller purports to convey. Mistake as to subject matter occurs when the thing is destroyed or never existed (McCrae). Misapprehension as to substance of the thing affects the k, while misapprehension as to quality does not. Mistake as to quality is only operative if both parties make the mistake and believe the contemplated thing is fundamentally different from what it actually is (Bell).

In Solle, Denning stated that equity can affect an ongoing k even if there would be no mistake at CL. The test in Solle finds mistake if it relates to fundamental facts or rights and would be unconscientious (ie gives one party an unfair advantage) to maintain. English courts overruled Solle with respect to common mistake (Great Peace), but Canadian courts have applied Solle (Miller Paving). Great Peace does not deal with unilateral mistake, but did not say so specifically.

**MUTUAL MISTAKE**

Mutual mistake occurs when parties are both mistaken about different things and the mistakes are reasonable. Courts will interpret k and read in terms to ameliorate mutual mistake wherever possible.

**UNILATERAL MISTAKE**

A unilateral mistake entails only one party misapprehending terms or assumptions that are not terms. Unilateral mistake is only legally relevant in context of snapping up or mistaken identity. If there is a unilateral mistake, a court will likely refuse to order SP.

**Mistaken assumptions** are irrelevant unless they are tantamount to fraud (Smith v Hughes). If other party knew of the mistaken assumption and its conduct was fraudulent, the k is avoided. The rule in Solle states that a court can rescind the k if it is unconscientious for other party to benefit.

**Mistake as terms** relates to one party knowing the offer contains a miscalculation and “snapping up” the offer because it is a good deal. The non-mistaken party does not have to have subjective knowledge. Showing they ought to have known the offer contained a mistake is sufficient.

**Mistaken as to identity** distinguishes between remote ks and face-to-face dealings. Where parties deal personally, the court presumes that they intended to deal with one another (Shogun). If mistaken identity is at all relevant, it must relate to the very identity, not a characteristic.

**NON EST FACTUM**

NEF is in context of written k where one party disputes whether s/he is responsible for any k obligations because their signature was forged or they did not know or could not have known the document was a k or that it was a particular type of k. Any carelessness vitiates the disputing party’s claim. The disputing party must establish a fundamental difference between the signed document and the belief in what the document was supposed to be (Saunders, Marvco). NEF renders k void. No title will pass to a third party.

**RECTIFICATION**

Rectification refers to a mistake in the written record of the k. (Bercovici) Both parties will generally agree there is a k. In common mistake, the disputing party must prove what was executed was not the agreement. In mutual mistake, neither party agrees with the written record but may advance different arguments. In unilateral mistake, one party is content while the other is not. Sylvan Lake sets out four considerations in this situation. There must be existence of prior oral k that is determinable and ascertainable. The claimant must show the oral terms were not recorded properly and that D knew or ought to have known about the error at the time of execution. The claimant must also show D’s attempt to rely on written document is tantamount to fraud. (Sylvan Lake)

VOIDABLE

1. **MISREPRESENTATION AND RESCISSION - (MacDougall, ch. 14)**
   * misrepresentation: one of the parties entered into the k b/c of a lie, wouldn’t have entered into the k had they been told the truth—**REDGRAVE**
     + wronged party can either hold other party to lie and affirm k, or rescind entire k
       - **can happen with innocent representation (recision, but not damages)—LAND**
   * **elements of misrepresentation**
     + statement of fact: positive statement, duty to reveal information, partial silence
       - caveat emptor: don’t always have to reveal facts if they aren’t asked for
     + factual—opinion or belief not factual UNLESS MADE BY KNOWLEDGEABLE PARTY (**LAND**)
     + material
     + reliance by one of the parties to enter into the k

**material**: facts might puffs or might not be material - material depends on context of k

* + subjective, but what would reasonable person have believed in the circumstances?
* if you are buying a car for parts and I tell you it’s blue but it’s red, that probably isn’t material, but if you are buying a yellow prius for your taxi fleet, probably is.
* "substantial" and going "to the root of" the contract. A statement by a real property vendor that the water on the property has been tested and is satisfactory when it is not, is material to the buyer's decision to purchase the property

**reliance**

* **one reason** for entering the k - doesn’t have to be sole reason but does have to be a reason - closely related to materiality
  + have to show reasonable person would rely on promise first (materiality)
* **context** showing reliance: Thus, in a contract for the sale of a used car, a statement about the year or the qualities of that make of car made by a dealer to a consumer might well be relied on: *E. & B. Transport Ltd*.; same statement made by one dealer to another less likely to be relied on, and if made by a consumer to a dealer, might never be relied on.
* **no duty to check** here as in *Redgrave*: no duty of due diligence

**Bars to Rescission:**

1. impossibility of restitution
   1. substitutive restitution sometimes used because you can’t get the disputed item back, so give money
2. execution of the contract
   1. if k is partially or fully executed, equity more reticent
3. hardship
   1. equity will not grant remedy if it causes hardship against either party
4. affirmation
   1. if you’ve affirmed the k you probably can’t get recision
5. delay: laches, as in **KUPCHAK**
   1. you can’t wait too long to seek a remedy

**Misrepresentation as a tort giving damages.**

* possibility of damages in tort; k = recision
* to establish tort have to establish deceit or negligence

**Misrep as a term in the k**

* if misrep is a term in the k, court treats it like a term—breach for damages/termination—**LEAF**

***Redgrave v Hurd*  1881 CA p. 355**

* **F:** old man lawyer sold his practice to a young man and fudged about the profits - young man refused to complete and old man sued for specific performance
* **I:** is it necessary that a false statement be knowingly false in order to be considered a misrep that can lead to recision?
* **A:** Equity is clear that “where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping the contract” and even in CL i**f someone makes a statement that is reckless as to the truth of it this can be construed as misrep.** Also, a purchaser is under no obligation to practice due diligence and verify statements made by a seller.
* **C**: contract rescinded and deposit returned: the effect of a false representation is "not got rid of' by virtue of the negligence of the person to whom it was made.

***Smith v Land and House Property Corp*. 1884 CA p. 359**

* **F:** Hotel sold to d on basis that leased to “most desirable tenant” but he was far from desirable and never paid his rent. Refused to complete transaction and d sued for specific performance
* **I:** can an opinion be a statement of fact to characterise this as a misrep that the p’s relied on?
* **A:** the facts known to the p on which his opinion was based would lead one to the conclusion that he was not at all a desirable tenant. Because the d’s had no knowledge of the tenant they relied on the p’s statements on a subject as to which prima facie the vendors know everything and the purchasers nothing
* **C:** it is to my mind a guarantee of a different sort, and amounts at least to 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.

**STATEMENT OF OPINION MADE BY KNOWLEDGEABLE PARTY TO DUMB PARTY IS A REPRESENTATION, INNOCENT MISREPRESENTATION LEADS TO RESCISSION**

***Kupchak v Dayson Holdings* 1965, BC CA p. 363**

***F:*** K’s bought Palms Motel company from d’s in exchange for some other real estate, which the d’s promptly developed and sold. When K’s found out about misreps as to past earnings of Motel they stopped making their mortgage payments and tried to rescind.

* **I:** Can the K’s get recision if the property they’d get back has been sold?
* **R:** the condition of rescission is the restoration of the defendant to his pre- contract position ...no stress is placed on whether the pursuer is so restored.
* **A:** Equity can take account of profits and compensate for deterioration. So it should be able to provide money as compensation for the property which cannot be returned, so as not to harm an innocent third party, and not to profit a fraudulent misrepresenter.
* **C:** compensation is a form of equitable relief just as much as account, indemnity, or declaration of trust, and payment of it may he ordered under equitable principles. Also **the K’s are not barred by laches as they did what they could as soon as they found out about the misrep.**

MISPRESENTATION

Misrepresentation occurs when one of the parties enter into the k on the basis of a lie. The party would not have entered into the k had they been told the truth. (Redgrave) Operative misrepresentation must be a statement of fact, not an opinion or belief, material, and must be relied upon. The materiality depends on the context of the k. It is what a reasonable person would have believed in all the circumstances. The misrepresentation does not have to be sole reason for entering the k. Mispresentation within the k itself will be treated as terms (Leafs). If there is operative misrepresentation, the wronged party can claim estoppel and hold the other party to the lie as though it were the truth. The wronged party can also claim rescission. Innocent misrepresentation allows rescission (Land House).

Equity may not award rescission if restitution is impossible, the k has been partially/fully executed, it would cause hardship against either party, if the wronged party has affirmed the k, or if a laches delay applies. Money amounts may substitute. (Kupchak)

1. **PROTECTION OF WEAKER PARTIES - (MacDougall, ch. 16)** 
   * one party may be significantly disadvantaged to point that court has to interfere with k
   * doctrines are most complicated—meant to help weaker parties, but weaker parties usually can’t understand them while stronger parties can
2. **Duress**: involves circumstances that surround the making the k their impact on the ability of pressured person to make a choice
3. Traditional Formulation of Duress: action occured that forces weaker part to accept agreement
   * coercion of the will prevents true consent

2. Modern Concern with "Legitimacy" of Pressure

* + legitimacy of pressure placed by stronger party rather than will of coerced person—there can be duress in an otherwise fully legal k

1. Effect of Duress
   * historically resulted in void k, modern courts do this for duress to person
   * now usually makes k voidable at option of weaker party
     + might not be possible to avoid k (if it harms third party)

4. Categories of Duress

1. **duress to the person: threat to physical well-being**
   * includes threats to parties connected to coerced party
   * need only be one of the reasons why party entered into the k

**b. duress to goods/property: threat to damage or take other party’s property**

**c. economic duress: new category**

* + reluctance related to economy based on pressures and differing economic strengths
  + **Pao On**: PC revises law to allow economic duress
    - for economic duress, has to be more than just commercial pressure—payment was not a voluntary act
  + test for legitimacy: threat of unlawful action is illegitimate
  + economic duress accepted in Canada (**Greater Fredericton**)
    - k variation must be extracted by pressure in form of demand or threat
    - exercise of pressure must be such that coerced part has no practical alternative but to comply
    - if those are satisfied, two considerations
      * whether promise was supported by consideration
      * whether coerced party protested and executed variation “without predjudice”
      * whether party took steps to disavow variation
    - difficult to use, rare acceptance

DURESS

Duress involves circumstances surrounding the creation of the k that impact the ability of the pressured party to make a choice. The notion that coercion of the will prevents true consent grounds the doctrine. Historically, only duress to the person or goods/property were under the doctrine. However, modern courts have accepted economic duress (Pao On).Greater Fredericton articulates a test for economic duress in k modifications. P must show (1) that the k variation was extracted under a demand or threat, (2) that there was no practical alternative other than compliance.The court then examines whether there was consideration, whether P protested and executed the variation “without predjudice”, and whether P took steps to disavow the variation.

2. **Undue Influence: unconscientious use of power**

* + look to surrounding circumstances of preexisting relationship
    - if imbalanced relationship, any k between them might not represent true assent

1. Establishing a Relationship of Undue Influence

1. **recent English law**
   * UI not confined to cases of abuse of trust and confidence
   * relationship falls into categories where law takes protective attitude (solicitor/client, trustee/beneficiary, doctor/patient), not employer/employee
     + these categories create irrebuttable presumption of UI
   * if relationship doesn’t fit into preexisting categories, must show proof that one person placed trust/confidence in another **along with proof of questionable nature of transaction—**rebuttable UI
   * actual UI: actual pressure, situations do not fit into other categories

**b. The Situation in Canada**

* + to give rise to presumption of UI (second category), look to ability of person to dominate the will of another through manipulation, coercion, or abuse of power (**Geffen**)
    - P has to prove required relationship and k worked unfairness in undue disadvantage or D unduly benefitted from it
      * Wilson and LaForest disagree over manifest disadvantage—unsettled area

1. Rebutting the Impact of the Presumption of Undue Influence on the Particular Contract
   * once UI established, burden shifts to D to show P entered into k of own informed will
     + decision of the other party was exercise of independent will—**getting legal advice is important**
2. Undue Influence Exercised by a Third Party
   * third party has to be acting as an agent to show UI

**Geffen v Goodman Estate [1991] 2 S.C.R. 353 p. 680**

F: Dispute over a will

I: Undue influence?

H: No

R: First ask whether potential for domination inheres in the nature of the relationship itself, then examine the nature of the transaction. Once P establishes presumption of undue influence, onus is on D to disprove it. **Magnitude of disadvantage is relevant to determine undue influence, as is the relationship AT THE TIME of the impugned action.**

UNDUE INFLUENCE

Undue influence relates to the context of the k parties’ preexisting relationship. If the relationship is demonstrably imbalance, any k between the parties might not represent true assent. If the relationship falls into a preexisting category in which the law would take a protective attitude, there is an irrefutable presumption of UI. These relationships include solicitor/client, trustee/beneficiary, and doctor/patient. The English approach states that if the situation does not fall into an analogous category, the claimant must show proof that s/he placed trust/confidence in another along with proof that the k transaction was questionable in nature. In Canada, courts will look the ability of the stronger party to dominate the will of another through manipulation, coercion, or abuse of power (Geffen). The claimant must show the relationship and k worked unfairness in undue disadvantage or that the other party unduly benefited from the disadvantage. Once P establishes UI, the burden shifts to D to show P entered the k of his/her own informed will. Therefore, evidence that P obtained independent legal advice is important. There will only be a finding of UI exercised by a third party if that party was acting as an agent.

1. Unconscionability:

Canadian Formulation

* + elements of duress and UI, equitable doctrine
  + focuses on circumstances of the creation of the agreement, involves relationships no ongoing
    - situations that are tantamount to fraud
  + **Morrison** articulates doctrine, P must show:
    - proof of inequality arising out of ignorance
    - need or distress of the weaker party
    - proof of substantial unfairness
    - these elements create presumption of fraud, D has to show bargain was fair and just

Reformulation?

* + more focus on the agreement itself, not on the presumption of fraud
    - does agreement violate community standards of morality?

Doctrine of “Unfairness” for Subsequent Events?

* + Wilson linked unconscionability and inequality of bargaining power
    - limited application to exclusion/limitation clauses

Inequality of Bargaining Power

* + Denning doctrine—relief to parties who without independent legal advice enter into a k upon terms that are unfair or transfers property for inadequate consideration
    - bargaining power impaired by reason of needs/desires, ignorance, infirmity
    - incompetence coupled with UI and pressures by another

**Morrison v Coast Finance 1965 BC CA p. 697**

F: Guys convince a poor widow to take out a mortgage to pay for CSA, give her a worthless promissory note and then they abscond

I: Unconscionability?

H: Yaas

R: U**nconscionability relates to relief against an unfair advatange gained by unconscientous use of power against a weaker party.** **Material ingredients are proof of inequality, need or distress of the weaker, proof of substantial unfairness of the bargain obtained**—preusmption of fraud, onus shifts to D.

**Lloyds Bank v Bundy 1975 QB CA p.704**

Lloyds Bank v Bundy (overruled in England)

F: Guy mortgages farm for the benefit of his son, but claims he didn’t know what he was doing.

I: Unconscionability?

H: Simplify into inequality of bargaining power

R: Unconscionable transactions when a party is so placed as to be in need of special care and protection and yet his weakness is explored by another far stronger than himself so as to get his property at an undervalue.

**Harry v Kreutzinger p. 709**

F: FN guy with hearing defect and little education embroiled in boat sale

I: Unconscionability?

H: Yes

R: Where a claim is made that a bargain is unconscionable, i**t must be shown that there was an inequality in the position of the parties due to ignorance, need or distress, coupled with proof of substantial unfairness in the bargain.**

UNCONSCIONABILITY

Unconscionability relates to the creation of the agreement. P must show proof of inequality arising of his/her own ignorance, his/her need or distress, and proof of substantial unfairness in the agreement (Morrison). These elements create presumption of fraud. The burden shifts to D to show agreement was fair and just.

Denning attempted to amalgamate the protective doctrines into the doctrine inequality of bargaining power (Lloyds). His doctrine required proof that the weaker party’s bargaining power was impaired by reason of needs/desires, ignorance or infirmity, and proof of UI or pressures from other party. This approach oversimplifies subtle differences between the protective doctrines. The SCC also attempted to streamline the protective doctrines in Kreutizinger where it linked unconscionability with the inequality of bargaining power. However, this approach is limited to exclusion and limitation clauses.

**TERMINATION**

**THE CONTENT OF THE CONTRACT**

* + breach = other party gets an election to terminate k (**past primary obligations and remedies still exist**) or affirm k (**k continues to exist)**
    - * have to do the election within a reasonable amount of time, or affirm the k
  + termination makes all subsequent primary obligations go away
  + recision extinguishes the k—innocent party can reverse k

1. **REPRESENTATIONS AND TERMS**
2. Express and Implied
   * term can be overt (express) or implied
   * all ks have certain implied terms b/c not possible to think of every single term
     + statutes, CL, parties (custom), reasonableness—**MACHTINGER**
   * express written/oral—court will recognize written terms
3. Primary and Secondary Obligations
   * primary obligations are what parties promise to do, cease to be enforceable at time of breach—**PHOTO PRODUCTIONS**
   * secondary obligations remedial—not all obligatory but powers
     + primary have to be breached for secondary to come in
     + not disproportionate to primary obligations
4. Conditions Warranties and intermediate Terms—**HONG KONG FIR**
   * essential terms: **conditions** 
     + results election to terminate of affirm
   * less important terms: **warranties**
     + parties know from outset that breach results in damages
     + affirmation at time of sale is a warranty as long as parties intended it to be—**HEILBUT**

**Intermediate/Innominate Terms—HKF, serious consequences treated like conditions**

1. Other Meanings of "Condition" and “Warranty”

calling something a condition/warranty does not mean they are that—**WICKMAN**

***Hielbut, Symons & Co. v Buckleton*  [1913] AC 30 (HL) p 371**

* **F**: rubber merchants underwrote shares in Filisola Rubber and Produce w/out prospectus because of good rep in rubber trade. Rubber trade fails and no trees so sue for fraudulent misrep or breach of warranty
* **I**: was the statement “we are [[bringing out] a rubber company]” in response to the question “is everything ok” a warrantable representation making up a collateral contract, or an innocent representation with no legal significance?
* **R**: a verbal collateral contract must be proved strictly to avoid lessening authority of written contracts. “**An affirmation at the time of sale is a warranty provided it appear on evidence to be so intended**”
* **A**: there was no evidence that the parties intended the affirmation to form part of the contract
* **C**: for the defendant.

***Leaf v International Galleries* [1950] 2 KB 86, 1 all ER 693 (CA) p 378**

* **F**: buyer purchased a painting of Salisbury Catherdral for 85£ purporting to be by Constable. When he tried to sell it 6 yrs later it was found not to be by constable. He wanted the sale rescinded, and is not able to ask for damages (too late)
* **I**: can the buyer rescind the contract on the basis of a misrepresentation?
* **R**: A mistake avoids a contract but if the mistaken term was a condition the buyer could reject the sale even after completion but if it was a warranty he can only claim for damages
* **A**: although it is fair to argue that the representation was a condition the buyer has only a “reasonable” time to return the goods before he is said to have accepted the condition “Laches” = delay in equity
* **C**: for the defendant

1. **CLASSIFICATION OF TERMS - (MacDougall, ch. 10 & 21)**

Contingent Conditions - Precedent and Subsequent

* CP has to happen before
* CS performance by one party triggers the ending of an obligation (duty to third party, has to do what is reasonable to fulfill the k)
* concurrent condition: law presumes obligations supposed to be performed as soon as k entered into

Entire and Severable Obligations

* + entire: obligation where entire thing has to be performed to trigger dependant condition
    - * performing party can seek quantum meruit—**SUMPTER**
  + severable: part performance is enough to trigger s/o

1. **Substantial Performance**
   * must have substantial completion of obligation to trigger dependant obligation—**FAIRBANKS**
     + if entire w/ substantial completion, other party’s obligation triggered
     + if severable w/ substantial completion, apportion on both sides or figure out if further severable

**2. Parts of a Several Obligation, Themselves Entire**

* + no obligation is infinitely severable

**DISCHARGE THROUGH FRUSTRATION**

Frustration discharges p/o, s/o—k is valid UP TO point of frustrating event

Event occurs after creation of k: **WHATEVER DONE BEFORE DOES NOT GET UNDONE**

**Paradine**: frustration doesn’t exist (overruled)

**Taylor**: implied term that k inoperative if frustrated event makes goal of k impossible

**ELEMENTS OF FRUSTRATION**

1. reasonably unforeseen (**Davis, Merchant Marine**—labour strikes foreseeable)
2. No self-inducement (**Merchant Marine**)
3. Purpose of k impossible or drastically different (**Capitol, Victoria Wood**)
   1. if only the underlying intention of the k, maybe no frustration (**Capitol—cannot subdivide, frustration**) (**Victoria—foundation of k was not destroyed**)
4. Risk not allocated to one of the parties (ie was there insurance?)

**FKA**

1. Does it apply? Not when foundation of k is insurance of if k provides for frustration
2. Sever if you can—if substantially completed (maybe) before frustration or if everything done just not payment, and can determine $ to those parts then they are not frustrated (becomes separate k)
3. Did working party create a benefit? Payment applies to all work done, even if other party did not receive benefits
4. Has completed work been destroyed? Cost split in half and shared between parties
5. Restitution? Undo any unjust enrichment, claim reasonable expenditures
   1. no loss of profits
   2. if delivery of property can be returned within a reasonable amount of time post-frustration decided by party who owns the materials—can keep or return for partial credit

**DAMAGES**

1. **DAMAGES - RATIONALE - (MacDougall, ch. 22)** 
   * damages are a right, not an obligation (P doesn’t have to seek them)
2. The Interests Protected
   * purpose of damages no different than purpose of k itself—vountary agreement to do certain things (primary obligations), and to provide remedy for not doing those things (secondary obligations)
     + primary forward looking, law provides consequences for not doing them
   * secondary obligations always paired with primary obligations

**Fuller and Purdue (1936) 46 Yale LJ 52 at 52-63 p. 783**

3 purposes in awarding k damges

* 1. plaintiff has conferred some value on the d in reliance of his promise - restitution interest in preventing unjust enrichment
  2. pl has changed his position in reliance - reliance interest
  3. even without enrichment or reliance - expectation

1. The Expectation Interest
   * when parties enter k, they expect other party to follow obligations
     + damages put injured party to the state they expected to be in had the k not been breached
   * only goal of damages is to compensate no more, no less
     + party cannot profit from breach and be put in much better position had k been performed
2. The Reliance Interest
   * involves compensation for wasted expenditure—wasted money relying on failed obligations
     + undoes loss P would have avoided if hadn’t entered the k in the first place
     + return P to earlier time before expenses or losses were incurred (similar to tort)
   * useful when a claim based on expectation interest is difficult to make b/c impossible to say what financial position would have been had other party not fucked up
   * money has to be truly wasted (ie could not have accrued another way)
   * court is vigilant when giving for both expectation and reliance to not overcompensate
     + some courts refuse to give both (like Denning)
   * P can opt ro claim damages for either interest
     + claim will not be permitted where D can show that had the k been performed P would have lost $$
       - unfair for D to cover expenses if breach saved P from losing a lot of $$$

**McRae v CDC 1951 HC p. 793**

F: see above

I: Damages?

H: Yes for incurred expenditure

R: General rule in CL is to measure damages for the estimated loss of the sour k. However, P will be entitled to recover the expense which he has incurred in the whole process. **Damages are to be measured by reference to expenditure incurred and wasted in reliance on the promise.**

**Sunshine Vacation Villas v The Bay 1984 BC CA p. 801**

F: Company contracts with The Bay to set up travel agencies, but The Bay breached k.

I: Damages?

H: Reduce them

R: Lost capital in this case refers to unrecovered working capital. P has not established that a proper award for loss of profits would have exceeded the amount of lost capital.

1. Restitution
   * expectation and reliance refer to P’s perspective, restitution talks about D’s gain
     + D must disgorge what he or she wrongfully gained
   * very rare successful application

**Attorney-General v Blake (Jonathan Cape Ltd 3rd Party) [2001] 1 AC 268 UK HL**

F: Soviet spy writes tell-all, government tries to screw up his publishing k because he signed an agreement not to release any information

I: Damages?

H: Account of profit

R: Basic remedy for breach is damages, but not always adequate. **Damages may be measured by the benefit gained by the wrongdoer,** jurisdiction to grant injunction or SP. Account of profits only acceptable in certain circumstances—**whether P had legitimate interest in preventing D’s profit-making activity that deprived him of profit.**

1. **DAMAGES - QUANTIFICATION PROBLEMS**
   * P bears burden of establishing right to damages—not just ability to make claim but quantum of damages
     + establish other party’s breach and quantum of loss as a result of breach
   * some damages might be too remote—P has to establish breach, loss, and that loss is not too remote

**Chaplin v Hicks [1911] 2 KB (CA) p. 814**

F: Beauty contest, chance k

I: Damages?

H: Yes

R: 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.

**Groves v John Wunder 1939 Minn CA p. 816**

F: K to take stuff off land then to restore land—D doesn’t restore land

I: Are damages for the work not done (fixing land) or the difference land value?

H: Work not done

R: D was wilful. Absent economic waste, damages must be for remedying defect.

Dissent: wilfulness doesn’t matter, calculate damages based on difference in land value

**Jarvis v Swans Tours [1973] 1 QB 223 (CA) p. 825**

F: Guy goes to Switzerland and is very disappointed

I: Damages?

H:Yes, for mental distress

R: Damages for mental distress when you rely on expectation of a certain mental state when k was for a certain mental state. Calculation is difference between k price and value of received experience.

1. **DAMAGES - REMOTENESS**
2. **Causation**
   * breach must lead to claimed damages—D might have triggered events, but not ultimately responsible for loss b/c 3rd party, natural event, or P break chain of causation
3. **Acceptance of Risk Based on Knowledge**
   * parties free to do risk assessment before entering into k—parties will inform each other about the situations
     + test for remoteness accounts for obligation to reveal special circumstances
4. **Test for Remoteness of Damages in Contract**
   * test from **HADLEY**: damages from breach are fairly and reasonably arising naturally (usual course of things like from the breach itself) or reasonable contemplation of the parties
   * **i. First Branch of the Test—general damages**
     + damages arising naturally: damages P would suffer within reasonable contemplation of parties
       - terms are crucial—more explicit terms are, greater number of factors that can assess damages
   * **ii. Second Branch of the Test—special damages**
     + special circumstances need to be known at time of k b/c other party has to assess risk
       - not specific, just has to be general understanding

**iii. Merger with Tort-Type Remoteness Test?**

* + - important to maintain distinction btwn k and tort
      * on the information made available to D when k was made, should D/reasonable person have realized was sufficiently likely to result from breach
    - fundamental differences between k/tort

**Quantification Issues**

* + **Coming up with figures**
    - P has burden to show loss was result of D’s breach
    - P has no incentive to establish market value for goods delivered which do not conform—D bears onus of proving goods had some value
      * D will establish value to keep damages at minimum
    - lost profit difficult to predict
  + **speculations/chances**
    - jury must do best they can in chance cases, verdict may be a matter of guess-work **(Chaplin**)
      * just b/c damages not fully certain does not preclude wrongdoing party from paying
    - if chance is too speculative, court will not order payment (**McCrae**)
      * **Chaplin k was all about giving P a chance, McCrae only indirectly led to chance of profit**
  + **injured feelings/disappointment/distress**
    - increasingly common to award damages for mental distress damages
      * k was meant to give certain emotion, did the opposite
    - test for mental distress damages (AFTER PASSING HADLEY)
      * **object of k was to secure psychological benefit that brings mental distress upon breach**
      * **degree of mental distress sufficient to warrant compensation**
    - promise for state of mind doesn’t have to be essence, just part of the k
    - employment ks: use Hadley (reasonable contemplation at time of k)
  + **minimal performance**
    - ks might have provided for wide range of performances—if not void for uncertainty, damages based on minimal performance of breaching party
      * not for how D would have performed obligations (too tort-like)
  + **more than one quantum of damages**
    - look at k and figure out main point of it (ie agreement to do work or to return property to a certain state)
    - wrongdoer entitled to expect aggrieved party to act reasonably
    - court should not investigate too critically why P wanted something other party promised
  + **time for assessing damages**
    - right to damages arises upon breach, usually the date to assess damages
      * court has discretion (ie if market fluctuates wildly)
        + if k involves continuing obligations, might be assessed with reference to times when obligations supposed to be performed
    - anticipatory breach: early damages
      * P can elect termination immediately, damages right away (assessed at time of election)
    - currency conversion—assessed at time of deciding the conversion

***Hadley v Baxendale* 1854 Eng p. 858**

P owned a mill, D took broken mill part to get it fixed and were negligent—delay causes loss and P sues D for damages

**Remoteness assessed by**

1. **things arising naturally from k (ie there were terms that were breached)**
2. **things in reasonable contemplation of parties (ie things parties knew about each other)**

***Victoria Laundry v Newman* 1949 Eng CA p.861**

D delivers boiler late to P, P loses profits out on government k

**R: P ONLY ABLE TO RECOVER THE PART OF THE LOSS THAT WAS ONLY REASONABLY FORESEEABLE AT TIME OF K**

***Koufos v Czarnikow (The Heron II)* 1969 En HL p. 868**

P charters ship that is late, price of sugar goes down and P claims loss in profit

Whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would have realized that **such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or the loss of that kind should have been within his contemplation**

1. **DAMAGES - MITIGATION**
2. **The Mitigation Principle (factor to consider in assessing damages)**
   * P has duty to mitigate damages—take all reasonable steps, can’t claim any damages arising from neglect
     + what a reasonable person in position of P would have done

2. **Mitigation in practice**

* + depends on the facts, usually depends on market price
  + P has to take steps to stem ongoing losses
  + **duty to take such steps as reasonable person would do in his own interests**

**3. When to mitigate**

* + depends on facts—cannot be expected until P learns of breach (**Asamera**)
    - tricky for fluctuating markets, unsettled area
      * should P be compensated for market fluctuations?

1. **Impecuniosity No Excuse**
   * financial factors usually disregarded, unless it is a factor known by other party at time of k

**5. Context of an Anticipatory Breach**

* + P can elect termination of affirmation, affirming may lead to incurring costs
  + **as long as P can show interest in affirming k, mitigation does not require acceptance of breach if not accepting would result in greater claim**
    - legitimate interest: early termination aggravates losses (**Asamera**)
      * not subjective, must have some “unreasonableness” (ie decision to affirm is wholly unreasonable)

**6. Act Reasonably, Not Perfectly**

* + P must act reasonably to keep losses under control, doesn’t have to be perfect

7. **Limitation period**: usually six years from time of breach

8. **Statutory control of damages**: damages sometimes capped

* + P only shows breach, no quantum
  + consumer claims, extreme economic circumstance, D requires state protection

***Asamera Oil Corp. v Sea Oil & General Corp.* 1971 SCC p. 871**

**To get SP, there must be legitimate and substantial interest (can justify not mitigating or affirming the k in the face of anticipatory breach)**

1. **TIME OF MEASUREMENT OF DAMAGES**

***Semelhago v Paramadevan* 1996 SCC p. 879**

**Damages at CL are at time of breach**

**Damages in lieu of SP are at time of judgment b/c waiting for equity to say forces parties to wait to find out**

1. **LIQUIDATED DAMAGES, DEPOSITS AND FORFEITURES**
2. **Liquidated Damages**
   * parties can avoid all of the above by agreeing to the damages at the time of the k
   * involves what the parties intended, CL fills in the blanks
3. **Liquidated Damages vs. Penalty Clause**
   * LD subject to principle that damages meant to compensate failure to person primary obligations and no more
     + do not put P in better position, not a threat to other party compelling them to perform primary obligations to avoid penalty
   * if LDs overcompensate, they are penalties and court will not allow it
   * penalty clauses k provisions that set out price paid on particular date and other price if paid on different date
   * law on penalty clauses/LDs (**Dunlop**)

1. even if parties say penalty or LD, court will determine what stipulated payment is

2. penalty is payment in terroem of bad party, LD genuine pre-estimated damages

3. question of construction judged at time of making k, not breach

4. aids to construction

A. penalty if sum is extravagant compared to greatest loss that could have come from breach

B. penalty if breach just means not paying a sum greater than what should be paid

C. presumption: lump sum for one or some events that might occasion trifling damages

D. if genuine pre estimate is impossible, it’s probably fine

* + if penalty, unenforceable—damages assessed by actual loss

1. **Protection for One Party, Not Both** 
   * equitable nature, protects one party who is treated unfairly by penalty clause
     + party benefitting from PC cannot ask equity to not enforce it
2. **Upholding Agreed Damages If Possible**
   * LDs provide certainty (super imp in ks), so courts reticent to unenforce them esp in commercial contexts
     + courts give parties benefit of doubt, fanciful figures not supported

**c. Formula Instead of a Fixed Sum**

* + formulas that give varying figures depending on severity of consequences acceptable unless formula generates excessive amount

1. **Distinction from Acceleration Clause**
   * LD enforceable with breach, different from clauses that call for higher payments (accel clauses)
     + ie making all accounts payable—**penalty law does not apply**
2. **Comparison with Exclusion/Limitation Clause**
   * penalty attempt to overcompensate, limitation limits compensation—both derogate no more, no less
   * CL will ascertain what parties actually agreed to (notice, context of application)
     + if notice + agreement, CL says okay—equity does other stuff
   * LDs too greedy, equity invokes penalty doctrine
   * limitation clause: equity applies unconscionability, public policy
     + difference in treat, unconscionability difficult to apply
3. **Deposits and Forfeiture of Deposits**
   * deposit relates to p/s obligations-preliminary payment to confirm acceptance, acceptance, or trigger other party’s obligations
     + characteristic of p/o and CP to making other party’s promises enforceable
   * if party fails to make payment after deposit—forfeiture
     + up to parties to decide in k, usually word deposit implies forfeiture
     + if amount not meant to be deposit and k breached, paying party can claim it back
4. **Relief from Forfeiture**
   * depositing party forfeiting on breach can seek relief from forfeiture
     + **forfeiture clause must be penal, unconscionable for seller to retain money**

**E. Punitive Damages**

* + viewing damages from D’s perspective rare, only relevant in restitution (why D breached irrelevant)
  + punitive damages punish D, not compensate P (very rare)—**retribution, deterrence, denunciation**
    - conduct departs markedly from ordinary standards of decency in situations that are malicious, oppressive, highhanded/offence to decency

**F. Money claims other than damages**

1. **Debt**
   * claim to enforce k promise to pay money, “action for the price”
   * have to show other party had obligation to pay fixed sum and sum not paid
   * not subject to mitigation diminution b/c not a money substitute for not performing p/o but a p/o itself

**2. Amounts paid and value transferred**

* + one party pays money to other and receives nothing in return, or one party transfers something of value and other party not under k obligation to pay

1. **Recovery of amounts paid**
   * getting back what has already been given, essentially restorative
   * available when other party fails to deliver what was paid for b/c **total failure of consideration**
     + party who is supposed to have performed under k did none of its obligations
       - if promisee received nothing, may not have a claim
   * if one party responsible for other party’s inability to complete performance, that party can recover back any money paid
   * if apportionment can occur, might recover if there is no failure of consideration

**b. recovery for work done/goods transferred**

* + one party does work/transfers goods, obligation of other party not arisen before k terminated
    - usually arises where obligation to pay dependent on performance of entire obligation, entire obligation not completed so payment never triggered
  + party done the work try to sever obligations to trigger payment for that part, argue amount should be paid for quantum merit, claim restitution for unjust enrichment

***Shatilla v Feinsten* 1924 Sask CA p. 885**

**D signed restrictive covenant after selling to P, D becomes shareholder in another company and violates RC, P sues liquidated damages**

**R: LDs are enforceable, but law may presume penalties which are unenforceable. If fixed sum is not a genuine preestimate, it is a penalty**

***H.F. Clarke Ltd. v Thermidaire* 1976 SCC p. 889**

**RC makes no reference to time period or area, but does refer to LDs formula**

**R:reasonable interpretation of RCs, is that they are geographically limited to place earlier established in k. Parties mutually agreed on formula, but it would still be extravagant.**

***J.G. Collins Insurance v Elsley* 1978 SCC p. 896**

**LD clause stipulates $1,000 for every breach in first agreement, only $1000 in second k**

**R: Nature of employment may justify RC (ie employee could steal clients). Covenantee must elect between LDs and INJ (damages assessed in equity at date of INJ). If stipulated LDs less than actual loss, agreed sum is maximum.**

***Stockloser v Johnson* 1954 Eng CA p. 898**

**P has to pay D for machinery, D tries to take back machinery when P defaults**

**R: Forfeiture not recoverable unless it is unfair/unreasonable for D to keep machinery. If money is expressly paid as deposit, buyer in default cannot recover—equity says yes if forfeiture penal and retain $$ would be unconscionable**

EXPECTATION INTEREST

Parties expect each other to follow k obligations. Damages in the expectation interest put the injured party to the state they expected to be in had the k not been breached. Damages compensate no more and no less. A party cannot profit from a breach and end up in a better position than they would have been in if the k had been performed.

RELIANCE INTEREST

Compensation for wasted expenditure is a reliance interest. P may waste money relying on obligations D failed to perform. The reliance interest undoes the loss P would have avoided if s/he had not entered the k in the first place. (McCrae, Sunshine Vacation) It returns P to an earlier position before the expenses were incurred. The reliance interest is similar to tort. Reliance interests are useful when establishing expectation would impossible, as was the case in McCrae. Courts are vigilant in preventing overcompensation if P brings a claim in both reliance and expectation. P can opt to claim damages in either interest.

RESTITUTION

Restitution addresses D’s gain. A restitution remedy requires D to disgorge what he or she wrongfully gained (Blake). Restitution is rarely applied with success.

QUANTIFICATION

P bears the burden of establishing the right to damages and the quantum of damages. Even if damages cannot be assessed with certainty does not relieve wrongdoer of paying damages for breach (Chaplin). Absent economic waste, damages must remedy any defect (Groves). Damages for mental distress are awarded when k was for a certain mental state. Mental distress damages calculated by difference between k price and value of received experience (Jarvis).

REMOTENESS

Hadley articulates the test for remoteness. Damages from the breach must fairly and naturally arise from the course of things or from reasonable contemplation of the parties. General damages arising naturally hinge on the terms of the k. The more explicit the terms, the greater the number of factors can determine the damages.

The second branch of the Hadley test refers to special circumstances known at the time of k to properly assess risk.The knowledge does not have to be specific. If these circumstances are in the k, they were clearly within the contemplation of the parties. The court may infer knowledge of special circumstances. Both parties must be aware of the circumstances at the time of k creation. (Victoria Laundry, Koufos).

MITIGATION

P must take all reasonable steps to mitigate as a reasonable person would do in his own interests. Mitigation cannot be expected until P learns of the breach (Asamera). Impecuniosity is no excuse unless D knew of it at time of breach. In the context of anticipatory breaches, P can elect termination or affirming the k. In affirming the k, P may incur losses. If P can show legitimate interest in affirming the k, mitigation does not require acceptance of anticipatory breach if not accepting the breach would result in a greater claim. As in Asamera, early termination may aggravate losses. P must act reasonably to keep losses under control, but s/he does not have to be perfect. Statute can cap damages in cases of consumer claims, extreme economic circumstances, or if the court finds D is in need of state protection.

LIQUIDATED DAMAGES/PENALTIES

LDs are contemplated within the actual k. If they overcompensate wronged party, the court deems the clause a penalty and disallows it. Dunlop sets out the law on penalites.

1. even if parties say penalty or LD, court will determine what stipulated payment is

2. penalty is payment in terroem of bad party, LD genuine pre-estimated damages

3. question of construction judged at time of making k, not breach

4. aids to construction

A. penalty if sum is extravagant compared to greatest loss that could have come from breach

B. penalty if breach just means not paying a sum greater than what should be paid

C. presumption: lump sum for one or some events that might occasion trifling damages

D. if genuine pre estimate is impossible, it’s probably fine

LDs provide certainty, so courts are reticent to disallow them particularly in commercial ks. Courts will give parties benefit of the doubt, but will not tolerate fanciful figures. If a formula in the k calculates LDs, the court will disallow it if generates an excessive amount. (Clark)

DEPOSITS

Deposits relate to primary/secondary obligations. If a party fails to make a full payment after paying a deposit, the party forfeits the deposit.

PUNITIVE DAMAGES

Viewing damages from D’s perspective is rare and usually only relevant in restitution. Punitive damages punish D for the purposes of retribution, deterrence, and denunciation. A court will only award punitive damages if D’s conduct markedly departed from ordinary standards of decency and was malicious and oppressive.

DEBT

Debt is a claim to enforce k promise to pay money. The claimant must show the other party had an obligation to pay a fixed sum. Debt claims are not subject to mitigation because they are not money substitutes for not performing a primary obligation, but are primary obligations themselves.

**UNENFORCEABLE**

1. **ILLEGALITY - (MacDougall, ch. 17)** 
   * law can say that a k is inappropriate or intolerable—might be whole or part of the k
     + law disapproves of k’s making, purpose, or performance
2. Older Approach to **Statutory** Illegality
   * two situations: formation of k is illegal or method of performing k is illegal
   1. **Formation of Contract Illegal**
      * statute might make creation illegal, courts reluctant to say k is impliedly illegal
      * test: if statute make formation of k illegal or not? if yes, k is unenforceable
        + dubious results
   2. **Performance of Contract Illegal**
      * particular purpose is unlawful , object of k is illegal not necessarily the act of making the k
        + ie ks to sell narcotics
      * distinguish two situations: whether k is capable or incapable of being lawfully performed (intrinsically illegal)
        + if capable, illegality turns of whether parties intended to break law in performance
          - presumption of legality, have to prove intention to break the law

unwitting party at outset can gain intent if party knowingly participates in illegality

1. Modern Approach
   * + older approach has emphasis on whether making the k was illegal, whether purpose/performance was illegal, what the intention and knowledge of the parties was
     + modern approach considers statutory purpose and all circumstances of making the k illegal
       - ks against statute uneforceable, different from ks where performance depends on breach
     + court looks to serious consequences of invalidating the k, social utility of consequences, and determination of class of persons affected

**CL Illegality**

* + heads of public policy not closed, but difficult to bring novel ones before the court

1. Restraint of Trade
   * context of agreement that is in restraint of trade most common issue
     + one party agrees to restrictive covenant to not do things for a certain amount of time
       - absent a reason for the restriction restrictive covenant is illegal
   1. **Balancing Freedom of Contract with Society's Interests**
      * + blanace demands of society for competition/availability of talents with principle that parties should be free to protect their own interests by freely entering ks
          - ensure that there was a legitimate interest in creating the restrictive covenant
   2. **Mercantile vs. Labour Contracts**
      * + important difference between k for sale of business and restrictive covenant in employment k
        + ambiguous restrictive covenant PF unenforceable (**Shafron**)
          - consider geographic and temporal scope (small area for short period of time more acceptable)

2. K to Commit Crime/Do Legal Wrong

* + encompasses things that fall short of being crimes, “public wrongs”
    - ie conduct of parties was disgraceful or criminally reprehensible

3. Ks Prejudicial to Good Public Administration

* + situations where individuals have k to corrupt public officials or undermine good government

4. Ks Prejudicial to Administration of Justice

* + ks that have detrimental effects on administration of justice (ie paying to stifle prosecution)

5. Ks Prejudicial to Good Foreign Relations

* + Friendly foreign governments protected from illegal ks (ie k to raise money against friendly gov’t)

6. Morals

* + any person who contributes to performance of illegal act by supplying thing with knowledge that it is going to do the bad thing, cannot recover the price of the performance
  + very ambiguous area of the law

**KRG Insurance Brokers v Shafron p. 730**

F: Employment k has restrictive covenant that does allow him to work for 3 years in the insurance business is he quits. Restrictive covenant says “Metropolitan City of Vancouver”

I: Illegal?

H: Yes for ambiguity

R: Restrictive covenant in a k is a restraint of trade. Restrictive covenants prima facie unenforceable, but reasonable ones will be upheld. Absence of goodwill and imbalanced relationship warrants stricter scrutiny of restrictive covenants in employment ks. G**eographic coverage of covenant and period of time in which it is effective often used to determine reasonableness (also extent of activity sought to be prohibited)**. A restrictive covenant in an employment k found to be ambiguous or unreasonable will be unenforceable. Notational severance does not belong in restrictive employment covenants (blue pen rule).

**Effects of Illegality**

* + labelling process, which ks are illegal? a question of statutory interpretation

1. Basic effect of illegality: court will not enforce k
   * better to say unenforceable b/c performance under illegal ks sometimes has effect

2. Recovery of Property Transferred Under Illegal K

* + property transferred under illegal k cannot be recovered—though unenforceable still has effects
  + if parties not equally blameworthy , court will allow innocent party to recover what was transferred
    - one party did not know about illegality, or illegality designed to protect one of the parties
  + if party repents illegality before performance of illegality, can recover any property
    - don’t need to examine heart or motives of person withdrawing from k
    - only applicable if party seeking to recover property
  + property can be recovered if claim to property does not depend on relying on illegal k

**Still v Minister of National Revenue [1998] 1 FC 549 (CA) p. 762**

F: Lady marries a Canadian and thinks she can work, gets fired and can’t get severance.

I: Illegal?

H: No

R: Illegality has two categories: CL and statutory. Ks can be rendered unenforceable on grounds of violating public policy. Impliedly prohibited k requires examination as to purpose or object underscoring the legislation—distinguish between express and implied prohibition. **A k is illegal as to formation when it is prohibited by statute. Illegal if performed in a manner prohibited by statute.**

ILLEGALITY

The law may declare a k inappropriate or intolerable. Illegality can apply to the whole k or a portion of it. The older approach to illegality emphasized whether the making of the k was illegal, whether purpose/performance was illegal, and the intention/knowledge of the parties. The modern approach considers statutory purpose and all surrounding circumstances. Ks in violation of statute, or ks performed in a manner that violates statute are both illegal (Still v MNR). The court considers serious consequences resulting from invalidating the k, the social utility of these consequences, and determination of the persons affected by invalidating the k.

At common law, public policy informs the illegality of ks. Public policy heads are not closed. Courts may use discretion to create new concerns when determining whether or not a k is unenforceable. Restraint of trade is the most common public policy concern. Restrictive covenants exemplify the issues surrounding restraint of trade. If a party signs a restrictive covenant, it agrees to not do certain things for a set amount of time, perhaps forever. The courts must balance demands of society for competition with the freedom of k. Therefore, a court will ensure the restrictive covenant was securing a legitimate interest. If a restrictive covenant is at all ambiguous, it is prima facie unenforceable (Shafron). As in Shafron, if the court applies the blue pen rule—it simply eliminates an offending provision—and the k no longer makes sense, the k remains illegal. Other policy concerns include ks ex turpi, ks prejudicial to good public administration/predjudicial to administration/good foreign relations, and morals.

With certain exceptions, the court must determine what response is the appropriate response to the public policy motivation behind deeming the k illegal (Still). Void ks simply means there never was a k. If parties have exchanged things because they thought they had a k, they can get things back. Unenforceability means there is something enforceable there, but the court will not enforce it. If the k exists but is unenforceable, the can presumptively keep the things. Unenforceability is a discreet response.

Property transferred under an illegal k is generally unrecoverable. There are exceptions to this rule. If the parties are not equally blameworthy, court may allow innocent party to recover property. This may entail situations where one party did not know about the illegality or the illegality was designed to protect one of the parties. If a party repents the illegality before k performance, it might recover property. Finally, property can be recovered if the claim to property does not depend on relying on an illegal k.

**NO CONSIDERATION**

**PENALTIES**

**L/E CLAUSES**

1. **EXCLUDING AND LIMITING LIABILITY - (MacDougall, ch. 11)**
   * exclusion excludes liability, limitation limits liability
   * usually used by powerful parties against weaker parties—**HUNTER**
   * doesn’t create obligations but alters them, limit obligations that exist elsewhere

**Notice of existence**—offer and acceptance construction

* + parol evidence: law doesn’t want to explore what parties knew or didn’t know
  + presumption that party spoke English
  + party must know that there is writing at the correct time (before k is entered into), has to be of practical use—**THORNTON**
    - opportunity to elect and understand the words
  + ***Lestrange***: signature represents fact that party has read and understood everything
    - can sometimes construct a signature based on past dealings—**MCCUTCHEON**
    - signature not sufficient if clause is onerous—**TILDEN**
  + if mistaken, might not be held to notice—non est factum, misrepresentation
  + a term particularly generous to one party will be interpreted narrowly

1. Notice Requirement - Unsigned Documents

***Thornton v Shoe Lane Parking p. 478***

* **F:** T injured in car park by other driver, SLP claimed excl. clause limited their liability
* **I:** did the notice (posted in the garage) constitute part of the k? Did the automated issuance of the ticket matter?
* **R:** there must be notice and consent
* **A: the customer cannot see the conditions until after paying and entering into K which isn’t fair or reasonable**: “it would be fiction, if not farce, to treat those customers as persons who have been given a fair opportunity before the ks are made…” p 482
* **C:** for T

***McCutcheon v David MacBrayne p. 488***

* **F:** McCutcheon shipping car from mainland, normally waiver signed limiting MacB liability but not done in this case and car lost due to McB negligent navigation.
* **I:** can the shipper rely on fact that waiver was normally signed (past dealings)?
* **R:** party is bound by a signed k, but knowledge of terms is subjective
* **A:** K never read by pl historically, so not aware of conditions. “past dealings” **only relevant if the conditions understood and agreed to**

1. Notice Requirement - Signed Documents

Tilden: exclusion clause has to be legitimate

Karoll: waivers have to be consistent with document to be enforceable

***Tilden Rent-a-Car v Clendenning* (1978), 18 OR (2d) 601 (On CA) p. 492**

F: Clendenning rented car and drank and drove (pleaded guilty) strict exclusion clause said any alcohol=no coverage

I: is the exemption clause valid?

R: L’estrange says sig. alone is valid, but McCutcheon says there must be notice and consent

A: The exc clause conflicts with ‘total coverage’ and not brought to C’s attention: **sig must indicate knowledge and consent. There must be proportionality and consent**

C: for C

***Karroll v Silver Star Mountain Resorts* (1988), 33 BCLR (2d) 160 p. 496**

F: K broke leg in downhill ski race, contested excl clause limiting SS’s liability

I: is the indemnity clause binding?

R: if the party is given sufficient notice and signs, there is consent

A: **the notice said in large print what it was, she had signed it before, and it was not unclear**

C: for SSM

1. Fundamental Breach & Its Aftermath
   * Denning doctrine—potential beneficiaries couldn’t really use it
   * not really law in Canada, have to find another equitable doctrine
   * Wilson in **Hunter**: exclusion basically the same as limitation, focus on unfairness of and inequality of bargaining power
     + assessed at creation ofk, unconscionable from the outset or look to subsequent events

***Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 (CA*) p. 506***

**F**: Wallis agreed to hire-purchase car, financing thru Karsales but car when delivered was badly damaged and he refused it - K sues for non-payment on grounds of disclaimer as to condition or fitness in k

**I**: Is it an implied term that the car be substantially the same condition, despite disclaimer?

**R**: (according to Denning) “exempting clauses only avail the party when he is carrying out his k in its essential respects”

**A**: **a breach “which goes to the root of the k” disentitles from relying on exempting clause**

**C**: for the d - doesn't have to pay

***Photo Production v Securicor* [1980] 1 All ER 566 (HL) p. 508**

**F**: Securicor to provide night watchman visits, watchman set a fire which burned down factory

**I**: Can clause excluding liability of employees except to ‘course of employment’ stand

**R**: fundamental breach is no more, must rely on construction of k

**A**: Unfair K Terms Act does not apply in this commercial k - **clear and express intent to waive liability for employee’s deliberate act**

**C**: for securicor.

***Tercon Contractors v BC Supp. 15***

* **F:** After soliciting “RFEI”s) for a major highway design-build project, the MOT issued RFP’s to participants, this was like a tender bid. Included was a clause: “Except as expressly and specifically permited in these Instructions to Proponents, no Proponent shall have and claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim” Then the M accepted a bid from one party, B, despite knowing it was a joint bid with an ineligible party. B’s bid was accepted over T’s and T sued for damages on the basis that acceptance of an ineligible bid constituted a breach of contract, and that the breach had cost it an award of the project.
* **I:** Did the province breach the tender contract by accepting a bid from an ineligible bidder? Does the exclusion clause bar a claim for damages for breach of the tendering contract?
* **R:** On the issue of the enforceability of exclusion clauses, courts must undertake a three-part inquiry for enforceability: **1) As a matter of interpretation, does the clause apply to the circumstances established in evidence?2) If it applies, was it unconscionable at the time the contract was made?3) If it applies and is valid, should the court nonetheless refuse enforcement based on an overriding issue of public policy?** (onus of proof here is on the party seeking to avoid enforcement.)
* **A:** Cromwell found that the exclusion clause did not cover the Province's breach - the clause applied only to claims arising "as a result of participating in [the] RFP" and not to claims outside of this, such as the claim brought by Tercon against the participation of third parties.
* **C:** For Tercon
* **DISSENT:** **“The appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of contract of sophisticated and experienced parties in a commercial environment to craft their own contractual relations.** I agree with Tercon that the public interest favours an orderly and fair scheme for tendering in the construction industry, but there is also a public interest in leaving knowledgeable parties free to order their own commercial affairs. In my view, on the facts of this case, the Court should not rewrite – nor should the Court refuse to give effect to – the terms agreed to by the parties.”

Exclusion clauses exclude liability. Limitations clauses limit liability. Stronger parties usually use these clauses against weaker parties. The clauses alter and limit obligations that exist elsewhere in the k. There must be notice of an exclusion or limitation clause. The party agreeing to the clause must have reasonable notice that the clauses exist. (Thornton)

The Lestrange principle states that if a party has signed a k, a court will presume knowledge and comprehension of any clauses therein. Court may sometimes construct a signature (McCutcheon) based on past dealings and whether the party previously understood and agreed to the terms. The signature alone is insufficient. There must be actual consent and knowledge (Tilden). However, the court may construct consent if the party is given sufficient notice (ie if the clause is in large print) (Karroll).

FUNDAMENTAL BREACH

In Karsales, Denning created the doctrine of fundamental breach. Fundamental breach is a breach that goes to the root of the k. Fundamental breach prevents a party from relying on an exclusion or limitation clause. The House of Lords rejected the doctrine of fundamental breach in Photo Production. In Canada, courts will look to see if another equitable doctrine applies. In Hunter, the SCC said that if the k at its creation allowed exclusion to apply, the court must look to subsequent events to see if it continues to be unfair. In Tercon, the SCC ruled that construction will decide the issue. The court set out three considerations: (1) did the clause apply to circumstances established in the evidence, (2) if so, was the application unconscionable at the time of k creation and (3) if the clause applies and is valid, should the court restrict enforcement based on public policy. The party seeking the avoid enforceability bears the onus. Binnie’s dissent discusses the tension between freedom of k and making bid processes open and transparent. Tercon may or may not be good law.

**EQUITABLE REMEDIES**

**EQUITABLE REMEDIES - (MacDougall, ch. 23)**

**A. SPECIFIC PERFORMANCE AND INJUNCTION**

1. **Definitions**
   * injunction: order to someone to do or not do something (ie perform an obligation or not break obligation)
   * SP: order for k party to perform k obligations (like injunction to person whole k)

**2. Keeping alive primary obligations**

* + do not provide substitute for broken p/o, seek to have p/o performed when performing party won’t or said it won’t when time arrives
  + order for SP, I means k not terminated—revives k, postpones date of breach

**3. Factors governing availability**

* + consideration of CL matrix
    - equity considers CL’s opinion—sometimes remedies unavailable if CL says k void or rightly terminated
    - not available after k is avoided (rescinded)
  + adequacy of damages: equity looks at CL remedies first to see if they are adequate
    - damages inadequate if subject matter is unique (subjective desires of BFPV for particular property may make it unique)
    - factors of time, place, financial constraints make damages theoretical
  + clean hands
    - court determines whether P actually deserves equity’s assistance
      * ie P who obtained k through fraud not going to sway equity, P who committed even a small misrep may not get help
    - P can’t be in breach of his own obligations, has to show he is ready and willing to continue performing the k
  + laches—can’t wait too long, depends on circumstances
    - if P is trying to stall, no remedy
  + hardship to D or third party
    - from delay or something actually identifiable
    - court protects interests of 3rd party who has existing k with D that could not be performed if it ordered remedy to perform k with P (ie court upholds k with BFPV)
  + obligations over period of time not subject to equitable remedies b/c need supervision (equity is lazy)
    - if relatively simple (Beswick), equity might consider it
  + obligation to perform personal service
    - disinclination to supervise extended obligations
  + mutuality
    - k must be enforceable against P if P is to have it enforced against D

DAMAGES IN LIEU OF SPECIFIC PERFORMANCE OR INJUNCTION

* + equitable damages: money that serves as a replacement for SP/inj that court cannot make usually b/c hardship to third party
    - assessed same as CL damages, but sometimes assessed at time of judgment
    - **SEMELHAGO**

***John Dodge Holdings v 805062 Ontario* On CA p. 904**

**SP for “unique property”**

**F: Purchase of land for hotel to be erected near amusement park, P wants SP**

**"Unique property" – quality especially suitable for its proposed use, cannot be reasonably duplicated elsewhere**

***Warner Bros. v Nelson p. 910***

**F** D breached K to perform solely and exclusively for P. P sought injunction to restrain further breach

**I** Will ct grant injunction? YES. Generally, **ct will not enforce a covenant for personal service, and if granting an injunction will have the same result, ct will not grant it.** However, ct justified injunction

Reasonable – limited obligations to 3 years

**Ct may grant injunction if damages is not an appropriate remedy (cannot adequately compensate "special, unique, extraordinary and intellectual services") and no adequate damages were available**

EQUITABLE REMEDIES

Injunctions are orders to someone to do or not do something. Specific performance is an order for k party to perform k obligations. These remedies do not substitute broken primary obligations. They seek to enforce primary obligations when performing will not or says it will not when the time arrives. Equity will consider CL’s position. If CL says the k is void or rightly terminated, the remedies will not be available. After a k is avoided, equity will not grant another remedy. Equity will consider CL remedies first to assess whether they are adequate. Damages are inadequate if the subject matter of the breach is unique. Parties seeking equitable remedies must come to court with clean hands. P cannot be in breach of his or her own obligations, and must show s/he is ready to continue performing the k. If a party waits too long, laches applies. If granting an equitable remedy will cause hardship to D or a third party, the party cannot receive the remedy. Equity will not grant a remedy if the obligations take place over an extended period of time, if the obligations are to perform a personal service. Finally, the k must be enforceable against P if P is to have the k enforced against D to trigger any equitable remedies. Equitable damages are money that replaces orders of SP or INJ if these orders would cause hardship to a third party. They are assessed the same as CL damages, though sometimes at the time of judgment.

ESSAY CONSIDERATIONS

**Freedom of k:** parties should be allow to enter into whatever k they want, fundamental precept of democratic society that freedom of k respected

* + - counter: need to protect weaker parties?
      * + counter counter: law of k already provides for weaker parties

difficult to use, often exploited by stronger parties that understand k law better

enshrining weaker party doctrines in statute? maybe, but might be too subjective, still it would help if weak parties actually understood and could avail themselves of fullest protection of the law

can’t protect weaker parties too much b/c FREEDOM OF K

**Intention to create legal relations**: should law assume that parties intended to create legal relations? is it the law’s business to impose who can/cannot enter into a k?

* + - * again, freedom of k. in obvious situations, maybe ITCLR applies
      * less obvious situations, important to consider what the parties actually wanted, shouldn’t be barred from entering into a k on the basis of their preexisting relationship

**Merging k with tort?**: important to maintain distinctions

* + - * law should overlap (ie areas of misrep/deceit) but not to the extent that it renders k law identical to tort law
      * k law addresses different ends, has different means, addresses different harms

**Importance of public policy in k**: make sure k law is aligned with public policy

* + - * difficult b/c it requires judicial intervention, ambiguous designations