**Contract Law April Exam CAN**

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# BACKGROUND TO THE LAW OF CONTRACT

# Formation of the contract

* For a K to be created you need: (1) offer and acceptance (2) certainty of terms (3) intention to create legal relations.

# A. offer and acceptance

## 1. Offer

* Sets the terms of the K
* **Bilateral**
	+ Both parties have obligations once K comes into existence
	+ **Offer sets out both parties’ obligations**
* **Unilateral**
	+ Only one party has obligations once K exists
	+ Offer is usually made by the person who *has* those obligations

### (a) Offer and invitation to treat

* Invitation to treat:
	+ Statement of readiness to negotiate
	+ Precedes the offer
* Factors to distinguish from Offer
	+ Whether ***all details*** necessary for K are present in communication
	+ Whether treating as offer leads to absurdity
* **TUNNEL SNAKES RULE**

Canadian Dyers Assn. Ltd v Burton
**F**: P asked for $ quote. D responds. P request lower $. D: last $ = “lowest [he was] prepared to accept.” P sends deposit. D sends draft deed. D later reneges, sends deposit back, says “no K.”

**I**: Was there offer and acceptance?

**A**: Quotation of price is not offer. Was more than quotation, added “prepared to accept” to end of statement, shows D was making offer at that price. D acted as if K, shows D *intended* K.

**C**: K was formed

**R: Words and actions** of the defendant will help to determine whether or not it is an offer

#### Pharmaceutical Society v Boots

**F**: Self-service pharmacy. *Pharmacy and Poison’s act 1933*: substances listed need to have purchase supervised by registered pharmacist. P argues offer at shelf/acceptance by customer taking (not supervised). D argues offer at counter/acceptance by cashier (supervised).

**I**: When is K formed in self-serve store?

**R:** Display of goods = ITT. Offer made by customer at check-out, acceptance by employee. Owner has final say (therefore K formation under their supervision).

#### Carlill v Carbolic Smoke Ball Co.

**F**: D’s ad says “£100 to anyone who purchases + uses it and get sick.” Carlill did so, got sick. Tried claiming reward. D argues ad was ITT (too vague/mere puff). P says offer!

**I**: Was this ITT or Offer? Can offer be to world?

**A**: Extravagance of communication does not negate as offer. Terms are clear. Reasonable person would see as offer. Ad was offer to the world, but only acceptable by those who do **acceptance ritual.** In this case, notification of acceptance did not have to precede performance**,** D’s wording waived it.

**C**: There was K.

**R**: Ad can be offer “to the world” for unilateral K, can be accepted by doing acceptance ritual. Extravagance no defence. “Reasonable person test for whether communication is offer.”

###  (b) Communication of offer

* An offer is not effective until it is communicated to the offeree.
* There can be no acceptance in ignorance of the offer (Clarke)
* Motivation is irrelevant to accepting the offer (Carwardine)

#### Williams v Carwadine

**F**: P witnessed murder of D’s brother. P did not initially provide info about murder. D stated he would give 20*l* to anyone who provided info about murder which led to conviction – put up posters all over town. P beaten by murder suspect, following this she thought she was going to die and voluntarily provided info about murder. D says no K because P not motivated by reward.

**I**: Do you have to know that the offer exists (at time of acceptance ritual) and if so, do you have to be ***motivated*** by the offer to accept?

**R**: No ruling on necessity of knowledge. Court found for P, despite finding her motive was not to accept offer (ie motive irrelevant).

#### R v Clarke

**F**: D offered reward for info on murder. P gave information, says did not intend on accepting at the time (forgot about it). Later, P requests reward. D says no K.

**I**: Is intention to accept**/**knowledge of the offer at time of acceptance ritual necessary to accept?

**L**: (maybe reads into Carwadine too much)

**C**: Clarke did not **mentally assent** to the crown’s offer - there was no “consensus of minds” until after the information had been given.

**R:** Both knowledge and intention are necessary **at time of acceptance ritual** in order for acceptance to occur. Knowledge is pre-req for intent.

## 2. Termination of Offer

3 ways an offer can be terminated:

1. **Revocation** – offeror cancelling offer

* Can happen at any time before acceptance
* In an **option K**, in exchange for consideration, the offeror leaves the offer open for set time.
* Can be **done by any means** (can be implied or express)
* To revoke ad: use ~same method as offer.
* Revocation ***not effective unless it is communicated*** (does not have to be direct) (ex: **Dickinson v. Dodds**)
* If offeree has knowledge of revocation before acceptance, then he has no remedy (ex: **Dickinson v Dodds**)
* **Postal Rule** does NOT apply: revocation of an offer is only effective upon ***receipt*** of the revocation. (ex: **Byrne**)
* you can revoke offer early, even w/a set deadline (except for unilateral where person has begun actions: **Errington**)

2. **Rejection** – offeree rejects offer (can do with a counter-offer)

3. **Lapse of Time** (actually one of the above)

* Could be A) inferred by the offer, and therefore offer is revoked after that time or B) not built into the offer, but implied by a period of time going by, offeree is rejecting it tacitly

### (a) Revocation

#### Byrne v Van Tienhoven

**F**: Offer to sell mailed to P by D 10/1. Offer received 10/11. P accepts by telegram on the 10/11, + confirmed by letter on the 15th.

BUT D had mailed revocation 10/8, NOT received by P until 10/20.

**I**: When is revocation valid?

**A**: If D’s argument was accepted offeree’s could never know if they have a K when accepting.

**C**: There was a K.

**R**: No such thing as “postal revocation rule.” Revocation not affected until communicated to offeree.

#### Dickinson v Dodds

**F**: P gives open offer to buy property within time limit. D sells to 3rd party before time up. P indirectly learns of this and sends formal acceptance.

**I**: Was the offer “properly” revoked before the plaintiff accepted?

**R**: You have to communicate (either directly or indirectly) revocation to the offeree. (like even by word of mouth)

**R2**: You can revoke the offer at *any time* before acceptance.

### (b) Unilateral contracts

* The offeror CAN **revoke** the offer before the act has been completed
	+ But there is a way that the unilateral k can be kept open for the offeree to finish acceptance ritual. = **LAW OF RESTITUTION**. Easier still: ***make k bilateral***.

#### Carlill v Carbolic Smoke Ball Co.

**F**: D’s ad says “£100 to anyone who purchases + uses it and get sick.” Carlill did so, got sick. Tried claiming reward. D argues ad was ITT (too vague/mere puff). P says offer!

**R**: Generally, offeror can revoke offer prior to completion in a unilateral k, sometimes not once performance has begun

Errington v Errington and Woods
**F**: Dad makes down payment. Says to P, pay off mortgage and it’s yours. P paying off mortgage. Dad dies ☹. D (dad’s executors): this is ours, leave. P says they still have right to continue paying off mortgage to get house.

**I**: Can D revoke offer before P finishes acceptance ritual.

**R:** Unilateral K: if acceptance ritual started (and offeror knows), cause of action through restitution→Offeror cannot revoke before offeree has chance to finish. Easier to just call it a bilateral K (acceptance ritual= offeree’s obligations)

**Problems**: 1) If offeror is not allowed to revoke the offer, what happens if he does? 2) Why does it matter that it is a unilateral contract. Why is bilateral exempt? 3) why does knowledge of the revoking party matter?

- *Errington* could be a unilateral k: offer = promise to transfer property

acceptance = making mortgage payments

Therefore acceptance only occurs when payments are finished.

- *Errington* could be (and likely is) a bilateral k: offer = promise to transfer property

acceptance = yes

Acceptor would be in breach of k if payments not made and therefore the offeror could sue for damages

You can’t get your money back in a rental payment scheme over time.

**\*\* Can avoid above situations by making an option-k: keeps offer open while actions are being performed \*\***

### (c) Rejection and counter-offer

* Everybody knows that counter-offer=rejection. Can ***only*** be revived by offeror referencing original offer existing.

#### Livingstone v Evans

**F**: D offered to sell P property for $1800. P replied “Send lowest cash price … will give $1600 cash.” D replied “Cannot reduce price.” P sends $1800. D refuses sale.

**I**: Did P counter-offer or ask for quote? Did D “re-offer?”

**A**: P’s statement was request for quote until they added own price: made it **counter-offer→**rejection. BUT P, by referencing original price, revived original offer.

**C**: There is a K.

**R**: Request for more info≠rejection. Counter-offer = rejection. Response to counter-offer revives original offer **if reference current existence.**

### (d) Lapse of time

Barrick and Clarke
**F**: P offered to buy land on Oct 30. D replied on Nov 15 w/ different price. P was away and didn’t reply to “accept” until Dec 10 (but P’s wife had written to ask that offer stay open until Nov 25). In meantime, D accepted offer from H on Dec 3.

**I**: Was the length of time which elapsed reasonably long enough to revoke offer?

**A**: D’s words indicated a limited period of time for the offer (“closing immediately”)

**C**: No K between P and D. D could have let K be created by P’s acceptance if he wanted.

**R**: If no time is specified in the Offer, the Offer then lapses after a reasonable amount of time. This depends nature of item the normal course of business and also the conduct of the parties.

## 3. Acceptance

* At time of acceptance there must be intention to create legal relations, certainty of terms, and consideration.

### (a) Acceptance

#### Livingstone v Evans

#### R: Acceptance must be an unqualified “yes.” Or else, any change in the offer constitutes a counteroffer

Butler Machine Tool v Ex-cell-c Corp **(BAD LAW)**
**F**: P(seller) quoted price to D(buyer) which included terms and conditions (variable pricing). D placed order including tear-off slip listing different terms and conditions (fixed pricing). P completed and returned slip to D saying “accepting with original quotation”. Each say the K is on their respective terms.

**I**: On whose terms was K founded? When was acceptance?

**A**: Denning’s **Battle of the Forms**: 3 outcomes. (1) Person who issues last formulation prevails (their offer is accepted), (2) first person to issue formulation wins, (3) no reconcilable middle, entire thing scrapped.

**C**: This case is number 1, D wins!

R: DENNING IS A FUCK. This is bad law – not authoritative. Use to criticize law. The offer must come from one party only.

### (b) Communication of Acceptance

#### Felthouse v Bindley

**F**: P discussing buying horse from nephew. P wrote to nephew setting out new price, and saying if he didn’t hear anything he would consider offer to be accepted. Nephew intended to accept, but didn’t send reply. Horse accidentally sold to someone else by D (auctioneer). P sues D for tort of conversion. D says horse was not P’s property.

**I**: Was there K (had horse become P’s)? Can silence constitute acceptance?

**A**: Nephew’s silence could not constitute acceptance →Horse still belonged to nephew at time of sale → P has no action against D.

**C**: No K was created, although both intended K.

**R**: Silence cannot be acceptance → acceptance must be communicated in some fashion

**R2**: Policy reason – so people cannot be forced into contracts by offerors stipulating silence as being acceptance

Carlill v Carbolic Smoke Ball Co.
**R:** Performance is sufficient to *be* acceptance *itself*. Necessity of communication may be waived by the wording of the offer. (Note to receive reward, you practically need to tell them)

#### Brinkibon v Stahag Stahl

**F**: P, in London, telexed acceptance of offer to purchase steel from D, in Vienna. P wants to sue D for breach of K under UK jurisdiction. D says they are not under UK jurisdiction. K may have been formed by telex from P in London to D in Vienna communicating acceptance or telex from D in Vienna followed by action on their part as acceptance. LC found K created in Austria – K made where acceptance received.

**I:** Where was the K created? What rule of acceptance should apply to telex communications?

**A:** Acceptance delivered to offeror in Austria so Austria has jurisdiction. Cases around acceptance by instantaneous communication must be resolved w/ reference to intention of parties and circumstances (ambiguities should look to what the parties intended).

**C:** K formed in Vienna where acceptance was received.

**R:** The jurisdiction under which the contract may be adjudicated is *where the acceptance was* ***received****.* You can stipulate in an offer whose law will apply.

#### Household Fire v Grant

**F**: D applied for shares with cheque for deposit. Received the letter, allotted him shares, and sent him the confirmation (acceptance of his offer). D never received. P goes bankrupt, claims $ owed fore shares from D. D says never had shares (no K).

**I**: Did P accept offer when posting letter (although it never arrived)?

**A**: Post office is agent of both parties. Deliverance to the

**C**: Sure.

**R**: Postal Acceptance Rule: As soon as letter of acceptance reaches post office, K formed. Offeror can explicitly preclude this rule: specifying acceptance method.

Holwell Securities v Hughes
**F:** D granted P 6 month option to purchase property and stated option had to be exercised by ‘notice in writing’. Before 6 months had passed, P’s lawyer wrote to D’s lawyer stating client was exercising option and included cheque for deposit. P’s lawyer sent copy of letter to D by mail which was not delivered. D refused to sell property and P sued for breach.

**I:** Does postal rule apply?

**A:** If postal rule applies then there is a K. But use of words **‘notice in writing’** meant that D required actual notice of acceptance. Postal rule does not apply when terms point to necessity of actual communication. Acceptance must arrive and be seen by offeror, does not have to be read or understood. Ps did not give notice of acceptance to D. Postal rule doesn’t apply in marriage Ks or in land Ks.

**C**: No K.

**R**: PAR very easily precluded. If language indicates that offeror themselves must see acceptance, then PAR cannot apply.

# B. Certainity of Terms

2 sources of uncertainty

* Absence of an important matter
	+ E.G. Missing price or quantity
* Ambiguity

In most cases, where parties intended K, courts will try to save K

3 categories of problematic terms

* 1. price to be agreed (***May & Butcher***)
		+ Invalid
			- Both parties can say whatever price they want
		+ Have to 'flick the switch' and commit to something
	2. Price determined by formula but no machinery (**Hillas v Arcos**)
		+ **Valid - as long as formula works and the court can apply it and reach an answer, there can be a contract**
	3. Price determined by formula (defective) but specified machinery (**Foley v Classique Coaches**)
		+ They go through mediation
		+ **Formula**: Things like "market rate" FOB+5%
		+ **Machinery**: a thing or person you can go to produce a price (arbitrator, price list)
		+ In May and Butcher there was machinery, but no formula (no formula->no price->no price no contract)
		+ **Valid IF the machinery can cure the defect**

#### May & Butcher v R

**Note: Low water mark. Courts usually try harder to save a K in commerce.**

**F**: P and D entered into agreement for P to buy surplus tentage. Price was to be agreed between the parties “from time to time.” Agreed that disagreements would go to arbitration.

**I**: Were the terms of the contract sufficiently defined so as to constitute a legally binding contract between the parties?

**A**: Agreement to agree (essential terms like price undecided) cannot be a K. Arbitration can only work with actually existing K’s, so this arbitration clause is null. People cannot be bound by a bargain they have not reached (no right to future agreements).

**C**: No binding K, for lack of price.

**R**: Agreements to agree on essential terms cannot be a K.

Hillas v Arcos (HL)

**Note: High water mark.**
**F**: P has K to buy timber from D, includes “option K” to buy more next year at -5% price list. D entered into K with 3rd party (making “option K” impossible to fulfill).

**I**: Was the option provision they entered into a binding agreement?

**A**: Court found terms sufficiently clear. There was a formula for determining price: price list. They knew it would be published. Parties’ discretion was fettered. This was not an agreement to agree, it *was* the future contract itself because it was sufficiently clear.

**R:** If there is a *formula* for essential terms, the court may apply it to determine them, making a K.

Comments: *Id certum est quod certum reddi potst* [what can be made certain is certain]

*Verba ita sunt intelligenda ut res magis valeat quam pereat* [words should be interpreted so as to make the thing they relate to effective rather than perish]

Foley v Classique Coaches
**F**: P sold land to D. Included a clause for future sale of petrol from P to D. Prices to be negotiated from time to time, disagreements go to arbitration. Eventually D wanted to buy from someone else and P sought injunction to prevent them, citing the K was binding, required that they purchase from P only.

**I**: Were the terms in the clause defined enough for it to be binding

**A**: Like Hillas, they both *believed* they had a K. Inferred “Reasonable price at reasonable quality” from analogy to pubs. It is an implied term (formula) which is fettering enough given arbitration clause which provides machinery if it fails.

**R**: if sufficient formula is able to be inferred, then mechanism such as arbitration can revive the defective formula. Court’s will make this endeavour if both parties believe K, act like there is a K (shows intention to create legal relations)

**R2**: Arbitration alone cannot save it if arbitration itself is entirely needed to produce the essential terms.

#### Sale of Goods Act, ss. 12 & 13

#### Empress v Bank of Nova Scotia

**F**: D tenant of P. In lease agreement there was clause that said lease be renewed “at the market rental prevailing at the commencement of that renewal term as ***mutually agreed***…”

**I**: Is renewal clause void because of uncertainty or agreement to agree?

**A**: If parties say they will enter into lease at rental to be agreed upon, no enforceable lease obligation. But there may be **obligation to negotiate**. Court interprets clause to mean: (1) P not compelled to enter into agreement; (2) implied term that P negotiate in good faith and (3) agreement on market rate would not be unreasonably withheld – same degree of diligence as ‘best efforts’. Terms applied because they meet **officious bystander** and **business efficacy** standards. P did not negotiate in good faith. **Duty to negotiate as shield**

**C**: P needs to negotiate in good faith.

**R:** While a promise to negotiate (in good faith) does not impose a contract, it does hold some legal force if there is an objective benchmark within the contract.

R2: Courts may be more inclined to allow duty to negotiate as a shield.

#### Mannpar Enterprises v Canada

**F**: K to extract sand and gravel from Indian Reserve for 5 years. Permit provided for right to renew for further 5 years “subject to satisfactory performance and renegotiation of royalty rate and annual surface rental.” P and D expected operation to extend over 10 year term. P gave notice of intention to renew for 5 more years. D did not renew permit. P claimed damages, says D has duty to negotiate in good faith.

**I**: Was renewal clause void for uncertainty?

**A**: without an objective benchmark there are no obvious expectations upon which the officious bystander test or business efficacy test can be applied. The clause *did* include a floor: not less than the previous term. However, this is not a proper target as it allows infinite outcomes above that floor.

**C**: D had no duty to negotiate.

R: without including an objective benchmark in a renewal clause, there is no basis to imply a good faith duty to negotiate. The “good faith” negotiation needs to have something to aim at. YOU NEED A GOSHDARN FORMULA.

R2: Courts may be less inclined to allow duty to negotiate as a sword

# c. intention to create legal relations

#### Balfour v Balfour

**F**: P sues D (hubband) for $ he promised as allowance when he went away.

**I**: Did D intend legal relations with his promise?

**A**: Atkins holds that agreements between husbands and wives may entail consideration and mutual promises, but are not contracts for want of intent to create legal relations

**C**: finds in favour of B

**R**: Generally speaking, arrangements made between husbands and wives do not constitute contracts

Comments: Law may be moving towards wanting to interfere in family promises (avoid patriarchy)

#### Rose and Frank v JR Crompton Bros ***(uncommon decision)***

**F**: P distributor of D’s shit. Parties signed agreement with clause specifying that it was not formal/legal agreement. D ended business arrangement, P sued for breach of contract.

**I**: Can agreements specifically exempt themselves from forming legal relations?

**A**: Their clear intention was to **not** create legal relations, as specifically shown in the text. Therefore the courts have no basis on which to adjudicate their promises.

**C**: No K.

**R**: If both parties clearly express they do not wish to be bound by legal relations, the court should strive to respect their intentions.

Comments: Courts don’t make this decision often. They will usually see commercial agreements as legally binding. See dissent: their orders to and from each other over time make a K.

# Enforceability issues

# Making promises bind – seals & consideration

## 1. Nature of Consideration and Seals

**Consideration must be distinguished from**:

1. **Motive**

2. **Failure of consideration**. Term used to describe certain types of breaches.

3. **Condition**. Can be condition precedent or condition subsequent.

4. **Adequacy**. Law should not judge value of consideration.

#### Royal Bank v Kiska

**F**: D signed to be a guarantor on a loan. D didn’t place a wafer on the paper, where “seal” was printed by P. P claimed that this

**I**: Was this efficient to constitute a seal

**A**: **Maj.** Found there was consideration, didn’t talk about seals. **Dissent:** P’s placement of the word “seal” did not constitute a sealing of the promise. The promisor must author the seal, **not** the promisee. Formality in law of seals must be preserved. The person affixing the seal must be aware (or at least acknowledge) that what they are doing is making the agreement legally binding. *Any* representation of a seal by the promisor is sufficient.

**R:** Seals can make a promise enforceable only if: (1) affixed or (2) at least acknowledged by the promisor as legally binding.

#### Thomas v Thomas

**F**: JT orally expressed desire for wife ET to have house used as residence and its contents **or** 100*l* in addition to other provisions made for her in will. After JT’s death, executors entered into agreement w/ ET “in consideration of John’s desires.” ET would take possession of house and in return maintain house and pay 1*l*/year for “ground rent” to executors. After some time, executors tried to evict ET claiming lack of consideration. ET said respect of husband’s wishes was consideration. LC found in favour of ET.

**I**: What can count as consideration?

**A**: Motive (**pious regard 4 wishes**) ≠consideration: flowed from dead guy. On this argument, the use of house would have been a gift, and **promise to make repairs** was necessary incident. No consideration involved in gift. To enforce this promise as contractual you need consideration. The law does not care what consideration is so long as it has some value in the eyes of the law moving from the promisee to the promisor. The express agreement to pay the executors casts this in the light of contract. The payment of 1*l* was consideration → it is enforceable. Had she been paying a landlord, that also would have been a gift (rent is necessary incident)

**R:** The law does not care what consideration is so long as it has some value in the eyes of the law moving from the promisee to the promisor. GIFTS ARE DUMB

## 2. Forbearance

Forbearance = promise to NOT do something

Where the promisee offers by way of consideration a forbearance to do something where they have ***no business doing that thing*** in the first place the consideration has no value.

* **If party believes he has a fair chance of success**, a reasonable ground for suing, then forbearance to sue will constitute good consideration regardless of whether the legal claim has merit (*Callisher*)

#### B (D.C.) v Arkin

**F**: P’s son (probably fat) was caught shoplifting from Zellers. Legal counsel for Zellers sent P a letter saying they would settle out of court if she sent fee $. Plaintiff paid the fee, but after getting legal council she sued for return. Zellers says there was valid K. P voluntarily paid the fee and entered into K. Argue there was consideration both ways: In exchange for Zellers forbearance to sue against her, the P voluntarily paid the sum of money.

**I**: In this case is forbearance to sue valid consideration?

**A**: Zellers had no valid claim for suit from which they were abstaining. Forbearance is only good consideration if they have a valid claim (or reasonably believe they do) to sue. A legal team such as Zeller’s could not ***reasonably*** believe they had a valid claim to sue. This holds for forbearing to exercise *any legal right* which you are not entitled to do.

**R:** a promise is not binding if the sole consideration for it is a forbearance to enforce a claim which is (reasonably foreseeable as) invalid.

## 3. Past Consideration

* Consideration made in the past is no consideration at all. (*Eastwood*)
	+ Past consideration = make a promise for an action that is already completed.
* **Emergency (Lampleigh) doctrine:** When there’s a request w/ the implication of payment the court will link the subsequent promise to pay to the previous request – one can recover on the promise. (*Lampleigh*)

#### Eastwood v Kenyan

**F**: D’s wife was P’s ward (paid money for her upbringing). D’s wife made promise to pay off P’s debt. When they married D remade this promise from himself. D didn’t pay. P sues.

**I**: Is past consideration (paying for upbringing) good consideration

**A**: At the time of the benefit was bestowed (upbringing) it was voluntary and not requested by D or wife. It was in the past and finished when D made promise. Therefore it cannot act as consideration.

**R:** Past consideration is not possible.

#### Lampleigh v Brathwait

**F**: D killed dude, sought pardon, asked P to get king to give pardon. P did that. D afterwards promised 100*l* as reward, but never paid.

**I**: Were P’s actions (though in the past) consideration? Is this an enforceable promise?

**A**: Mere voluntary favours in the past cannot be consideration. However, it can still be good consideration for a subsequent promise if: (1) it was performed at the request of the promisor; (2) that there was an understanding that it would be ultimately paid for; and (3) and if it had occurred at the time of the promise it would have been legitimate consideration.

**Com:** There needs to be a reason why promise was not made at the same time the request (**Emergency**)

## 4. Pre-Existing Legal Duty

### (a) duty owed to a third party

#### Pao On v Lau Yiu Long

**F**: P owned all the shares of Shing On. D were majority shareholders in Fu Chip (**3rd party**). P reached a deal with Fu Chip, **Deal 1**, for a share swap. P entered into a different (but attached) deal with D, **Deal 2,** requiring D to buy back a portion of shares at $2.50/share. P soon realized this was a shit deal. P refused to complete Deal 1 unless D agreed to remake Deal 2 to be that D would indemnify P of any loss on the market value. That new promise (**Deal 3**) was given. When the time came to indemnify, D refused to honour the Deal 3, claiming unenforceable because P’s consideration (completing the Deal 1) was invalid: it was a pre-existing duty to a 3rd party.

**I**: Is an existing duty to a third party valid consideration?

**A**: Preliminarily, it can be consideration even though past because *Lampleigh* (means you don’t need to worry that the promise was in the past). **|** Need to further ask whether promising to do something you *already have to do* for 3rd party can be good consideration. It can, because you are adding another person who can enforce that promise. This makes it *fresh* because there is a new encumbrance on the person giving it as consideration (both B and C can enforce it!)

**R:** Pre-existing duty to a 3rd party is valid consideration because it adds an enforcer to the duty.

###  (b) Duty owed to the promisor

2 Situations:

1. The same promise for **more**

2. The same promise for **less**

**This may occur in two situations**:

a. Rescind and replace the k with a new one

b. Replacing a term in the k – but this can only be accomplished by creating a new k

**Accord and Satisfaction** = accord is the agreement by which the obligation is discharged. Satisfaction is the consideration which makes the agreement operative. an agreement in which there is consideration that replaces an old prior obligation – the law says this is enforceable as long as there are **new promises** that change the existing promises.

#### Gilbert Steel v University Constr

**F**: P & D had existing K. Then P supplier increased the price of steel bars. D orally agreed to the increase. Written K drawn up but never executed. P sues for breach of oral K: claims oral agreement makes promise to pay more binding.

**I**: Was there consideration for this promise to pay more for the same service?

**A**: P proposed 2 alt forms of consideration: (1) promise of ‘good price’ for 2nd building – **court says no;** (2) ‘giving more credit’ – **court says no**. Old K was not destroyed in favour of new K, D did not intend that. P claimed D estopped from denying liability because they kept accepting invoices – court says estoppel cannot be used as a sword and no detrimental reliance demonstrated

**C**: D wins, promise not binding.

**R**: Promise or performance of pre-existing duty to promisor is not new consideration, nor is forbearance from breaking the K.

**Rescind and replace** the pre-existing legal duty, that would solve the problem. **It is consideration**. The value in replacing the original contract is that neither side sues on its obligation (**mutual forbearance**). Must be **explicit**. The original contract still exists, but the duties are unenforceable.

* The parties have to **intend** to cancel their pre-existing legal relationship.
* Problem is when **contracts are complex** (Fredericton). It is difficult to discern what you are pulling out and isolating and replacing.
* Rescission argument is only available where obligations of ***both parties*** are at least partially unperformed. **Must be done early**. The consideration is the **mutual release of old obligations**. If one party has fully performed, an “accord and satisfaction” is normally required to release the obligations.

#### Greater Fredericton Airport v NAV Canada

**F**: P was doing renovations; needed D to move their Instrument Landing System. D said replacing ILS altogether would be better, refused to move their ILS unless P paid for the replacement. P reluctantly agreed to pay (under protest), b/c otherwise reno could not get done. P refused to pay claiming: (1) no consideration (2) under duress.

**I**: Was there sufficient consideration for the promise to pay? Was promise obtained under economic duress?

**A**: Performance of a pre-existing obligation does not qualify as fresh or valid consideration. Nav promised nothing in return for the Airport’s promise. Commercial reality is that efficiency sometimes requires existing contractual obligations to be adjusted, law must protect their expectations that these modifications be enforced. It would be an injustice not to, if the promisee has acted in good faith and to their detriment in relying on the enforcement of those changes.

**C:** There was no consideration but as a post-K mod it was still enforceable – BUT not in this case because duress.

**R:** Post-contractual modification, unsupported by consideration, **may be enforceable** so long as it is established that the variation was not procured under economic duress.

#### Foakes v Beer

**F**: D owes P judgment debt entitled to principle +interest. They enter into payment plan which does not specify interest. P later claimed to be owed the interest from D.

**I**: Did payment plan release D from paying interest? Is a promise to accept less valid?

**L**: *Pinnel’s Case*

**R**: “payment of lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole.” No consideration given.

#### Foot v Rawlings

**F**: D owed money to P, initially to be payed with promissory notes. Entered into arrangement to pay with post-dated cheques (smaller payments and less interest) and suspend the enforcement of promissory notes. D was complying but then P sued to collect the money from the notes.

**I**: Did D give P sufficient consideration for their promise to accept less?

**A**: Change to payment with post-dated cheques is sufficient for consideration. Cheques and promissory notes are negotiable instruments. Post-dated cheques were meant to susupend pre-existing promissory notes, not replace them: **promise not to rely on the promissory notes.**

**C**: P’s promise

**R**: Modification of payment (form, place or time) is sufficient consideration as it had an **arguable benefit**: exempts promise from the rule that a smaller sum can’t satisfy a larger debt.

Law and Equity Act, s. 43
43 - **Part performance** of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction for a greater amount, though without any new consideration, must be held to extinguish the obligation (not the k).

**Three elements:**

1) actual part performance (just saying or promising you will take half does not suffice—you must actually pay. Does not work for promised payments.)

2) expressly accepted (not implicit)

3) in satisfaction of greater obligation (you would have to agree to extinguish the underlying obligation, not to change it or put it in the background, etc.)

* + Might this apply regardless of the equities? It is a codification of an equitable principle. Could go either way.
	+ This doesn’t overrule Foakes v Beer. It is still good law. But, would apply to Foakes “same for less” situation.
	+ **Couldn’t use 43 in Foot v Rawlings**, as there was still the original agreement in the background (The promissory notes were only suspended). The pre-existing contract needs to be extinguished.
	+ Still require consideration in Gilbert Steel situation (agreement to pay more). S 43 will ***never*** apply here. BUT Greater Fredericton could change the need for consideration for promises to pay more. if it prevails
	+ The statute does not make the 2nd k binding, it simply extinguished the first obligation (thereby possibly not making it a pre-existing legal duty)
	+ D&C Builders reminds us that L&E Act is a codification of an equitable principle. Does it remain an equitable principle? Do we have to add a proviso that it must be equitable to use this doctrine?

# Making Promises bind – estoppel

**Promissory estoppel:** = where someone make a **promise** intended to be relied upon, and another person **relies** on that statement to his or her detriment, the person making the statement cannot go back on it (subject to equities: *D&C Builders*).

* **suspends** the rights between parties, makes it so you can’t renege on a promise
* The ***reliance*** is key. Same role as consideration in contract. When you give the **actual reliance**, that is when promissory estoppel kicks in.
* ***Detriment*** – If the promise is not fulfilled, has the promisee altered their life in such a way that the non-fulfillment will be of a detriment to them?
* Very similar to estoppel by representation in effect. You get the **full contents of the promise**.
* Must be a statement about the **future**. It is ***not about*** ***fact***.

**Estoppel requires:**

1. Must be a **promise** intended to **affect** legal relations. The promise should be clear and unambiguous.
2. There must be **actual reliance** on the promise
3. There had to be some **detriment** suffered by the person relying on the statement

#### Central London Property v High Trees House**Beginnings of Promissory Estoppel**

**F**: P was landlord to D. P agreed to accept less than the contractual because of war time conditions (low tenancy). D paid reduced rent 5 years. Then P asked for regular rent + backpayment. P brought action.

**I**: Can P’s promise to accept less in rent be enforced? (also into the future)

**A**: Promise of reduced rent valid for duration of war – expired once houses were full to capacity (end of period when equitable to estop)– so after this point Ds must pay original full rent. Offers **2 versions** of promissory estoppel.

**R: Big version**: A promise intended to be binding, intended to be acted upon and in fact acted upon, is binding so far as its terms properly apply (ie: the conditions that caused the promise to be made still exist).

**Small version**: promise to accept smaller sum in discharge of larger sum, if acted upon, is binding notwithstanding absence of consideration – party not allowed in equity to go back on promise.

#### John Burrows v Subsurface Surveys

**F**: D was consistently late with his payments and finally P decided execute legal right to sue for whole amount. D claims that because P has not taken action with regard to late payments in the past –that he can use promissory estoppel as a defence.

**I**: Is a series of “waivers” of someone’s rights a *promise* which someone can be estopped from going back on?

**A**: Promissory Estoppel can only apply to clear (express) promises, not ones inferred from inaction. P never explicitly waived right to sue – never made any promise to forbear suit.

**C**: YOU GOTTA PAY

**R:** Waiving the rights in the past does not constitute a promise to waive rights in the future (choosing to wave rights and promising to wave rights are different)

#### D&C Builder v Rees

**F**: The P reluctantly accepted a smaller amount for reno work than was owed because he needed money and the D knew this and used it against him (crazy wife who was like “take this money or take nothing!” and they were poor so they took the lesser amount). P sued for full amount.

**I**: Can estoppel be used to enforce a promise made under inequitable circumstances?

**A**: where there is a true accord you can’t go back on it, but when there no true accord there can be satisfaction.

**R**: Qualification on Central London Property Trust = the creditor is barred from his legal rights only when it would be inequitable for him to insist on them but he is not bound unless there is a true accord between them.

#### Combe v Combe

**F**: The D and P were divorced – the husband agreed to pay the wife 100*l* per year, he never did. 7 years later the wife wants the money (there was no pre-existing relationship involving payments).

**I**: Is the husband’s promise to pay enforceable?

**L**: *High Trees*

**A**: Denning reasoned that *High Trees* cannot apply b/c principle does not create a new cause of action where one did not exist before. Can only be used as a shield against someone enforcing K where it would be unjust to allow enforcement given circumstances. Estoppel can be used, however, as part of action where parties intended to affect legal relations and on party acted on a promise to their detriment.

**R: Estoppel is a shield not a sword—can be part of cause of action but never the whole cause of action (e.g., to modify existing legal relations but not to create a relationship).**

#### Waltons Stores v Maher (Note: Persuasive in Canada, not binding)

**F**: Waltons (appellant) and Mahers (respondent) negotiating for a lease of land owned by R. A proposed demolition of exiting building and construction of new one. Target date for opening store created sense of urgency, verbal agreement between parties to amend terms of lease. Demolition of the building started and there was no objection by Waltons. Waltons now claims there was no intention to proceed.

**I**: Can Walton’s be estopped from denying a K when they had no intention of signing the lease, but allowed Maher to proceed anyways without objection?

**A**: Case suggests that promissory estoppel may be used as a sword, but only where the outcome of not using it would be unconscionable (this requirement means unlikely to undermine *Gilbert*). Also suggests hat there need not be a pre-exisitng relationship to use promissory estoppel—that estoppel can be used to create the legal relationship. In this case court used combo of promissory/proprietary estoppel together to create K.

**R: Promissory estoppel may be used as a sword where the alternative outcome would be unconscionable; *may* be used to create legal relations (force K).**

Benefits of Waltons: encourages keeping one’s word. Might benefit weaker parties, since unconscionability is built into the consideration.

Criticisms: increases litigation; uncertainty in what promises are enforced, when are relationships created; the distinctions in equitable doctrines gives the law flexibility.

#### M(N) v A(AT)

**F**: Mr. M promised to pay the outstanding balance on Ms. A’s mortgage if Ms. A moved to Canada to live with him and get married. Mr. M did loan her $100,000 on a promissory note, which she used for her mortgage. They broke up. Ms. A claims that through promissory estoppel she is entitled, as minimum equity, to not have to pay back the loan.

**I**: Can Mr. M’s promise be enforced?

**A**: Test for the enforcement of a promise: did the parties intend to affect legal relations? A necessary element of promissory estoppels is the promisee’s expectation or assumption of a legal relationship. Answer here is no, court finds the mortgage promise was not intended to be binding. These types of promises made in the context of a relationship are at the parties’ own risk. If Mr. M had to pay her mortgage by law then she would be legally obligated to stay with him.

**Ratio: If parties did not intend to create legal relations, and failure to keep promise is not unconscionable, promise cannot be enforced using estoppel. Note: this case indicates a less generous approach to estoppel than that taken in Waltons.**

# Enforcement by and against whom – privity

## 1. Third- Party Beneficiaries

**Privity:** Who the parties are = who is privy to K. Only party to a K can enforce it or be sued under it. Person outside the K has usually given no consideration, but privity operates independently of consideration.

**Horizontal privity**: When party A enters into K w/ B for something that benefits A and C. A can only sue for damages that A has suffered, and sometimes for specific performance. Tends to be domestic/social situations e.g. *Tweddle*

**Vertical privity:** Chain of Ks – each person has K w/ person above and below him in chain, but no Ks w/ other people in chain. Often commercial/supply chain situations e.g. *Dunlop*

**Can 3rd party beneficiaries sue or be sued?**

* Third parties to a K do not derive any rights from that agreement nor are they subject to any burdens imposed by it (*Tweddle*)
* Only parties to a K can sue for a breach of the K. The only exception to this rule is if a party named in the K was acting as an agent of an unnamed party – in this case the unnamed party can sue/be sued *but* there must be adequate consideration (*Dunlop*)

#### Tweddle v Atkinson

**F**: P was son of JT. J made agreement with son’s wife’s father (G) that both G and J would give to P some $. G died without giving P money. Clause in contract says P “has full power to sue the said parties”. P and wife ratified and assented to the agreement. Brought suit against G’s estate.

**I**: Does P have standing to sue for enforcement of K?

**A**: Consideration must move from the party entitled to sue upon K: therefore third party beneficiary who did not provide consideration cannot enforce the contract. Love and affection ≠ consideration. JT could sue for breach of K, but would not be able to get damages because he has not suffered any losses.

**R: 3rd party cannot enforce K, even if K is for 3rd parties benefit. Only the party who has provided consideration can sue (horizontal privity), but will not be successful unless can show damages. Love and affection ≠ consideration.**

#### Dunlop Pneumatic Tyre v Selfridge’s

**F**: P sold tires to wholesaler (Dew) on terms that Dew would not sell tires below P’s list price, and would include condition in any sales to retailers that retailers would also promise not to sell below P’s list price. Dew sold tires to Selfridges (D), D signed agreement with Dew not to sell tires below P’s list price. D then sold tires to several customers below list price, P claims injunction o and damages against D for D’s breach of contract with Dew.

**I**: Can P sue D even though they had no contractual relationship?

**A**: No K between P and D, therefor P cannot sue b/c of doctrine of Privity. This is a case of vertical privity. In order for P to successfully sue, would have had to given D consideration for promise—there was no consideration. A principle not named in the K can sue if the promise was contracted as his agent; but P would have to give consideration through agent. Dew, in this case, was not acting as agent of P.

**R: Only parties to a K can sue on the K (Vertical Privity). Agency must usually be explicit, courts reluctant to construct agency.**

## 2. Circumventing Privity

### (a) specific Performance

#### Beswick v Beswick (CA)

**F**: Uncle sold business to nephew, in K nephew (D) promised to pay P ₤5/week. The D paid until the uncle died, then refused to pay. Aunt was both herself and executor. She wins later as executor in getting specific performance.

**A**: Denning: where a K is made for benefit of 3rd party, who has a legitimit interest, it can be enforced by the 3rd party in the name of the contracting party.

**R**: Where a K is made for benefit of 3rd party, who has a legitimit interest, it can be enforced by the 3rd party in the name of the contracting party. OVERULED BY HL below.

#### Beswick v Beswick (HL)

**F**: See above.

**R: A 3rd party CANNOT enforce a K. A party to the K may be able to call upon specific performance, but only in limited circumstances (such as one where damages are inadequate). K enforced b/c aunt, as executor of estate, enforcing on behalf of uncle who is party.**

### (b) Trust

### (c) agency

## 3. Exception to Privity

#### London Drugs v Kuehne & Nagal 1992 SCC

**F**: LD hired KN to store machinery for them. KN was only liable for $40 for any damages under a limitation of liability clause in K. Employees of KN damaged machine, workers claimed coverage by liability clause in KN’s K with LD.

**R:** This is a horizontal privity exception. Where two parties enter into a K that has a defence intended to benefit a 3rd party, 3rd party may benefit from defence even if not privy to the K. This entitlement only works as a defence, not a cause of action.

#### Fraser River Pile & Dredge v Can-Dive Services 1999 SCC

**F**: Fraser owned a barge that was under charter to Can-Dive. Can Dive sunk boat. Clause in Fraser’s K with insurance company that insurer waived its right of subrogation against charters and extended coverage to charters. Insurer paid Fraser for the loss of bare. Fraser than waived its right to Insurance co.’s waiver of subrogation so that insurer could bring a negligence claim against Can Dive.

**L**: *London Drugs*

**A**: Can Dive wanted to use the waiver of subrogation under Fraser and Insurance co. K as defence against Insurance co.’s negligence claim. Court found that London Drugs exception not only applies to employment K, and can employ in a scenario like this one. Court said K is from when the 3rd party became an interested party. Contract is crystallized, therefor the no subrogation clause cannot be removed after Can Dive has a reason to rely on it.

**R: Entitlement of 3rd parties to use K as a defence *in London Drugs* extends to scenarios beyond employment🡪 LD rule crystallizes right of 3rd party to use clause in K as a defence when third party becomes an interested party.**

# Formal Pre-requisites for enforcement

## 1. Writing Requirements

Law and Equity Act, s. 59(3)

1. Land transfer must be in writing. Guarantee or indemnity must be in writing.
* Exact words need not be used, not necessarily a full written K, but at least written evidence of each obligation.
1. the party to be charged (**Transferor**) has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
* **Part performance**
	+ If the defendant started to perform their K, you no longer need writing
1. the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person’s position that an inequitable result, having regard to both parties’ interests, can be avoided only by enforcing the contract or disposition.
* **Proprietary Estoppel**
	+ Promise is given in oral K and the person has relied upon it

## 2. Parol Evidence Rule

**PER**: If a k has been reduced to **writing** and the writing appears to be **complete**, then the court will **not** hear oral evidence outside the written k (argue either another contract or not applicable at all):

* What counts as *complete* is more complicated (below)

#### Gallen v Allstate Grain Co. 1984 BCCA

**R:** (1) Parol Evidence Rule: Where a K has been reduced to writing and appears complete, the court will not hear evidence outside the written agreement. However, there are exceptions to the PER. (2) Where an oral representation and written agreement contradict one another, there is a strong ***presumption*** in favour of the written agreement, however, this presumption is rebuttable.

**F**: Oral representation: this seed will smother weed. Written K: “no warranty as to the productiveness/any matter ‘bout seed/will not in any way be responsible for the crop.” R sued for breach of warranty.

**I**: 1) is Oral Representation admissible? 2) can it add to/subtract/vary/contradict written K?

**A**: **Parole Evidence Rule**: when entire K is in written evidence, oral evidence to the contrary is not admissible. **Exceptions:** (1) To show fraud (2) to give context (implying terms/custom) (3) for rectification (4) to establish condition precedent to the K (**5) to establish collateral agreement** (6) to support that the doc is intended as full K (7) to support claim for equity (8) to establish tort.

Rule is a strong presumption **but it is rebuttable (**exceptions above). Stronger where parties produce an individually negotiated document (instead of boiler plate form). Weaker where form K contradicts specific oral term. Less force where oral representation adds/subtracts/varies the recorded document than where it contradicts.

**C**: No contradiction between oral K and written agreement.

Lambert said when oral terms are permitted that vary written contract**, doesn’t matter** whether seen as **collateral** agreement or part of **main** contract.

* 1. Two contracts dealing with same subject matter, time, and parties **cannot contradict**. Since written rule was clearly and demonstrably made, reason requires one to conclude that the **oral** one, **contradicting** it, was **never** **made**.
* 2. The ***principle*** **cannot** be an **absolute** one.
* 3. The first principle is supported in case law.
* 4. If the contract is induced by an **oral misrepresentation** that is inconsistent with the written contract, the **written contract cannot stand**.
	+ MacDougall: if the written K says “all terms AND representations” this may cover your ass in this circumstance.
* 5. **Presumption weaker** where oral representation **adds** to, **subtracts** from, or **varies** the recorded document **as opposed to**  where it ***contradicts*** the recorded document.
* 6. PER is always **strong**.
* 7. **Stronger** in **individually negotiated** document than a **standard** printed form, though strong in both.
* 8. **Weaker** for contradiction between **specific** **oral** representation and **general exemption** clause, as opposed to specific oral representation and equally specific clause in document.

# Content of the contract

|  |  |  |
| --- | --- | --- |
| Main Question:Is a statement a term? 🡪 | Basis to Decide:Intention of parties 🡪(*Heilbut, Canadian Dyers*) | Significance:Only **terms** are *contractually* binding and breach leads to remedies |

|  |  |  |
| --- | --- | --- |
| CLASSIFICATION: | WHY: | HOW: |
| * Express, implied terms
 | * To know all contractual obligations
 | * Terms implied by:
* Custom
* Necessity
* Operation of law

(*Machtinger*) |
| * Primary, secondary obligation
 | * To know main obligations and remedial obligations and liabilities
 | * Ask what obligations and liabilities become enforceable or arise upon failure to perform others
 |
| * Conditions, intermediate terms, warranties
 | * Only breaches of conditions or breaches of intermediate terms with serious consequences can lead to remedy of **termination.**

(*Hong Kong Fir*) | * Ask how important the term is in terms of consequences
	+ Assessed after breach (**NB**: especially intermediate terms)

(*Hong Kong Fir*)* How parties labelled terms is not determinative (*Wickman*)
* Classification notionally done on **formation of the K**.
 |
| * Contingent conditions (conditions precedent or subsequent) – or not
 | * To know whether something must occur before a contractual obligation (or even a whole contract) becomes enforceable, or (in the case of a condition subsequent), ends
 | * Interpret contract
 |
| * Entire, severable obligation
 | * If entire, one party must *complete* performance of obligation before other party’s obligation becomes enforceable.
* If *substantially performed,* then an entire obligation is taken to be completed (*Fairbanks*).
* Even if entire obligation not substantially performed, court may award payment on *quantum meruit* basis (*Sumpter*).
 | * Interpret contract
* Compare with facts in *Fairbanks* to determine if level of performance amounts to *substantial performance.*
* Look to see if non-paying party has chosen to benefit from the part performance, if so *quantum meruit* payment may be awarded (*Sumpter*). [Restitution]
 |

# Representation and Terms

* **Term** = a statement made for which that party intended to give an absolute guarantee. Only terms are *contractually* binding and breach leads to remedies.

Heilbut, Symons & Co. v Buckleton 1912 HL
R: To determine if communication is term, look to whether the words and actions (reflective of *Canadian Dyers*) show *intention* for it to be part of the K (a guaranteed obligation).

**F**: Agent of D purchased shares from agent of P based on P’s representation that company was a ‘rubber company’. Company turned out to be sour . D lost money – D brought action for breach of warranty.

**I**: Did P’s actions constitute a representation or a term of a collateral K?

**A**: P argued this was collateral K term (sale of shares needed to be entirely written). Need to determine if D’s

**C**: This was a representation, as it was a response to an inquiry and adjectival.

Leaf v International Galleries 1950 Eng CA
**R**: **Doctrine of Merger:** If something is found to be a term/condition of the K, you cannot seek representation remedies (even if it is both a term and representation).

Once K has been accepted and reasonable time has passed, aggrieved party has “affirmed the K.” Only available remedy is damages (tort), cannot seek termination + K damages (no obligations left to terminate).

**F**: P bought a ‘Constable’ from D. 5 years later he finds out it is not a Constable. Sues for misrepresentation (seeking to rescind).

**I**: Can communication be both representation and a term, and if so can you choose which remedy to use?

**A**: “Constable” was a term in the K. P could have sued for breach of term, but sufficient time had past such that he had “accepted” it. Thus he could not terminate the K or seek K damages for breach of term. And as such, as remedy was unavailable to through K law, he could not seek to rescind the K for misrepresentation.



# Classification of terms

**Explicit v Implicit Terms** (*Machtinger*)

* + Terms can be implied by FACT or by LAW
	+ Implication by FACT
		- Custom/Usage
			* (Particular or General). **Particular** is that the parties have done this before. **General** is industry practice.
		- Implication because of Necessity
			* Because it *necessarily* follows from what was agreed in order to make rest of k work (e.g., Canadian dollars is a term by necessary implication).
			* E.G. Officious Bystander Test: term will be implied if it is necessary to give business efficacy
	+ Implication by Operation of LAW
		- If the law (usually statute) says that as an incident to a certain ***type*** of K there must be a certain term it will be implied.
		- E.G. *Sale of Goods Act*
		- Contracting Out 🡪 where parties “get out” of having a term implied by law b/c there are other terms which are inconsistent. Sometimes the *Act* says you cannot do this bad man.

**Primary v Secondary Obligation**

* + Primary obligations: the regular terms of the K; actual expected obligations
	+ Secondary obligations: if the primary obligation is not performed then the breaching party has a “secondary obligation” to do something in compensation for the breach.
		- Court implies these to have been part of the K at formation.

*Question: If a term is a primary obligation, what kind is it? (see below)…*

**Condition, Warranty or Intermediate Term** (*Hong Kong Fir*)

* + **Condition** = a term characterized as an essential term in the k.
		- *Remedy* = damages and the innocent party can treat the k as **repudiated**. If repudiation accepted (**Termination)**, k comes to an end, the primary obligations are terminated, but the secondary obligations remain
	+ **Intermediate Term** (Innominate)
		- *Remedy* = If *consequences of breach* are serious, result is same as a **condition** (**Termination**). If not serious, it is same result as warranty (**Damages**).
			* We assess seriousness of *consequences*, not seriousness of *breach*.
		- Remember that the term is always intermediate—doesn’t “become” condition. It is only that the remedy mirrors that situation.
	+ **Warranty** = a term that is not essential to the k (collateral to main purpose)
		- *Remedy* = unless stipulated otherwise in k, only remedy is damages, no termination (therefore must prove harm was done). Primary obligations continue to exist.
	+ **NB**: Terms Classified here by (1) intention or (2) if classifying as one would lead to unreasonable results (*Wickman*)
		- Labelling the terms in a k is not determinative (the court makes the decision), thus it is better to specify the secondary obligations in the k to illustrate the types of terms (*Wickman*)
			* E.G. “failure to perform this term will give A the power to terminate the K”

**Contingent Conditions – Conditions Precedent and Conditions Subsequent**

* + Condition Precedent: an event which triggers the enforceability of an obligation
		- Example: If K says no $ till statue delivered, delivery = condition precedent for $. If no delivery, then $ not enforceable.
	+ Condition Subsequent: event which triggers the end of an obligation
	+ Concurrent conditions: obligations which are “due” at the same time
		- Ex: Mark buying gummy bears. Payment and transfer at same time. Mark enjoys gummy bears but then realizes he only exists within this example. He panics. He frames Kieran for murder.

*Question: At what point does a condition precedent trigger the next obligation? (see below)...*

**Entire v Severable**

* + Entire: An obligation in which part performance will not trigger the next obligation (usually payment)
	+ Severable: An obligation which can be “broken down” into smaller obligations. Part performance will suffice to trigger equivalent part performance of the next obligation.

Qualifications on concept:

* + **Substantial Performance** is enough to satisfy and entire obligation (*Fairbanks*). This will trigger obligation to pay.
	+ **Restitution** may allow a party to receive value for the goods or services performed even if the obligations of the k have not been fulfilled (*Sumpter*)—party may try to get paid on ***quantum meruit***basis.
		- Payer has to pay “compensation” decided on quantum meruit basis. QM is not a k term, it is simply how much you must give the other person based on the amount of work they put in/amount of benefit they gave you.

If person ***substantially completes*** entire obligation, the other party *cannot* apportion payment. Substantial completion triggers the ***entire***obligation to pay.

* + If party sustained a loss, he must claim that in damages or debt. Payer can claim “damages” for breach of k. To get the balance back.

Hong Kong Fir v Kawasaki Kisen Kaisha (1962) Eng CA, p.436
**R**: Intermediate term will act as a condition or a warranty depending on the seriousness of the consequences of the breach.

**F**: P hired ship from D. Term said “tender a sea-worthy ship” The ship needed hella repairs, was delayed.

**I**: Was this a breach of warranty or condition? Does this breach amount to a repudiation?

**A**: Some terms cannot be said to be at the heart of the K *until you know the effect of the breach.* Therefore, this cannot be classified as warranty or condition: it is an **intermediate term.** This type of term will act as a condition or a warranty depending on the seriousness of the breach.

* NOTE: Senior courts have said some terms will always be warranties or conditions. Benefit is greater predictability.
* Intermediate terms result is more litigation, so courts more hesitant to find intermediate terms in contracts b/w two commercial parties

Wickman v Schuler 1973 HL, p.443
**R**: Whether a term is a condition, warranty or intermediate term will be determined by the court based on the objective intention (from the words an actions, like in *Canadian Dyers*). The fact that one interpretation could lead to an unreasonable result should be considered: the more unreasonable, the less likely the parties could have intended it.

**F**: Manufacturer has K with vendor, includes c 7 (“shall be a condition” that you push our products) and c 11 which provides remedies for breach of c 7.

**I**: Does labelling something as a “condition” put it into the classification of terms which if breached gives the election to terminate?

**A**: Although they referred to this as a condition, it is the role of the court to label the terms. The fact that there was a clause (c11) to remedy breaches shows that it is unlikely that “condition” meant “a term which gives right to termination,” as this would c11 irrelevant.

Fairbanks v Sheppard 1953 SCC, p.456
**R**: If obligation is entire and is condition precedent for another (e.g. to pay), “substantial performance” will be sufficient to trigger that next obligation. Here the heart of the obligation was not fulfilled, court did not find substantial performance. They then spat on him.

**F**: D contracted to build machine for P for a price. P paid a small amount on the account but when the machine was nearly complete, D refused to finish it until he received further payment, to which he was not entitled.

**I**: Did S “substantially” complete his obligation(s) under the K?

**A**: Court finds that at time D refused to continue work, there had not been substantial completion of his obligation under K (which was an entire obligation), which was to construct a machine ***capable of producing soap chips*** of a commercial quality. What remained to be done required engineering skill and knowledge. There was also no evidence of a new K to accept and pay for the work done up to that point (**no quantum meruit K)**.

* You can also claim substantial performance if it was the **other party’s fault** that you could not complete it.
* Where there is substantial performance but also defects, substantial performance doctrine applies, enabling supplier to enforce agreement **subject to customer’s counterclaim** **for damages** arising from defects.
* **Late performance** is conceptually no different from other types of defective performance. Delay is not usually sufficiently serious to discharge the other party unless time is “of the essence”. Usually either by agreement or subject-matter.

Sumpter v Hedges 1898 Eng CA, p454**R**: Partial performance of an obligation may receive payment on **quantum meruit** basis IF the paying party chooses to enjoy benefits of partial performance. E.G. if something is left on property, benefitting from it does not warrant doctrine **quantum meruit**.

**F**: P entered K with D to build buildings for lump sum. Work partially completed.

**I**: Can plaintiff recover for the work which he did perform in spite of abandoning the contract?

**A**: In K law, there would need to be another K formed after abandonment for payment of what was completed. This would make no sense, who would do this (also consideration)? You can infer a new K (*or later, give restitution*) for payment on a **quantum meruit basis** if the paying party has elected to take benefit from partial performance (needs to be voluntary).

Machtinger v Hoj 1992 SCC, p.463
**R**: 3 ways to imply a term: (1) **Custom/Usage** (2) **Implication because of necessity** (3) **Operation of Law**

**I**: On what basis can you imply a term into a K?

**A**: The intention of the contracting parties is relevant to the determination of terms implied as a matter of fact [Custom/Usage or Implication because of necessity] not to terms implied by operation of law.

# Good faith and honest performance

Bhasin v Hrynew 2014 SCC
**R:** Post formation dishonesty that doesn’t otherwise constitute a breach of K is actionable.

**F**: CanAm(C) is an independent education savings plan dealer with separate Ks with H and B.  H (B’s competitor) pressured C into not renewing k with B. B asked and C was equivocal over whether they would renew k with B. C minimally abided with 6 months’ notice clause.

**I**: Did C owe B a duty of good faith, and if so, did it breach that duty?

**A**: **Good Faith** = organizing underlying principle in contracts for parties to perform honestly, give appropriate regard to other party, not undermine their interests in bad faith. **Duty of Honest Performance (DHP)** is an implied duty in contracts and can be breached, operating regardless of parties’ intention. Involves minimum standard of honesty which parties must be able to rely on = parties must not knowingly lying to/mislead each other about contractual performance.

**C**: DHP = solidification of Good Faith underlying principle which operates in contracts regardless of parties’ intent and compels parties to act honestly about contractual duties.

* **Duty of Honest contractual performance is not a term, but a new duty. This is post-K with how a party is performing the K and carrying out their obligations – this could be a breach of a party’s duties.**
* **In this case, fraudulent misrepresentation only actionable if occurred prior to K formation. DHP makes post K dishonesty actionable without an intent requirement, only must have knowledge.**
* “It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.”

# Excluding and limiting liability

## Notice Requirement – Unsigned Documents

* **Notice Requirement** – all clauses excluding or limiting liability require **notice** be given to the other party
	+ This is a part of offer and acceptance: limitation clause not “accepted” unless notice
* Specifically, for unsigned documents
	+ Must be notice of all exclusion clauses before the time of contracting – if details provided later it is not contractually binding (*Thornton v Shoe Land Parking Ltd*)
	+ Must **subjectively** have notice (*McCutcheon*)
	+ Notice has to come before or at time of agreement: K is held at time it is entered into at acceptance –

Thornton v Shoe Lane Parking 1971 Eng CA
**R**: Customer is only bound to an exemption clause **(1)** if she knows ticket issued subject to it or **(2)** if company does what is reasonably sufficient to give her notice of it (displaying on machine where ticket purchased)

**F**: P paid for parking @ machine, which then printed ticket saying “issued subject to the conditions as displayed on the premises.” Sign outside said “all cars parked at owners risk.” D claims exempted from liability due to the ticket, which references conditions listed on one pillar in the parking lot as well as the ticketing office.

**I**: Was this exemption clause part of the K?

**A**: Precedent says customer’s ticket is offer, taking/retaining ticket they rsnbly should know has terms they have accepted and K formed. THIS IS NOT THE SAME. Here acceptance happens when customer pays, K is formed. If terms are on the ticket or in the parking garage, they cannot be taken to be part of the K.

McCutcheon v David MacBrayne 1964 HL
**R:** Past dealings irrelevant when it comes to imposition of conditions re unsigned contract, unless it can be proven that P had actual knowledge of conditions in previous dealings between P and D. Onus is on D to prove past knowledge. (Waiver see *Burrows*)

**F**: P transporting car to mainland by ferry. Ferry sinks, car total loss. P sues, D claims exclusion clause excludes from liability. However, P never signed the K and had not been aware of clause on this occasion or any time before when using ferry service.

**I**: Can D rely on exclusion clause on basis of claim that it had been incorporated on this occasion through past dealings?

**A**: Onus is on party seeking to limit liability to make it clear to the other party at K formation that terms include an exclusion clause. As P had never been aware of clause, D cannot rely on past dealing to import terms.

## Notice Requirement – Signed Documents

* **Notice Requirement** for signed document
	+ Normally a signature on a document containing the liability clause will constitute notice
	+ But Context is important:
		- If it was reasonably apparent that the signing party did not have time/ability to read the written K **AND** the clause is unusual and onerous, then a duty arises on the party wishing to rely on the liability clause. (*Tilden* and *Karroll*)
		- Duty to bring clause to their attention (underline, telling them, little red flag sticker, etc) (

Tilden Rent-a-Car v Clendenning 1978 ONCA
**R:** Unless reasonable measures are taken to draw the signing party’s attention to **unusual** and **onerous** terms in a standard form document, those terms are not enforceable (See gloss in *Karroll*)

**F**: Clendenning rented a car from Tilden, signed agreement without reading, which was clear to the clerk. C alleges that had he been aware of all unusual terms (excludes liability if *any* alcohol consumed by T before an accident), would not have signed K.

**I**: Does the exclusionary clause in the rental K leave C liable for damage to car that occurred when he was driving?

**A**: Exclusionary clause in question inconsistent with the purpose of K. Moreover, signature does not equal consent given the hurried, informal manner that transaction was carried out. In such circumstances, necessary for party relying on exclusionary clause to take reasonable additional steps to draw onerous terms to other parties attention to ensure consent.

* Unusual= something inconsistent with overall purpose of the K.

*Karroll v Silver Star Mountain Resorts* 1988 BCSC
**R**: If there is no reason to believe that signing party would not agree/did not have ample opportunity to see exclusion clause, then no duty on other party to bring to attention.

**F**: P entered skiing contest, signed release w/ indemnity clause, got leg broke. P claims not bound by indemnity clause because she was not given adequate notice or opportunity to read it.

**I**: Is she bound by indemnity clause?

**A**: Gloss on *Tilden*: In ordinary situations, no need for the party relying on signature to bring exclusion clauses to attention of the signing party b/c usually its reasonable to assume they’ve read what they signed. **Before there is a duty of the party relying on exclusion clause to bring it to the attention of the signing party, there needs to be some circumstance that gives reason to believe the signing party is not aware of the exclusion (e.g. signed hurriedly).**

## Fundamental Breach & Its Aftermath

Karsales v Wallis 1956 Eng CA **– bad law in Canada**
**R:** Fundamental Breach: a breach which goes to the very root of the k disentitles the party from relying on the exempting clause.

**F**: D inspected car. P then bought car and leased it to D for financing. Upon receiving the car, it was not in the same condition as when D inspected it (heavily damaged). D told P he would not accept the car.

**A**: Exemption clauses only apply to a party who is carrying out his K in its essential respects. Not if breach goes to heart of K.

**C**: Decided for D – there was fundamental breach

* Problems with Doctrine of FB:
	+ Can be used even for Ks with clauses that were carefully drafted by both parties. Undermines intention of the parties
	+ If parties intended the exclusion clause, then applying FB undermines the contract!!
	+ Doctrine not directly linked to ***unfairness*** – could operate in cases without unfairness and be unavailable in cases with unfairness
	+ Often used by parties who did not need it

Photo Production v Securicor 1980 HL [Authoritative in England – Dubious in Canada]
R: Fundamental breach is dead. But there is a rule of construction if breach is arguably fundamental - if it is in offer and acceptance and was intended by the parties it applies unless enforceability is contrary to statute. Where K is ambiguous read against interest of party providing K (*Contra proferentem*). To be enforceable an exemption clause requires clear wording, as was the case here.

**F**: Security employee starts fire at factory, factory burns down. Security company claims not liable b/c of exclusion clause. Factory argues fundamental breach of K and therefore clause null.

**I**: Does an exemption clause excuse a fundamental breach?

**L**: Legislation in England enacted after *Karsales* so makes fundamental breach doctrine irrelevant.

Tercon Contractors v BC 2010 SCC
R: Binnie: three separate questions (1) **unconscionability:** was the exclusion clause unconscionable at the time the K was made – inequality of bargaining power (2) **illegality**: was there a legal reason why the parties were not free to negotiate the exclusion clause? (3) **public policy:** are there other public policy reasons that the exclusion should not apply (looking to formation of K) – onus on party seeking to avoid exclusion clause to identify public policy and how it outweighs public interest of enforcing K.

**C**: public policy does not include equity or reasonableness but the term is not defined other than that. After this case, some courts have used Wilson’s post-formation unfairness doctrine however, Binnie’s position suggests only looking at construction.

**F**: Province enters tendering K with 6 companies, specifying that only these companies are eligible. 1 of the 6 companies combines with an ineligible company and enters a co-bid. PL and the co-bid are the two finalists, PL loses. PL sues saying would have won if rules in k had been followed. However, clause in k excludes damages “as a result of participating” in the tendering process.

**I**: does exclusion of liability clause preclude P from bringing action against BC?

**L**: *Hunter Engineering* - Dickson/Wilson standoff : split court. *Tercon presumably sides with Dickson*.

*Photo Production* - abolition of Doctrine of Fundamental Breach

**A**: Majority: held that fundamental breach doctrine does not apply in Canada. Agreed with Binnie’s (minority’s) approach to applicability of exclusion. Disagreed with the interpretation of the clause in this case.

* In *Tercon,* SCC should have cleared up, but didn’t. It noted that “equity or reasonableness” could not lead to interference with valid k. But, there is a role for “public policy”.
* Binnie’s dissent (but what she says about FB is good law):
* **ON EXAM**: We first ask whether the clause is part of the secondary obligations or primary obligations. Second, we assess the matter of notice. Then, we reach what Binnie described (dissenting, but the following being good law) in *Tercon*:
* **ON EXAM**: Summary: first, whether as a matter of interpretation the exclusion clause applies to the circumstance—that is, look at **construction**. This depends on intention of parties as expressed in k. Exclusion clauses must be read ***contra proferentem****.* If it does not apply, we stop here. If exclusion clause applies, the second issue is whether clause was **unconscionable** at the time k was made, “as might arise from unequal bargaining power” (*Hunter*). This relates to k formation, not breach. If clause is valid and applicable, court looks to third inquiry: whether court should refuse to enforce valid exclusion due to overriding ***public policy***, proof rests on party seeking to avoid clause, that outweighs very strong public interest in freedom of contract (this presumably rejects Wilson’s test of “unfairness” put forth in *Hunter*).
* **ON EXAM**: Binnie added this test of public policy. We don’t know why Binnie picked this doctrine. Binnie does not define it, and it is unclear whether it must be against public policy at the *formation* of the k or whether it can *become* contrary to public policy. Binnie does seem to suggest it must be egregious.

Not vital notes:

* In *Hunter Engineering*, two separate judgements. Wilson accepted the abolition of fundamental breach doctrine, though thought *Photo Production* should not be adopted in entirety since there was no statute. Said FB could apply if very thing bargained for was not provided, and courts could look at fairness and reasonableness. Dickson preferred wholesale adoption of *Photo Production*, which treats fundamental breach as a matter of contract construction. Only where unconscionable (as might in situation of unequal bargaining power) should court interfere with agreements.

In *Hunter* *Engineering*, both Dickson and Wilson said 1) look at construction 2) both say look at whether unconscionable. Wilson says unconscionability = “inequality of bargaining power”—it has to be unconscionable at the start, it cannot *become* unconscionable through operation of k. 3) Wilson says look at “unfairness”, which kicks in after the creation of k. If unfair, court does what it needs to do (alter wording, change damages, anything).

## 4. Legislative Treatment

* Issues arising at or before “contract” is formed: capacity, misrepresentation, mistake, protection of weaker parties (duress, undue influence, unconscionability)
* Issues arising before or after formation: illegality
* Issues arising after formation: frustration, limitation of actions
* Also, first four relate to parties themselves. Illegality and frustration relate to outside standards or circumstances that affect k, though parties can have some impact.

# Excuses for non-performance of the contract

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Device** | **Reason** | **Who uses** | **Prerequisites** | **Effect** |
| Capacity | Some persons not capable of contracting | Party without capacity (mental incapacity, infants) | Status of incapacity | Depending on nature of incapacity* Contract void
* Contract voidable
* Contract unenforceable
 |
| Misrepresentation | One party misled other party | Party who was misled | Erroneous factual statement inducing contract | Contract rescindedSometimes tort damages |
| Mistake | (one or) both parties mistaken about assumptions (or terms) | Mistaken party | Usually common mistaken assumption before kSometimes mistake about other’s identity | Contract void (usually)Some law saying contract is voidable |
| Duress | One party coerced by other to contract | Coerced party | Illegitimate threat | Contract voidable (historically, void) |
| Undue influence | One party dominated by other | Dominated party | Relationship of undue influence leading to questionable contract | Contract voidable |
| Unconscionability | Contracting circumstances unfair and tantamount to fraud | Weaker party | One party taking unfair advantage of position of other | Contract voidable or subject to judicial adjustment |
| Illegality | Public policy disapproves of some contractual situations | One or both parties, depending on type of illegality | Formation or performance of contract prohibited by statute or common law | Contract void or unenforceable |
| Frustration | Contract purpose becomes impossible | Both parties | Unforeseen catastrophic event | Contract wholly discharged from point of frustrationStatutory consequences (except in Nova Scotia) |
| Limitations of actions | Must bring claim within statutory period | Either party, as a defence | Limitation period has expired | Obligations unenforceable in court |

# EFFECTS OF CONTESTING K

### Eliminating K:

|  |  |  |  |
| --- | --- | --- | --- |
| **How** | **Effect** | **Who uses** | **For what reason** |
| Contract void | No contract | Both parties (operation of law) | * missing ingredient for formation
* common mistake
* *non est factum*
* some mistaken identities
* illegality (often)
* duress (historically)
* incapacity (sometimes)
 |
| Contract voidable | Contract undone | Protected party | * misrepresentation
* duress
* undue influence
* unconscionability (sometimes)
* mistake (scope uncertain)
* incapacity (sometimes)
 |

### Altering k or its effects:

|  |  |  |
| --- | --- | --- |
| **Method** | **How** | **Why** |
| Severance | Removing part of contract | IllegalityUnconscionability |
|  | Treating as two contracts | * to meet form requirements
* to treat one k as terminated for breach or frustration
* to resolve privity problems
 |
| Judicial adjustment of terms | Assist in creating terms | Difficult to tell what was in offer |
|  | Set k aside “on terms” | Mistake in equity (if still good law)Unconscionability |
|  | Severance | Reconstituting agreement after removing part |
| Unenforceability of all or part of contract | Court refuses to order performance or give remedy for non-performance | * illegality (practical effect)
* lack of consideration or seal
* Expired limitation period
* Incapacity (sometimes)
* Exclusion or limitation clause
* Penalty clause
 |
| Contract discharged after frustration | Primary and secondary obligations disappear after frustration | Frustration: unforeseen catastrophic event making contract impossible |

**VOID** **Ks**:

* May be a flaw in formative stage (e.g., no offer, too uncertain, type of illegality or incapacity that makes void). There is no discretionary aspect. It is void or not. Does not depend on volition of parties.
* No basis for CL damages or termination.
* If anything has been transferred, it might be possible to reclaim under restitution, even if it has gone into hands of third party.
* Might sever into two contracts, making part void, part not void. Usually, though, we think of the severed part as unenforceable.

# Misrepresentation and rescission

Ideally – try to argue breach of k before misrepresentation.

Mere puffs, terms and representations: every communication can be categorized as one of these.

**Misrepresentation** = representations that are not true.

 🡪 Those that have legal significance are called **operative misrepresentations**

 🡪 Party to whom misrep was made may be able to rescind (and may also have claim for damages in tort)

DO NOT TALK ABOUT ESTOPPEL BY MISREPRESENTATION. For misrep: either go to a) law of misrepresentation or 2) estoppel by misrepresentation. Latter is being held to your lie as if it were the truth. If you are not happy with the state of affairs, go to law of misrep. This is an election. You go to k or tort or both. Remedy for tort: damages. Remedy for k: rescission.

* If using estoppel by representation to hold maker to (false) statement, cannot also claim operative misrep.

Assess: 1. Is there operative misrep? Law only cares about this. 2) What is effect?

In order to be an *operative misrepresentation*:

1. Has to be a **statement of fact**
	* Statements about the future, the law, or opinions are not statements of fact. Must be present or past
	* Ignorance of law is no excuse, thus **statements about the law** cannot be basis for misrep.
	* Doesn’t have to be made *by* a contracting party, but **must be made *to* a contracting party**. If no connection, doesn’t count. But, could be something connecting to contracting party that it counts. E.g., business associate, family member, might hold.
	* **Partial truth** can be a misrep.
	* A misrepresentation as to the state of a man’s mind is a misstatement of fact.
	* **Conduct** can be an operative misrep.
* As long as important component is fact, that will suffice. If there is an underlying fact, that is enough (*Smith v Land and House*). A **promise to pay** may be a statement of fact. The statement impliedly asserts that he is able to pay.
	+ **Silence** can constitute a misrepresentation:
		1. If there is a fiduciary duty or peculiar duty (e.g., director to corp, property defects)
		2. When a question is asked but there is whole or partial silence in response. E.g., “not aware of any problems” but hasn’t really checked.
	+ But, in most cases *caveat emptor*.
1. That is **untrue**
	* In *Redgrave*, remedy of rescission was extended in equity to “**innocent” misreps**.
	* Possible issue regarding **ongoing duty** to update. Do you have to let someone know if the vehicle was in an accident later?
	* [Untrue statement can be used for election 1) estoppel, sticking to k on terms (holding to lie) or 2) misrep—rescind k.]
2. That is **material**
	* Synonymous with “significant”.
	* Must be one of the reasons why the person entered into the k.
	* Subjective quality: did *you* rely on it as a reason to enter. Also, look to objective quality: would a *reasonable person* have relied on such a statement?
3. That is **relied on by the other contracting party as a reason to enter into a k.**
	* Appropriate to conflate with materiality. Would not rely if immaterial.
	* Must be “a reason”; need not be “sole reason”.
	* Ways to assess reliance:
		1. Look at who parties are (e.g. car dealers should know more about cars than you)
		2. If a person has done investigations to verify the statement, then they did not rely on your statement (*Redgrave*)

REMEDIES:

There are 3 types of operative misrepresentations:

1. **Innocent** = operative misrep but not negligent or fraudulent (did not know it was false)
2. **Negligent** = should have known
3. **Fraudulent** = knew but did not tell

|  |  |  |
| --- | --- | --- |
|  | Common Law (Damages) | Equity (Rescission) |
| Innocent | N | Y |
| Negligent | Y | Y |
| Fraudulent | Y | Y |

**Rescission** = undoing of the k.

* This is form of “avoiding “ k. k is voidable.
* No particular way to effect rescission. Can simply return property.
* Both parties will be put back to the position which they were in before the k existed. If k rescinded for misrep, k has disappeared and no basis for damages in contract. But, tort may award damages.
* Downside is that you remove obligations the other person owes to you.
* Anything that was transferred under the “contract” must also be returned
* There is no remedy for an innocent misrep unless you can acquire the conditions before the k came into existence (since there is no CL remedy).

**Bars to rescission**:

(but nothing in equity is absolute – courts may ignore the bars to rescission if it’s fair to do so)

1. Rescission would adversely affect 3rd party rights (**undue hardship**)
	* Try to argue third party has no rights that could be affected (Shogun cases).
2. The impossibility of **complete restitution** (restitution *in integrum*)
	* If what has been transferred cannot be returned or returned in condition when transferred, remedy is not available (though *Kupchak* says something contrary)
	* Equity can take into account profits and make allowance for deterioration.
3. **Affirmation** = the innocent part may lose an equitable remedy because they are taken to have affirmed the k.
	* When a person discovers the misrepresentation, they are given an election: use the equitable remedy or to continue with the k. When they decide not to pursue an equitable remedy, they are seen to have affirmed the k and are no longer eligible for an equitable remedy.
	* Can be continued use, making arrangements to deal with consequences.
4. **LACHES** = a delay in seeking remedy—taken to be a form of affirmation of k.
5. **Execution** of the k
	* If both parties have completed the obligations in the k – then the k is finished and there is no k – therefore there is nothing to rescind.
	* Perhaps weak argument

Redgrave v Hurd 1881 Eng CA
**R:** It is not necessary to prove that the D knew that the representation was false as long as it was a relied on to enter into the k - innocent misrepresentation can lead to rescission. Where it is shown that they had knowledge of facts contrary to the misrepresentation or that they did not rely on it, they lose the right to rescission. Providing someone with the opportunity to investigate does not necessarily mean there is no operative misrepresentation.

**F**: K to take property and practice. D asked how much $/year practice made. P responded “~300-400£”

”. Gave receipts which showed only 200 and D asked why the difference? P gave bundle of papers for D to inspect, had D inspected he would have found the difference would not be made up.

**I**: Is the defendant able to rescind the contract?

* In certain cases, there is an expectation that a party will investigate where the information is obvious and available.
* Redgrave made rescission more significant as a remedy, equity has more discretion than common law to do justice.

Smith v Land and House Property Corp. 1884 Eng CA
**F**: P offered sale of hotel to D, stated that there was “a most desirable tenant.” D buys hotels. Tenant then goes bankrupt.

**I**: Can this statement be a misrepresentation (or is it opinion)?

**R:** A statement of opinion can include facts and can therefore be false. When the facts are not equally known by both parties, an opinion is more likely to constitute a statement of fact.

Kupchak v Dayson Holdings 1965 BCCA
**R**: Rescission of a k plus monetary “compensation” is an option even when complete rescission cannot be achieved. If a period of time does not reasonably allow someone to rescind then it cannot constitute a sufficient delay to trigger laches (barring rescission).

**F:** The defendant fraudulently induced the plaintiffs to purchase shares in a motel company in exchange for payment plus two pieces of real estate. By the time P found out about the misrepresentation, some of the real estate had been sold and developed.

**I**: Can a k be rescinded if it is impossible to return the parties to their original positions?

* This case was about fraudulent misrepresentation, however it could apply to innocent as well.
* There are three barriers to equity: (1) clean hands (2) Will take into account the hardship against the guilty party (3) delay/laches – must come to court in a reasonable time.

**Rescission versus Termination:**

|  |  |  |
| --- | --- | --- |
|  | **Rescission**  | **Termination** |
| **Remedy for:** | Misrepresentation | Breach of k (must be condition or serious consequence of intermediate term) |
| **Type of remedy:** | *Equitable* – it is discretionary | *Common Law*  |
| **Action:** | Undoes the k, restores situation to conditions before the k | Ends the k – the innocent party has the right to terminate the primary obligations |
| **Comments:** |  | This remedy is easily lost if it is not acted on right away (in some cases it is lost as soon as the k is entered into) – therefore would only be able to claim damages. |

# Mistake

## 1. Introduction

**Mistake** = at least one of the parties has a misunderstanding about the contract.

 🡪 Consequences = k is void (never came into existence) or voidable (k is brought to an end)

* There is no absolute law on mistake.
* Mistake is almost always used as an alternative to misrepresentation.
* Misrep is in essence a mistake by one party *that is usually attributable to the other party*.
* An argument cannot just be made under mistake; some other doctrine must be introduced.
* Don’t try to simplify the law of mistake. Recognize its complexity.
* Caveat emptor: Even if you know other party is under a misapprehension, there is no duty to disclose circumstances, unless a failure to do so would amount to fraud. Parties must act in own self-interest.

You are usually arguing mistake to try to get rid of k (void or rescinded). Usually, however, parties don’t want k to disappear, but instead want k to say what they wish. Thus, mistake is not a great alternative.

Order of analysis: 1) Construe 2) implied term 3) rectify 4) mistake or misrep (whichever looks better).

Order of mistake analysis:

* First, did someone make a mistake? About what (identity, existence of subject matter, etc)?
* Second, did k (implicitly or explicitly) deal with risk of occurrence? If the risk was allocated in the k, it is simply a breach of k. If it is not accounted for in the k, does the mistake fit into another area of law besides mistake?
* Third, if mistake is attributable to the other party, you can go to misrepresentation.
* Fourth, if it does not fall within mistaken ID/NEF/Rectification, then go to complex *Bell v Lever* area.

Who is mistaken:

* 1) Unilateral: A mistaken, B not mistaken.
* 2) Common: A mistaken and B mistaken about same thing
* 3) Mutual: A mistaken about X, B mistaken about Y and neither is right or wrong (might argue offer/acceptance problem).
* Unilateral mistake: Will probably not prevent creation of k. Rarely has effect on k, except where “snapping up” of offer that offeree knows contains a mistake or where there is mistake as to other’s identity.
* Common mistake: the k is void. It never came into being.
* Mutual mistake: If parties meant different things, might be no k. If both are reasonable, may be mutual mistake and no k. Tends to relate to terms, not assumptions.

Legal situation

* CL:
	+ Void (common—says nothing was created) (most cases seem to go here)
	+ Termination
	+ Damages
	+ (implied term to avoid harsh consequences of void)
* Equity (doesn’t create or uncreate ks; equity changes things)
	+ Voidable (rescission, which says k exists but allows for undoing) (equity gives you the ability to take election in CL) (Only one can make the election) (extremely unusual historically)
	+ Refuse to the non-mistaken party an equitable remedy—no specific performance. (Essentially equity says there is no contract, since it refuses a remedy).
	+ Change k—different meanings (rectification—done through equity. Equity does not think it is changing the contract) (equity only does this when it feels the evidence is wrong, not a problem with terms. Then go back to CL and use PER). The mistaken party is the one asking for rectification. Having gotten rectification, equity won’t give you specific performance traditionally.
* Equity does the bare minimum in these situations.
* Mistake is not an automatic part of the law—the law is trying to determine when consent is important and when it is not.
* Some people would argue **there is really no law of mistake**. The doctrine should be dealt with in separate areas:
	+ Offer/acceptance (look at mutual mistake—this looks like there simply is no consensus ad idem as to what is being offered and agreed upon).
	+ Misrepresentation
	+ Frustration (future)
	+ Implied terms
	+ Unconscionability (e.g., snapping up)
* The law is sceptical about giving a remedy for mistake. It is essentially **compensating for a bad bargain**. Mistake looks like a desperate bargain. Also, the law must get into the **mind of the parties**—evidentiary difficulties.
* We are **not sure** when you can use CL, when you can use equity.
* If we can use equity, it is unclear what the **remedies** are.

Smith v Hughes - (**Unilateral Mistake**) 1871 QB
**R**: A unilateral mistake can affect a K where the mistake was about a term (**NB**: if it were up to Blackburn this would be all that was necessary). Mistake must have been clear to non-mistaken party. If one party has made a mistake w/r/t the terms of the K, and there is something unconscionable about the other party relying on that mistake, then the K is void. **NB**: it is very difficult to argue misrepresentation about a term, because they are statements made about the future. This is why it’s important that parties be able to claim mistake in such cases.

**F**: K for purchase of oats. Seller (S) thought they were old oats (which were more valuable/desirable), and refused to pay when they turned out to be new oats. Buyer(B) sued for breach of K.

**I**: When (if ever) should it be relevant that one or more parties to a K made a mistake?

**A**: 3 different decisions: 3 different decisions:

**Cockburn CJ** thought that mistakes about an assumption outside the K were irrelevant, and so the mistake had to be about a term to be relevant. Would be dealt with through offer and acceptance, so no doctrine of mistake need exist. This would mean that caveat emptor still applies.

**Blackburn J** thought that the focus should be on the B’s mind—ask if B was mistaken about what S was promising. Emphasis on S’s mind—was B mistaken about S’s mind, rather than about the state of the world. Mistake **must be about a term** not an assumption.

**Hannen J** thought that B must show (1) that he was mistaken, (2) that S knew about the mistake, and (3) that S knew B was mistaken. NB: P’s mind matters (the question is kind of whether P was blameworthy in all this).

The law has sided with Hannen J.

## 2. Mistaken Assumption

Assumptions about background information, namely 1) facts (e.g., ID, but that could be a promise in corporate/credit context) or 2) law (ID question often arises in corporate law. That can be a question of law).

Even if ID is a term, you might not want to argue that. You would be en route to proving a breach, which would result in damages. However, other party is probably unable to pay since they are breaching the term of being the person who is creditworthy. Also, if the term goes to the heart of the k, there may be nothing to terminate (you already performed your primary obligations, e.g., give money). *Leaf* says you can’t have it both ways: something cannot be both a representation *and* a term. You will not want it to be a term; you prefer consequence that there is no k, so go to mistake first. You get back whatever you gave.

Bell v Lever Bros. 1932 HL
**F**: P paid D severance, then found out that D did things he could have been fired for anyway.

**I**: When does a mistaken assumption make a K void?

**A**: 3 circs/areas in which a mistaken assumption can affect the K: **(1)** the ***identity*** of the contracting parties; **(2)** the ***existence*** of subject-matter of the K at the date of the K (includes the subset of ‘impossible’ subject-matter, e.g., contracting to buy something you already own); **(3)** the ***quality*** (essence) of the subject-matter. Attaches to common mistakes that alter the subject-matter of the K essentially. K is void in all these cases due to lack of consensus on the fundamental nature of the K.

**R**: Mistaken assumption only relevant where it goes to the fundamental nature of the K, such that it (completely?) negates the consent of one or both parties.

* Quality is broad: it is the nature of a thing, not “high or low”. Must be the essence of the k.
* Atkin distinguished between mistaken assumption about quality and mistake where quality is a **term** in k (a party bears responsibility for quality). Latter could be a breach
* Atkin takes it upon himself to clarify law. We are not clear whether his catalogue is the beginning or the end of the law on mistake. *Solle* says it is the beginning (in fact, Denning says “my rule is better”). In *Great Peace*, says *Bell* is the end of mistake. Atkin doesn’t really use the law on mistake that he set out—he just construed k. Other judges did not talk about mistake.
* Atkin says nothing about mistake as to terms. Also nothing about misrepresentation.

Solle v Butcher 1949 Eng CA
**R:** Mistake may apply in equity, see below.

**F**: P was ‘scoundrel’ tenant. D owned flat. P made a mistake of law, advising D that the flat would not be subject to rent controls, when in fact it was. P wants a refund for overpayment, and continuation of K with lower rent. D wants rescission.

**I**: Can a mistake render a K void*able*?

**L**: *Bell v Lever Bros*—Denning LJ approaches this decision as what the CL has to say about mistake, then proceeds in this decision to consider what equity would say.

**A**: There are 2 kinds of mistake:

**CL mistake**—like in Lever Bros, such a mistake (involving lack of consensus on fundamental terms) leads to a void K

**Equitable mistake**—leads to voidable or rescinded K. 3 situations:

**(1)** Unconscientiousness: a unilateral mistake where the other party either knew or ought to have known of mistake. Leads to rescission.

**(2)** Material misrepresentation: a unilateral mistake where one party’s mistake is due to a (potentially innocent) material misrepresentation of the other, where the misrepresenting party becomes aware of the mistake and allows the other party to enter into the K without correcting him/her. Voidable K.

**(3)** Common (fundamental) mistake to facts/relative rights: where both parties have made the same fundamental mistake and the party seeking to avoid the K is not at fault. Voidable K.

ASK **(1)** Was there a mistake at CL (such that the K is void)? **(2)** Was there a mistake in equity (such that the K is voidable)?

* If void, landlord would have to give back all rent. Much of k had already been performed. Denning is not happy with CL occupying the field.
* From p 203 of MacDougall’s book, emphasis added: *Solle* "allows one party to avoid the contract for such mistake or to permit the court to set the contract aside on terms. In Denning L.J.'s words, if there was a mistake operating in equity, the contract "can be set aside on such terms as the court sees fit"...This potentially gives a court a broad ability not just to roll back the contract, but to roll back part of it, add conditions, or even impose new obligations."
* Not clear why there is even anything for equity to modify, since CL would make void.
* Denning actually considers the mistake one of fact rather than law—he considers it a mistake about the characteristics of the flat (such that they thought the rent controls wouldn’t apply). Otherwise he could not have applied any doctrine mistake.
* If the case is right, tough to know when mistake operates. Also unclear when narrow view operates when *Bell* wouldn’t.
* This case bears striking relation to *High Trees*. Says CL says this, but equity comes along and allows law to progress. He also does the same “big vs small” version. There is also a complexity in result (in HT, it was a product of notice and the suspensory nature of promissory estoppel that allowed for higher rents in the future). There are parallels.

McRae v CDC 1951 Aus HC
**C**:  Party can’t rely on common mistake where it is **(1)** entertained by him/her recklessly or carelessly AND **(2)** he induced the mistake in the mind of the other party.

**F**: K for right to salvage a wrecked oil tanker. D made 2 factual misreps (that there was a tanker and that it was in a particular place). The tanker did not exist, and it especially wasn’t where D said it was. P argued breach of K, and D argued mistake (to avoid having to pay damages).

**I**: Is this a common mistake as to whether there was a tanker, or is it breach of K?

**A**: This was not a mistake. It was breach of K. D took on the risk that the tanker did not exist when it carelessly believed it did and told P that it did. Ks are about allocating risk. D allocated that risk in a reckless way and now has to deal with the consequences.

* This is a more realistic view as to argument of mistake’s likelihood of success. One party has shouldered the burden. Contract is about risk allocation.

Great Peace Shipping v Tsavliris Salvage 2002 Eng CA
**C**:   *Bell v Lever Bros* is correct, and *Solle v Butcher* is not. There is no equitable mistake, only CL mistake. 5 requirements to find common mistake that can void K, above. Mistake only applies where there is no provision in the K that covers the situation encountered (this survives in *Miller Paving*, *infra*).

**F**: A K was negotiated for the P to fix D’s boat, but the boat was further away than D and P thought. D hired someone else to fix the boat and refused to pay P the cancellation fee in the K, on the basis that there was no K because of common mistake.

**I**: When can common mistake make a K void? Can common mistake ever make a K voidable in equity?

**A**: Mistake only applies where there is no provision in the K that either explicitly or implicitly covers the situation encountered. There are 5 requirements for a common mistake to make a K void:

(1) A common assumption as to a state of affairs;

(2) No warranty by either party that that state of affairs must exist (i.e. neither party promised that that state of affairs would exist);

(3) The non-existence of the state of affairs must not be attributable to the fault of either party [NB: in *McRae* this was the problem];

(4) The non-existence of the state of affairs must make performance of the K impossible;

(5) The state of affairs may be the existence or a vital attribute of the consideration to be provided or may be a state of affairs that must subsist if performance is to be possible.

That the boat was further away than both parties thought was not a term essential to the K. Performance of the K was possible, so the claim to find that this was a mistake that made the K void fails at (4). Also failed on point (2).

* *Great Peace* has yet to be adopted in Canada, and there might be good reason not to. There is no reason why we cannot move on to equity, and it might work injustice if we cannot.

Miller Paving v B Gottardo Constr. 2007 ONCA
**C**: Three step process for mistake: **(1)** check if someone implicitly or explicitly took on the risk at O&A (per *Great Peace*), **(2)** check if CL mistake is satisfied (per *Bell*), **(3)** check if equitable mistake is satisfied (per *Solle*). If you’re done at **(1)**, you’ve got breach of K. If you’re done at **(2)**, you’ve got a void K. If you’re done at **(3)**, you’ve got yourself a voidable K, dog.

**F**: Parties signed an agreement saying that P had been paid for all materials. P realized that they had not been paid for everything, and tried to charge for additional materials. Both parties thought all the materials had been paid for—common mistake.

**I**: Is *Great Peace Shipping* correct about mistake in Canada?

**A**: *Solle* still deferred to in Canada. The way we go about this is, logically, to argue that a K is void first, then voidable. **First**, consider offer and acceptance (as *Great Peace* tells us to do): is there an express or implied condition that provides who bears the risk of the relevant mistake? **Second**, if the K is silent on risk, consider CL mistake per *Bell*. **Third**, if the K is not void at CL, consider equitable mistake per *Solle*.

## 3. Mistake as to Terms

Smith v Hughes 1871 QB
**R**: A unilateral mistake can affect a K where the mistake was about a term (**NB**: if it were up to Blackburn this would be all that was necessary). Mistake must have been clear to non-mistaken party. If one party has made a mistake w/r/t the terms of the K, and there is something unconscionable about the other party relying on that mistake, then the K is void. **NB**: it is very difficult to argue misrepresentation about a term, because they are statements made about the future. This is why it’s important that parties be able to claim mistake in such cases.

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The law has sided with Hannen J.

## 4. Mistake and Third-Party Interests

### Mistaken identity

Shogun Finance v Hudson 2003 HL
**C**: Mistaken ID can affect K (via CL and equity) but whether it does depends on how K was entered. Mistaken ID may render K void where one party is deceived into thinking another has the identity of a third party, and the agreement is conducted exclusively in writing. Face to face, where no harm to 3rd party, a K may be rendered voidable upon discovery of the deceit.

**F**: Rogue buys car using another’s license (Patel). Gets financing from P and sells car to Hudson (D). Both P and Hudson claim title to the car. Can P get car from Hudson?

**A**: When the contract is with a person with whom you are dealing with face-to-face—k is voidable, but only if ID is “of the essence”, eg. rogue caused you to enter through fraud/tantamount to fraud, and no hardship to 3rd parties. If the contract is with the person identified in the k and if the k is written from a distance void due to non est factum. In this case, K found void b/c agreement conducted solely via correspondence and no good title passed from Shogun to rogue, therefore no title passed to Hudson.

* Rogue had part ownership and that is all he could pass along to Hudson (under *nemo dat*). Under SOGA, however, if you have buyer who is in possession with part ownership, they can pass on full ownership to subsequent buyer. (But, if there is no ownership interest in rogue because of void original k, nemo dat can bring the ownership back to original owner).
* Thus, we need k to be void. We need mistake showing k is not in existence.
* Two mechanisms by which *Shogun* makes a k void: 1) non est factum with respect to party whose name is on the paper 2) there is no k except with the person named (though that too would be void) (not NEF here).
* If the other party simply does not exist, there can be no k.
* Nemo dat: when a party has no interest to pass, but they made a k to pass something, the k is valid. However, due to nemo dat, no legal title passes and hence there is a breach of contract.

This case stands in contradiction to *Great Peace*, which says that once the CL has spoken, equity cannot speak on mistake. In *Shogun*, court says we look first to CL *and then equity* for mistaken identity. Why should there be a peculiar rule for mistaken identity that does not apply to the broader law on mistake?

***Non est factum*** = it is not my deed. Common law doctrine.

* *NEF* does not allow you to hold on to the agreement. It is automatic.
* Either you did not enter K, or there is a fundamental difference between document as is, and as you believed to be (but latter only applies if not due to your own negligence.
* The innocent party cannot be negligent (e.g., if you don’t read k, can’t invoke *NEF*, cite *Marvco*)
* Remedy = void k
* With *non est factum*, given that successful plea makes k void, impact on third party is no barrier.
* Subsequent buyer from original buyer cannot take title, even though he was not involved in first k. Compare this to where k is voidable: if third party buys before original k is avoided, new buyer has good title (at least until the first k is rescinded).

### *non est factum*

Saunders v Anglia Bldg. Society 1970 HL
*Non est factum* is not applicable if that party signed due to carelessness—in other words, another party must be culpable. To invoke *non est factum*, the mistake must make the contract “fundamentally different” from what the signing party believed it to be.

Marvco Color v Harris 1982 SCC
*Accepts Saunders in Canada.*

**F:** D thought they were signing an amendment to their mortgage. However, their daughter’s boyfriend got them to sign a new mortgage to an innocent 3rd party. D did not know what they were signing, although both literate and educated.

**R:** Confirms *Saunders* in Canada. If you are careless (in this case not reading the K), you cannot use *NEF* to get yourself out of the K.

## 5. Rectification

**Rectification** = written k is changed by order of the court. Equitable doctrine.

* The k exists, but there is a question regarding the written record of evidence.
* What is in writing is not the k; the writing is evidence of the k. Often used as preliminary step in parol evidence rule argument.
* Burden of proof is higher than BoP but below BARD (*Sylvan Lake*)
* Usually only applies to common mistake
* However, can apply to unilateral mistake in some circumstances (*Sylvan Lake*). There are no true unilateral mistakes (since that would mean one party is lying).

Sylvan Lake Golf v Performance Industries 2002 SCC
**R**: Rectification is discretionary, rectification not contingent on due diligence *per se*. 4 part test below.

**F**: Oral K b/w A and R included option for a residential development by R which would include a double row of houses requiring 480 yards and width of about 110 yards. A had lawyer reduce oral terms to writing, “accidentally” wrote 110 ft. R signed *without reading*. Much later R realized “mistake.” R refused to allow transfer to A, unless A fixed. A sued for specific performance. R countersued for rectification.

**I**: Can agreement be rectified for mistake?

**A**: Rectification is available for unilateral mistake provided 4 conditions are met:

(1) Prior oral K w/ definite/ascertainable terms.

(2) P establishes that written record does not correspond to oral K, and at that D knew/ought to have known of error and P did not (applicable whether error innocent or fraudulent). Rectification only available where attempt of D to rely on the mistake amounts to ‘fraud/equivalent of fraud.’

(3) P must show ‘precise form’ in which the written instrument can be made to express the prior intention.

(4) All pre-conditions must be established by convincing proof (more than BoP but less than BRD; to close floodgates).

Application: (1) Parties had oral agreement more that agreement to agree. (2) A knew of error, and knew R would assume terms of oral K were reflected in writing. Fraudulent. (3) Precise form of oral K could be determined. (4) Because R had lots of corroborating evidence, standard met. **The fact R did not use due diligence not relevant as rectification only corrects written evidence to match actual oral K.**

# Protection of weaker parties

The following doctrines are equitable, although duress was rooted in and has possible consequences in common law. You may be able to argue all three together.

* Mistake is about what a party does or does not know. Protection of weaker parties is about whether you truly consented to the k. You might know everything, but may not be able to consent due to circumstances.
* It assumes that a k is based on consent. It is a modern notion, since the concept of consent did not become an element of the common law until the mid-18th century—influenced by continental Europe.
* The law is being overtly paternalistic. It mirrors the law of illegality.
* If the law is going to protect someone, is this the way it should do so? That is, should the judges be doing this on a case-by-case basis? It seems ad hoc. Perhaps it is a political issue and should be done through legislation.
* Parties may not wish to bring themselves within the category of “weak”.
* “Unconscionability” is a label placed on the k. By contrast, UI and duress are labels of the process through which k was created.
* UI is an ongoing concern. UI only kicks in where there is a relationship which concerns the law and it wasn’t the particular circumstances of the k, but rather the ongoing relationship type that makes the k suspect.
* Duress looks to the moment of the k. The relationship may be regular outside the moment of creation of the k, but if there is duress at creation, that is the key.
* Both duress and UI can involve third parties (not unconscionability).

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Timing?** | **Label placed** | **Can third parties be involved?** | **Remedy** | **Are we looking at content?** |
| **Duress** | Looks at particular event 🡪 moment of k creation | On process (though GF says we look to content as well) | Yes | Equity makes k voidable. If common law (historically), then void. | GF says yes (look at consideration). This is significant shift. |
| **Undue Influence** | Ongoing concern (look to relationship). Later unfolding of k does not matter | On process | Yes | Equity makes k voidable or may make obligations unenforceable if some have been performed. | Wilson in Geffen says content is relevant in the context of “commercial” transactions. |
| **Unconscionability** | May unfold to become unconscionable: Harry | On k—often on part of the k | No | Equity is not bound by typical voidable or unenforceable remedies: Morrison | Yes. Is there “substantial unfairness”?: Morrison |

## 1. Duress

Economic Duress Origins:

*Pao On*: **duress** defined as coercion of the will so as to vitiate consent (when a party is deprived of his freedom of exercising his will)

* *Pao On* extended duress to circumstances of economic duress, but it did not change the test for duress. *Pao On* also moved duress into equity—the effect was to ***make the contract voidable***. This lets the person subject to pressure keep the k if it is beneficial. *Greater Fredericton* would reject the legitimacy consideration and “independent legal advice” factor.
	+ Factors to consider
	+ **1) Did he protest?**
	+ **2) Was there an alternative course open to him?**
	+ **3) Was he independently advised?**
	+ **4) Did he take timely steps to avoid k (i.e., did he complain after the k)?**
	+ **~~5) whether the pressure was legitimate~~  Added by *Gordon (*’92 ONCA*)* Removed in *GF***
* *Universe Tankships Inc of Monrovia v Int’l Transport*: when deciding if pressure is legitimate or not, consider:
	+ a) the nature of the pressure and
	+ b) nature of the demand

Greater Fredericton Airport v NAV Canada 2008 NBCA
**R**: Two Conditions Precedent: **(1)** K variation must be extracted by pressure (demand or threat; ex: refusing to perform k obligations) **(2)** coerced party would have to have had no practical alternative but to agree. After this has been established, Three Factors**: (1)** Was the promise supported by consideration? (Court will be more sympathetic if no consideration – issues of quantum and timing are unclear) **(2)** Was it made “under protest” or “without prejudice”? **(3)** Did the coerced party take reasonable steps to disaffirm the promise as soon as practicable?

**F**: P was doing renovations; needed D to move their Instrument Landing System. D said replacing ILS altogether would be better, refused to move their ILS unless P paid for the replacement. P reluctantly agreed to pay (under protest), b/c otherwise reno could not get done. P refused to pay claiming: (1) no consideration **(2) under duress**.

**I**: Is this economic duress?

* + *Poa On* set out four factors that had to be met **1) Did he protest? (2) Was there an alternative course open to him? (3) Was he independently advised? (4) Did he take timely steps to avoid k (i.e., did he complain after the k)?**
	+ *Greater Fredericton* set out two conditions precedent, along with three factors to be considered **(see brief above)**
		- When conducting a duress analysis, consideration is a factor in determining whether there was economic duress rather than a black or white element of contract’s enforceability. If no consideration, factor pointing to greater likelihood of duress.
		- Whether or not party claiming economic had independent advice is not a factor.
	+ However, still have the question of whether GF is applicable beyond looking at K variation, e.g. formation.

## 2. Undue Influence

* Hard for P to prove relationship of UI if not established relationship.
* Established relationships: Parent-child, guardian-ward, solicitor-client, trustee-beneficiary, physician-patient, religious advisor-advisee, etc.
* Being equitable, must consider **laches, undue hardship, clean hands**. Then again, there is more leniency given to laches for UI, since the delay may be due to the UI. Equity will not scrutinize as rigorously.
* Equity may find unenforceability. For unenforceability, may be that only certain obligations are unenforceable or only the strong party cannot enforce. The law can pick and choose. This can be highly advantageous for the weaker party: he can avoid performing any obligations and can call upon the other to perform his obligations. The k is left in place as valid.

|  |
| --- |
| Geffen v Goodman Estate 1991 SCC**R**: Test for undue influence: **(1a)** P must establish that the relationship between them and D was one of UI; **(1b)** For commercial transactions only, P must ***also*** establish that the K left them at a “manifest disadvantage” [skip 1b for gifts]; **(2)** D can rebut the presumption of UI by showing that this particular K was entered of P’s own “full, free and informed thought”.**F**: T a woman with a history of mental health issues, set up a trust that would be divided equally among her mother’s grandchildren when she died. She did this after a meeting with her brothers and a lawyer.She also had a will that left her estate to her children. Her son claims that her brothers unduly influenced her to set up the trust.**I**: What is the test for undue influence?**A:** Analysis* The test for undue influence (**UI**) has two main steps:
* (1a) The **burden is on P** (or whoever is seeking to have the K found voidable) to establish that the relationship between the (allegedly) ‘weak’ and ‘strong’ parties was one of UI at the relevant time (i.e., when the transaction/gift was made, or shortly before). This can be done in 2 ways:

 (a) established relationships—there are certain relationships which are inherently unequal. They include solicitor-client, parent-child, and guardian-ward. (b) actual relationship of UI—that the two parties had a relationship that didn’t fall into a category in which UI is presumed to be present, but the relationship was unequal anyway.* (1b) If the transaction was commercial (not completely clear to me whether this covers any kind of K, or only Ks entered into by companies/for reasons of commerce, since her example of non-commercial is gifts/bequests), then **P must also show** that the K was unfair, in that it left P at a “manifest disadvantage”.
* Wilson J’s reasons for differentiating between commercial and non-commercial transactions are: (i) that interfering with parties’ freedom of K in commercial transactions should not be done lightly, so imposing an additional requirement in that context makes sense; (ii) parties to commercial transactions tend to be acting out of self-interest, so the presence of manifest inequality is a sign that something unsavoury may have occurred; (iii) when a P received no consideration (i.e., for gifts/bequests), it is inappropriate to require that they prove that giving the gift was unfair.
* (2) The **burden is on D** (or whoever is seeking to have the K upheld) to rebut the presumption of UI, by showing that the weak party entered the K of their own “full, free and informed thought”. This may mean showing that no actual influence was used in the bargain, or that the weak party had independent advice, or (again) how great the disadvantage was to the weak party. Any combination of those may also be sufficient. The way Wilson J explains it makes it seem like a holistic assessment to me.

**Application** to this case. (1a) The deceased was in a vulnerable position at the time of the execution of the trust, and could have been unduly influenced by her brothers. (1b) A trust is like a gift rather than a commercial transaction, so this step is unnecessary. P has established the presumption of UI. (2) There was very little actual communication between the deceased and her brothers at the relevant time, and her brothers’ motivation in advising her was to actually assist her. Plus, she received independent legal advice. Ds have successfully rebutted the assumption of UI. |

## 3. Unconscionability

Invokes relief against unfair advantage gained by an unconscientious use of power by a stronger party against a weaker one (***Morrison***). It is a combination of **status and action**. Some courts assess whether an “unfair advantage” arises, and hence unconscionability appears to involve examining the content of the k.

🡪 Determines whether k is unconscionable – does not attach the label to the parties, just the transaction

🡪 Result is: courts are more apt to tinkering with k and finding part of k unconscionable

* The **other two** doctrines are **inept at dealing with particular terms**, since they deal with the whole k.
* The k may start out as conscionable, but becomes unconscionable through how the world unfolds (according to Lambert in *Harry*).

Unconscionability **requires you to go to court**, since you cannot know your remedy until you seek the court’s assistance. For example, determining what is the minimum intervention needed to obviate the unconscionability must necessarily be determined by the court.

Ambiguities: Is it even a separate doctrine? What is the test? What is the remedy if established?

Morrison v Coast Finance 1965 BCCA
**R: 3 part test for unconscionability: (1)** Burden on P to prove inequality in the parties’ respective positions, arising from the ignorance, need or distress of the weaker party**. (2)** Burden on P to prove substantial unfairness in the resulting bargain**. (3)** Burden on D to rebut the presumption of fraud by proving the bargain was “fair, just and reasonable”.

**F**: Rs convinced P to sell a mortgage to Ds and lend Rs the money advanced. Rs used the money to pay off a loan to Ds and buy cars from Ds. Ds knew that was what the money would be used for. P could not pay off the mortgage b/c her only income would have been the payment of a promissory note from Rs, who would not pay. The promissory note did not include interest. The consideration P received was the valueless conditional sales agreement for the two cars that had already been paid for. P wants the mortgage set aside on grounds of unconscionability.

**I**: What is the test for unconscionability?

**A**: Application: (1) we are told the inequality is obvious; (2) the bargain was clearly unfair, as P essentially received nothing at all; (3) Ds have not rebutted. P clearly did not know what she was doing, and sought but did not receive legal advice. Ds should have been aware that she was uncomfortable, and that the deal was manifestly unfair. **Remedy b/c Rs not present:** Instead of simply setting aside the whole transaction, the court decides to set aside the mortgage and assign the promissory note and valueless sales agreement to Ds.

Lloyds Bank v Bundy 1975 Eng CA
**R**: See analysis. The remedy is voidability.

**Comment:** Bad law in England; ambiguous/potentially persuasive in Canada. Drawn upon in *Harry*. MacDougall: doesn’t actually unify them at all, rather simply lists them.

**F**: D took out a loan from P to pay his son’s debts, using his house as collateral. P’s lawyers had come to D’s house to explain that using the house as collateral was the only way he could help his son. His son went bankrupt and P foreclosed on the house.

**I**: What’s the deal with the protection of weaker parties?

**A**: Denning tries to find golden thread underlying the weaker party doctrines. 5 cat-orgies. **(1)** Duress of goods: when one party has greater bargaining power because they have something that belongs to the other party, who pays to get it back. **(2)** Unconscionable transactions: a situation in which the stronger party gains an unfair advantage over the weaker by unconscionable use of power. Denning cites Morrison as falling into this category. **(3)** Undue influence: either where one party has defrauded the other, or where a stronger party has taken advantage of their relationship with the weaker to gain an advantage. **(4)** Undue pressure: where the stronger party threatens the weaker so that they enter into the agreement. **(5)** Salvage agreements: when a ship is in danger of sinking, the rescuer is in an unfairly strong position.

* Denning’s view has not been generally accepted but is sometimes used to “inform” decisions (e.g. Lambert in *Harry*).
* Ignores differences. Lessens flexibility by having so many doctrines.
* The paradox is that the people these doctrines are designed to help are not able to utilize the doctrines due to their complexity.

\*\*\* You can use both tests in *Harry* as SCC hasn’t ruled on which one should prevail.

Harry v Kreutziger 1978 BCCA
**R:** 2 tests for unconscionability: (1) *Morrison* Test, (2) Lambert’s “community standards” test below.

**Comment**: Not clear how to determine community standards, or when to use which test.

**F**: P sold his boat and fishing licence to D for a low price. The boat was not worth much, but licence worth a lot. P was not well-educated or versed in business, whereas D was. P did not want to go through with sale, but D persisted and exerted pressure over him. D assured P that he could get a new licence after the sale, and knew that was a lie.

**I**: I’ll take unconscionability for $500, Alex

**L**: *Morrison v Coast Finance*: 3 part test adopted and rearticulated by McIntyre. *Lloyds Bank v Bundy*: simplified into a single question and applied by Lambert.

**A**: **McIntyre JA**: applies *Morrison* (1) P was clearly in an inferior position to D. (2) The bargain was substantially unfair. (3) Not rebutted. K should be rescinded.

**Lambert JA**: influenced by Denning’s decision, he “simplifies” matters of unconscionable use of power, unfair advantage, grossly inadequate consideration and impaired bargaining power into one question: whether the transaction, seen as a whole, is sufficiently **divergent from community standards** of commercial morality that it should be rescinded. Because this is a question of ‘community morality’, Canadian cases are more relevant to answering this question about a particular set of facts than cases from abroad. For the same reason, recent cases should be more persuasive than older cases.

Problem: What is the community? What is morality? What is immoral?

Benefits: Much more open-ended and less structured by an intricate list of pre-requisites.

* Could have argued mistake, could have argued offer/acceptance.
* Lambert’s test tends to be used as an alternative to the *Morrison* test formulation.

# Remedies

|  |  |  |  |
| --- | --- | --- | --- |
| **Remedy** | **When Available** | **Who can claim** | **Nature and effect** |
| Termination | For breach of condition (or sometimes intermediate terms) | Party not in breach | Ends primary obligation of both parties from termination |
| Damages | Upon breach of any primary obligation in the k | Party not in breach upon showing:* Breach of other
* Amount of loss (quantum)
* Reasonableness of claim (not too remote and claimant mitigated)
 | Money substitute for obligation broken, quantified by reference to:1. pre-agreed amount (“liquidated damages”)
2. CL rules and principles
3. Combination of a and b
 |
| Debt | Upon failure to pay contractually specified sum | Party not in breach. Need not mitigate. | Order to pay sum stipulated in contract |
| Specific Performance or injunction | One party is about to breach or has breached k | Other party who:* Has “clean hands”
* Is not tardy (laches)
* Is not seeking labour
* Can show above (CL) remedies not adequate
* Can show that k not terminated or avoided
 | Equitable remedyOrder to perform kKeeps primary obligations alive |
| Equitable damages | When specific performance or injunction is appropriate but unavailable (or P opts for money substitute) | Party who might have got specific performance or injunction  | Equitable remedyMoney substitute for specific performance or injunction |

* There is a right to CL remedies (*damages*), but must argue for equitable (*specific performance, injunction*) remedies (there is no right to them as they are discretionary)
* CL tends to build things; equity tends to destroy or modify things.
* Because most of the excuses doctrines destroy obligations, they are better thought of as forms of relief rather than remedies. A remedy is typically an alternative obligation that is imposed on the other party. True remedies concern what is in the k. It is not truly a remedy to say that one is relieved from one’s obligation.
* Excuses concern the context of the k that gives rise to relief. Occasionally, we got into the content of the k (unconscionability and to a certain extent frustration and undue influence). But, must be content in association with surrounding circumstances. To compare with termination, the obligations are ended because of what is in the k. Termination focuses on the content.
* Termination also is not a remedy, as it ends obligations.
* For remedies, we focus on the specific obligation. REMEMBER TIMING when assessing remedies.

# Damages – Rationale

* Two aspects: 1) right to damages 2) quantum of damages.
* Right: as soon as an obligation is breached, there is a right to damages. The liability is strict.
* Quantum: the liability is not strict due to considerations of remoteness. The quantum for damages is based on fault.
* Common law remedy:
* CL will assume you want damages, debt, etc. CL is saying that damages are available because you want them. You can alternatively specify what you want. Liquidated damages is actually a debt claim, since it is specified. You can mix the remedies (not the case with equity).
* Damages in **torts**: the court looks backwards and awards money that is meant to restore the party to his previous position.
* Damages in **contracts**: the court looks to the future and awards money that puts the party in the position that he would have been in had the promises been fulfilled.
* Identify what the term is in the k that is being attacked. What are you complaining about? Then look to what the damages are.

Characterizations of Damages:

1. Interest Protected (rationale)
	1. Expectation = the money expected to get or save from the k (e.g. profits)
	2. Reliance = the expense incurred because the innocent party relied on the k (e.g. expenses)
	3. Restitution = aim is to prevent unjust enrichment

🡪 Expectation and reliance damages tend not to both be awarded – 1 or the other (*Sunshine Vacation*)

1. Overarching
	1. General
	2. Specific
2. Heads of Damage

**🡪** Loss of profit, wasted expenditure, interest, etc

**The law of obligations**: Roman law divided up obligations - on one side are those the parties agreed to, and the other side is what the law imposes.

* The law-imposed damages include tort. The party-agreed obligations include contract and quasi-contract (restitution). The damages in tort are restorative. The damages in k are about expectation. The focus is on the person complaining. There is little concern about the other party.
* Restitution is restorative in a different sense. It is thought of as deprivation in the sense of unjust enrichment. The future turned out such that one party landed where they ought not be (in the sense that they got too much).
* In civil law, the k is about rights and the default remedy is SP. You only get money if SP won’t work. CL takes the opposite approach.

#### 1. The Interests Protected

***Fuller and Purdue*, “The Reliance Interest in Contract Damages”** – page 783

* 3 rationales why damages are given—these are seen as the interests protected:
1. Expectation
	* Aims to put innocent party in position she would have been in had the k been filled
	* This is the ruling principle for breach of k
	* Promotes market activity
	* Value of the expectancy = position you would have been in if k were fully performed
		+ i.e. these are profits – sometimes hard to quantify
	* Why we should protect expectation: “psychological”, that the breach of a promise arouses a sense of injury due to being deprived.
	* problem with this explanation is that no legal system tries to invest with juristic sanction all promises.
* Possible second explanation: “will theory” of contract law. Contracting parties are exercising a “legislative power”. State implements private law already established by parties.
* Third and more promising solution: economic or institutional approach. Credit economy tends to eliminate the distinction between present and future (promised) goods. Expectancy should be regarded as a type of property.
	+ But, could argue that the expectancy is not the cause of legal intervention but the consequence of it.
* Fourth explanation: juristic. It offers the measure of recovery most likely to reimburse promisees for the individual acts and forbearances which make up his total reliance on the k.
* Enforcement of promises is important – discourage breaches of contract. Since expectation is more easily measurable, it offers a more effective deterrent against breaches. Can see as a quasi-criminal sanction rather than a principle of compensation. We can justify on grounds of promoting and facilitating reliance on business agreements.
* In moving from reliance to expectation interest, we move from corrective to distributive justice.
* To protect reliance *interests*, k law should award the expectation *measure* of damages.
1. Reliance
* Two ways of looking at reliance interest: 1) compensation for wasted expenditure. P may incur expenses expecting D to perform his obligation. Can claim for waste. 2) using money to undo loss that P would have avoided if he had not entered k in first place.
	+ Aims to put innocent party in position she would have been in had she not entered into the k
	+ This is good for when P has not suffered loss measurable by expectation level or has been unable to prove or establish expectation losses with the requisite degree of certainty
	+ P can also seek this if they will get more than they would through expectation measures or if expectation measures are difficult to value monetarily (McRae)
	+ E.g., expenses incurred, opportunity costs forgone.
	+ The distinction between reliance and expectation is not just “losses caused” vs “gains prevented”. Reliance may also cover some gains prevented. Also, expectation is not exactly gains prevented.
	+ One looks backward, the other looks forward. Both look at the world from the perspective of the P. The D’s position is irrelevant to a great extent. Restitution *does* look at the D.
1. Restitution
* Object here is to prevent unjust enrichment.
* Prevent gain by a promisor defaulting at the expense of the promisee (i.e. D-based)
* Can involve both losses incurred and gains prevented (disgorgement damages)
* 2 elements:
	1. Reliance by the promisee
	2. A resultant gain by the promisor
* Restitution is the strongest case for relief. If we follow Aristotle’s distributive justice, restitution is even stronger compared to reliance.
* In assessment of damages you *measure the extent of the injury*, determine whether it was *caused* by the D’s act, and ascertain whether the P has included the *same item* of damage twice in his complaint.
* Damages in k can protect multiple interests (expectation, restoration, restitution).

#### 2. The Expectation Interest

(see Fuller and Purdue stuff)

#### 3. The Reliance Interest

## The Interests Protected

#### *Fuller and Purdue*

In K law, we award damages based on P’s expected gain from the K for economic reasons. Protecting the expectation interest is another way to protect against a certain kind of detrimental reliance—when P relied on the K by not entering into *another* K. This facilitates reliance on business agreements which has A+ economic effects.

In assessing damages, you measure the *extent* of the injury, determine whether it was *caused* by the D’s act, and ascertain whether P has included *the same item of damage* twice in her complaint. This appears scientific or something, but it isn’t really—we design damages for certain *purposes*. 3 purposes for which K damages are awarded: **(1)** restitution interest, **(2)** reliance interest, and **(3)** expectation interest. Each has specific objectives, which we should use as the lens through which to examine them, because as Nietzsche says, the most common stupidity consists in forgetting what one is trying to do. Intuitively, the need for judicial intervention decreases in the order listed.

Restitution Interest

This is where we make a D who breached a K pay P for the value he gained from her carrying out the K. The *objective* of this kind of damages is to prevent a defaulting promisor from gaining at the promisee’s expense. 2 elements: **(1)** reliance by the promisee, and **(2)** resultant gain of the promisor. ‘Corrective justice’—combines both unjust impoverishment on the part of P and unjust gain on the part of D, and thus seems to demand judicial remedy. The only interest that considers the position of D.

Reliance Interest

This is where we make a D who breached a K pay P for the value she lost in relying on D’s carrying out his promise.The *objective* is to put P in as good a position as she was in before the promise was made. Usually covers ‘losses caused’ but can conceivably also cover ‘gains prevented’ where opportunities for gain were foregone in reliance on the promise. Still a matter of ‘corrective justice’—reliance by the promisee still present and in need of correction, even though resultant gain is not there. Good for when expectation cannot be quantified with certainty.

Expectation Interest

This is where we make a D who breached a K pay P what she would have gained from his carrying out his promise, or we force him to perform the promise. The *objective* is to put P in as good a position as she would have been in if the promise had been kept ‘Distributive justice’—rather than bring back the status quo, protection of this interest tries to bring a new situation into being. Seems harder to justify than the other 2, so why is this the ‘normal rule’ of K recovery? In other words, why should a promise, which has never been relied on, ever be enforced at all?

3 possible explanations: **(1)** it’s psychological, **(2)** “will theory”—because a K is essentially private legislation agreed upon between parties, and that legislation should be enforced, and **(3)** economic approach.

**(3)** is the most promising candidate of the three above. The essence of a credit economy is that it treats present and future goods the same way. Expectations of future value are afforded present value, and, as such, promises about the future should be enforced regardless of whether they’ve been relied upon.

Criticism: this might be circular. The reason a credit economy can exist is because the law enforces promises about the future as though they have present value, so that can’t be an explanation for why the law does that.

Best explanation is **(4)** *juristic*—twofold explanation: **(a)** protecting the expectation interest is the best way to protect against detrimental reliance, and **(b)** facilitates reliance on business agreements.

**(a)**: The expectation interest, then, can be seen as the ‘gains prevented’ part of a reliance interest. 🡪The existence of a duty to mitigate seems to support this explanation.

 **(b):** We want people to rely on their Ks being fulfilled to promote market activity, which we all agree is dank.

## The Expectation Interest

See Above

## The Reliance Interest

#### *McRae v CDC* 1951 Aus HC

**R**: Damages can be given for reliance interest provided they are based on expenditures that are truly wasted (would not have been wasted if the breach did not happen). Useful where expectation interest is difficult to quantify.

**F**: K for right to salvage a wrecked oil tanker. D made 2 factual misreps (that there was a tanker and that it was in a particular place). The tanker did not exist, and it especially wasn’t where D said it was. P argued breach of K, and D argued mistake (to avoid having to pay damages).

**I**: How should damages be assessed when expectation interest is impossible to calculate?

**L:** *Chapin* (below)

**A**: Expectation interest impossible: The CDC did not promise a tanker of any value, only the location. In contrast to *Chapin,* K was for a stranded tanker, not for a chance of profit from salvage. Reliance interest possible: P needs to show needs to show (1) expense was incurred (2) b/c of D’s promise (3) the fact of D’s breach made it certain that P’s expense would be wasted. The burden is on the D to show that it was **not** **truly wasted** i.e. would have been wasted despite the breach.

#### Sunshine Vacation Villas v The Bay 1984 BCCA**R:** When both expectation and reliance interests are available on the facts P can choose whichever is larger. Where one is more speculative, then the other will be awarded.

**F**: P was granted licences to operate its agencies in 6 stores operated by D. But then D retained its agreement with existing licensees, meaning that the stores were not available for P to operate. P claimed damages for loss of capital (reliance) and loss of profit (expectation).

**I**: Can damages be awarded for both expectation and reliance interest?

**L**: *Bowlay Logging:* P can elect to claim reliance interest damages, but if that is less than the demonstrable losses that would have occurred if the K had been performed, then they can’t be awarded any damages.

**A**: Reliance interest damages are only available in the alternative to expectation. If reliance>expectation, P can choose reliance interest. D claimed that P would have lost $ if K performed, citing *Bowlay.* **BUT** *Bowlay* only bars both reliance if the potential loss is demonstrably greater than the capital spent in reliance of the K.

* If the expectation of a performed K is that you would be in a worse position than before the K, the court will not award reliance interests b/c the point of reliance is to put you back to where you were before the K.

## Restitution

#### *AG v Blake* 2000 HL**R:** Where P has a “legitimate interest” in preventing D from making a profit, they may be awarded damages on restitutionary interest.

**F**: D was spy for UK, defected to USSR. Wrote memoirs exposing formerly confidential information. P (AG of UK) sued for breach of confidentiality clause in his K, b/c only actionable way to sue him. P had no losses from breach (expectation or reliance), claimed restitutionary principles should let them recover D’s “ill-gotten” profit

**I**: Can damages be awarded on restitutionary interest?

**L**: *Wrotham*

**A**: D breached K (obvi). General rule in common law is that damages are to put P into position they would have expected to be if K performed (**compensation**). *Wrotham* stands for proposition that damages can be for more than just compensation. Borrows logic from specific performance: if courts can order you to perform obligation, they should be allowed to order you to get rid of gains from breaching if you have irreparably breached. Courts can order damages to disgorge D of profits gained from breach. **This will only be granted in exceptional circumstances.** It’s not enough that D cynically and irreparably breached K to enter into more valuable K, must also be of significant policy importance to not let him profit.

* The main argument against availability of restitutionary damages, advanced by Lord Hobhouse here, will be uncertainty. This will have unsettling effect on commercial ks where certainty is important. This is not well founded. It is only available in exceptional circumstances. Perhaps we could argue that restitutionary interest damages would be larger (in certain cases), and hence would deter breaches more effectively. Agreements should be protected by the courts.
* Criticism: Lord Nicholls does not ID any general principles to allow claims in other contexts. Restitutionary interest discourages efficient breach. Efficient breaches are good and should be encouraged—both parties benefit, as does the overall economy. Moreover, nearly every P will claim they has a “legitimate interest” in preventing D’s profit-making activity.
* If person broke k, and other party did not sustain a loss but the other gained, there are examples of where disgorgement happens in law. For example, fiduciary duty. Lawyer situations are common, directors/corporate officers. They are not allowed to take an opportunity that could have gone to another. The reason they have to hand it over is the law of restitution. It is merely a coincidence that there is a k. It is not a contractual damage.
* Here, we are looking for a situation where there is no fiduciary situation and the only basis for the restitutionary remedy is a breach of k.
* It is not clear why one can recover the restitutionary interest through k. There is some doubt as to whether you should be able to get a restitutionary award without a fiduciary obligation.

# Damages – Quantification Problems

#### *Chaplin v Hicks* 1911 Eng CA

**R:** When K is for a chance as something valuable, ToF should just “do the best they can” using “guesswork” to come up with a $ amount for loss. The fact that an expected profit cannot be assessed with accuracy does not relieve D from paying

**F**: K for newspaper beauty contest. P was one of 50 finalists. 12 would be selected and get the “promised engagements.” D (organizer) fucked up so that P couldn’t make it to the meeting to be picked. Breach of K

**I**: Can you/how do you quantify damages when breached term was for *chance* of value.

**NB:** this is different from *McCrae* b/c there, the K was for a tanker, not a chance of reaping value from that tanker. Here K was for chance itself.

* Could argue that, apart from chance of success, a way to distinguish *McRae* and *Chaplin* is that in *Chaplin* the subject of the k was giving of a chance to win, whereas in *McRae* the subject was a wrecked tanker that only indirectly led to chance of profit. Perhaps weak.
* To give her a quarter of the potential gains is to put her in a position that could not have resulted from the k’s performance or breach. This is doing justice; it is not a true assessment of the position she would have been in (or the losses she incurred).

Groves v John Wunder 1939 Minn CA
**R: See analysis. Can argue either judgement on exam. Canada seems to take dissent’s view.**

**F**: D agree to remove sand and gravel from P’s property when done leaving it how they found it. Breached by not doing this.

**I**: Which is the correct quantification of the expectation interest? **(1)** The expectation of the increase in property value (Lower $)? **(2)** The expectation of the creation of a physical reality (higher $)?

**A**: Stone (Majority): Tort damages would be based on value of property, but K damages are based on “hypothetical peak of accomplishment(not value) which would have been reached at the work been done as demanded.” Seeing as this K was for leaving it as it was, not for increasing property value, proper amount is (2). Based on an idea that K-law if for bringing about realities that you want, and damages should compensate for $ value to get you there.

Olson (Dissent): Damages should be the difference between what was contracted for (market value) and what was delivered (market value). Proper amount is (1). Based on idea that damages should simply convert the expectations into their market value

\*Note: may be important for essay question.

* Court had two figures: high figure (cost of getting work done not done by party in breach) and lower figure (difference in value of property now that it was not in “improved” state). Judges looked at k to figure out what main point of k was. Was it to have work done, or was it for return of property in particular state at the end?
* Swimming pool situation: court may find cost of cure would be out of proportion to benefit received (i.e., the pool is pretty much as good, and cost of fixing would be massive).
* Court should not question reasons of P too much. They had a bargain.
* Group discussion: Group had an inclination towards awarding higher amount where you can show that the purpose of the contract was not about market value, but specifically about the outcome🡪 *Groves* appears reaching for an idea that damages should be awarded in lieu of specific performance where the point of K is product, since we cannot award specific performance for general labour (most labour services).

Jarvis v Swans Tours 1972 Eng CA
**R**: Damages available for mental distress in K law. Where K is meant to bring entertainment/enjoyment/piece of mind, damages may be given if opposite emotions caused (disappointment, distress, frustration).

**F**: P went on Swan tour. Many of the amenities and services he was promised were not delivered or were misrepresented. P sued for the cost of vacay + mental distress (aggravated damages).

**I**: Does Klaw give damages for mental distress?

NB: unclear where the boundaries are for non pecuniary damages.

* Law historically said that money cannot buy happiness, so we will not compensate for your emotional harm. K law took a stern approach. Also, tort is the one who deals with this sort of thing, not k.
* We are talking about **special damages** here. They are particular to the person.

# Damages Remoteness

Hadley v Baxendale 1854 Exch Crt
**R**: **General Damages**: Damages which arise naturally from the breach (according to the usual course of things).

**Special Damages**: Damages which would be reasonably supposed to have been the probable result of a breach in the contemplation of both parties at the time they made the K. So if P let’s D know that this type of loss will occur if breach, loss is fair game. P can “let D know” by right of the nature of P itself.

**F**: P’s mill stopped b/c broken shaft. P ordered shaft from D. D said that it would be delivered the following day. Delivery was delayed by neglect. P claimed they were entitled to damages representing the amount of money that they would have made with a working mill during the delay. D said too remote.

**I**: What is the test for remoteness of damages in Klaw?

**NB: Policy** 🡪 Freedom of K based on idea of *caveat emptor*, conscious allocation of risk. But if the risk of something is so remote that you could not reasonably expect it to result from you breaching your obligation, your replacement obligation (damages) should not be to compensate for it. You could not have reasonably allocated that risk beforehand.

* The idea is that the k is about the **conscious allocation of risk** between parties. One is aware of and willing to take on the risks attendant with the special consequences. The parties must have the opportunity to provide for the breach knowing fully of the circumstances. We can contrast this with the thin skull principle in tort law. There, you take the victim as you find him/her.
* The special circumstances must be known at the time of acceptance.
* The loss cannot just be foreseeable, it must be a *probable* result of the breach.
* We often see special damages information in recitals.

Victoria Laundry v Newman 1949 Eng CA
**R**: 6 points on remoteness—**(1)** The purpose of damages is to put P in the position she would have been in if her rights had been observed. We place certain limitations (2-6) on this rule. **(2)** P can only recover losses that were reasonably foreseeable at the time the K was entered into. **(3)** Reasonable foreseeability depends on the knowledge of the parties. **(4)** 2 kinds of knowledge: (a) imputed and (b) actual. First branch of *Hadley v Baxendale* is about (a). Second branch (special circumstances) is about (b). **(5)** Neither branch requires that D have actually asked himself what losses would likely result from his breach. What matters is what losses a *RP with D’s knowledge* would have contemplated had he asked himself the question. **(6)** It doesn’t matter if the loss was a necessary result of the breach. It only has to have been a “serious possibility” or a “real danger”.

**F**: D delivered boiler late. P lost out on increase in business and lucrative gov’t Ks.

**A**: Application included the consideration that D, an engineering company, should be expected to understand the nature of P’s potential losses more than the average person would.

Koufus v Czarnikow (The Heron II) 1969 HL
R: When assessing whether P’s losses were too remote, the key q is whether a RP in D’s position would have realized that P’s losses were sufficiently likely to result from D’s breach of K. (Clarifies point 6 from Victoria Laundry)

F: P chartered D’s ship to deliver sugar. Sugar arrived late and price had fallen. P sued for lost profit.

I: How should we describe remoteness in Klaw?

A: The language used in *Victoria Laundry* makes K law liability sound much broader in terms of remoteness than it is. Remoteness is broad in tort law but not so broad in K law.

* Where a breach would not lead to a certain loss in the great majority of cases, then that loss cannot be compensated with general damages. However, could get special damages if you communicate circumstances that would heighten probability of loss, but **do** have to communicate.

# Damages – Mitigation

Southcott Estates v Toronto Catholic District School Board 2012 SCC
R: A single-purpose company is not relieved of this duty to mitigate solely because it is a single-purpose company. // Where P makes a claim for specific performance which has some fair, real and substantial justification, P is relieved of the duty to mitigate their losses. // D has the burden of proving that (1) it was possible for P to mitigate and that (2) P failed to do so.

F: P, a single-purpose corp, entered into K of sale (land) with D. D breached K.

I: (i) Should a single-purpose company have to mitigate its losses? (ii) Should P have to mitigate its losses if it’s seeking specific performance? (iii) Who has the burden of proving mitigation/lack thereof?

A: Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties based on the particular circumstances of the case. In this case, P could have mitigated its losses. The circumstances were that it belonged to a group of companies that could have bought land, despite the fact that P had no money with which it could do so. It was only fair for it to do so.

# Time of measurement of damages

Semelhago v Paramadevan 1996 SCC
R: CL damages assessed at time of breach. Specific performance damages assessed at time of judgment (for practical reasons this is usually the time of the trial).

F: D breached K of sale. Market value rose between breach and trial.

I: At what point in time should damages be assessed?

A: Specific performance keeps the K alive, so when it is awarded but the promise cannot be performed for some reason, the breach actually occurs at the time of the judgment, so that’s when damages should be calculated.

# Liquidated damages, deposits, and forfeitures

* ***Punitive clause defence is an equitable doctrine.***

Shatilla v Feinstein 1923 Sask Prov Crt

**R**: A ‘liquidated damages’ clause must be a bonafide pre-estimate of the actual loss that would be suffered by the aggrieved party upon the failure of the other party to perform the associated primary obligation. Just calling them ‘liquidated damages’ does not make them so.

**F**: Ds sold their business to P. K of sale included a non-compete clause, imposing $10,000 in ‘liquidated damages’ if Ds did so.

**I**: Can a seemingly-punitive liquidated damages clause be enforced?

**A**: If the sum is larger than any loss that could possibly arise, that cannot be a genuine pre-estimate. If a number of distinct promises are all included in the same ‘liquidated damages’ clause, with the same associated amount, then there is a presumption that that is not a genuine pre-estimate. The reason we interfere is that the clause was not arrived at *in the proper way*—the parties are allowed to be wrong about the amount provided for by their liquidated damages clause (see *HF Clarke*, *infra*, for the limit to this), as long as it was intended to compensate for the prospective losses that could actually be suffered, and they actually considered what those losses would be.

H.F. Clarke Ltd v Thermidaire 1974 SCC

**R**: Even where the parties specifically intended that a liquidated damages clause reflect the cost of the primary obligation, equity will render the clause unenforceable where the formula or amount is not reasonable or fair. Liquidated damages need ot be reasonable in comparison to actual damages.

**F**: P and D had a K that included a three year non-competition clause. The specified “‘liquidated damages” were for the “gross trading profit” of D’s prospective competitive venture.

**I**: Is intention determinative of whether a “liquidated damages” clause is punitive or enforceable?

**A**: Although the parties arrived at their clause by specifically attempting to replace a primary obligation with a corresponding secondary obligation, they did so in a way that markedly departed from what was fair or reasonable.

J. G. Collins Insurance v Elsley 1978 SCC

**R**: Only the party who has to pay a “liquidated damages” clause can challenge it for being punitive.

**F**: D broke K with a liquidated damages clause. P sued for damages because they were greater than the specified amount.

**I**: Can either party argue that a liquidated damages clause is punitive and should be unenforceable?

**A**: The ‘penalty clause’ argument interferes with freedom of K. This is not done lightly—it is designed to provide relief from an oppressive penalty for the party who has to pay it. It is a defence and can only be used by D.

·  **NB**: Macdougall says P should have framed it as a limitation clause rather than a liquidated damages clause—so when you see a clause that looks like a liquidated damages clause, consider whether it could be framed as a limitation clause.

Stockloser v Johnson 1954 Eng CA
**R**: At CL, a forfeiture clause or express deposit provision is enforceable. In equity, there is relief from forfeiture when both **(1)** the forfeiture clause is of a penal nature, and **(2)** it is unconscionable for the seller to retain the money. In BC, use this test to determine whether to use the discretion granted by s 24 of *L&E Act*.

**F**: D sold P a machine, which P was to pay for in installments. Clause that the machine belonged to D until P completed all payments. P failed to pay once near the end, and sued to recover the previous payments on the grounds that the forfeiture clause was punitive.

**I**: Can a party be granted relief from forfeiture either at CL or in equity?

**L**: *Law & Equity Act*, s 24.

**A**: In this case, P was found to have essentially ‘gambled’ by entering into this K, and was now asking equity to save him. This would mean interfering with the allocation of risk D and P agreed upon.

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**Law and Equity Act RSBC 1996, c. 253 – Supplement 6**

**S 24**: The Court **may relieve** against all penalties and forfeitures, and in granting the relief [may impose any terms as to costs, expenses, damages, compensations and all other matters] as the court thinks fit.

* At CL, a forfeiture clause or express deposit provision is completely fine. There is relief from forfeiture in equity, however, when both (1) the forfeiture clause is of a penal nature (i.e., it is out of all proportion to the possible loss suffered by the other party), and (2) it is unconscionable for the seller to retain the money. (2) is the hard part.
* **NB**: Considerations for unconscionability. (a) Which party broke the K? (b) *How* penal (i.e., how disproportionate) is the clause? (c) Why does the party seem to be seeking this relief? In this case, the P was found to have essentially ‘gambled’ by entering into this K, and was now asking equity to save him. The homie Denning DO NOT play dat.
* **NB**: This kind of relief directly changes the K by interfering *directly* with freedom of K. That’s because it’s about a primary obligation of the K, whereas the penalty clause stuff, *supra*, was about *secondary* obligations that didn’t properly correspond to the primary obligations.
* Consider: 1) is the deposit meant to be kept in the event of a breach? 2) is the court able to give any relief.
* Usually, “deposit” implies forfeiture in event of default, but this can be changed by the parties. If money is not meant to be forfeited, payor can sue for it back.
* Denning says buyer cannot recover at CL. But, equity comes along (same as mistake, estoppel, and now deposits). Court can order remedy as it sees fit.
	+ First, must be of a penal nature (this is dubious, as it brings in secondary obligation concepts).
	+ Second, “unconscionable” in the sense of simply unjust in equity.
* **Deposits:**
* Deposit relates to both primary and secondary obligations.
* Deposit is preliminary payment often used to confirm acceptance, be acceptance, or trigger other’s obligations.
* Deposit is used as part payment of final price. So, has characteristics of primary obligation of payment. Also condition precedent to other’s obligation becoming enforceable. If party making deposit fails to complete payment obligation after having paid deposit (and other party terminates), then deposit is forfeited by way of remedy to party receiving. Hence, also secondary obligation of party who paid.

# Equitable Remedies

* Equity does put secondary obligations in the k, but only in a limited way. It is really just a secondary order to do what the k says for you to do. It is not seeking a substitute for a primary obligation.
* Equity, unlike CL, is imposing these remedies not purporting to be carrying out the wishes of the parties (as is the case with damages). One cannot combine equitable remedies easily.
* Two types:
1. **Injunction** = order of court to someone to do or not do something (with respect to a particular term in k)
	* Mandatory (to do something), prohibitory (not do something)
	* Specific performance is a type of injunction
	* Can be pre-breach (prohibit from breaching) or post (mandatory injunction to perform)
2. **Specific Performance** = order by court to a party to perform the k obligations (injunction to do whole k)
	* Must be mutuality of performance – both parties must fill their primary obligations
* Neither of these will be ordered for labour contracts (*Warner Bros*).
* NOTE: Can’t get these if k is terminated! SP postpones date of breach (*Semelhago*)
* Equitable damages assessed at time of judgment and not, as is case of CL damages, at time of breach: *Semelhago*.
* These are discretionary – courts will consider the factors below.
* **Getting an equitable remedy (factors to consider):**
* **A. Consideration of the CL matrix**
* If CL says k is void or terminated, equity can do nothing.
* Equitable orders are unavailable after equitable responses of rescinding k, or otherwise avoiding it, have been used.
* **B. Adequacy of damages**
* Damages may be inadequate where good is unique in that it could not be bought anywhere else (land, historically).
* **C. Applicant must come “with clean hands”**
* Clean hands is assessed in context of particular transaction. If P has misrepresented/fraud, might be disqualified.
* **D. The P’s own conduct in respect of the k obligations**
* **E. Timely request (Laches)**
* Two considerations are always length of delay and nature of acts done during interval.
* **F. Hardship to the D or to third parties**
* **G. Obligations extending over a period of time**
* Generally not subject of SP because they are said to need the constant supervision of the court.
* **H. Obligation to perform a personal service**

John Dodge Holdings v 805062 Ontario 2003 ONCA

**R**: For SP of an obligation to be available, the obligation must be unique in some way, such that damages would be an inappropriate remedy.

**F**: D contracted to sell P a tract of land, which D failed to deliver. The land was near a new shopping centre. P sued for SP.

**I**: When is SP available?

**L**: *Semelhago* (land must be unique for SP to be available); *Wyndham Street Investments* (how unique land must be).

**A**: *Semelhago*: unique means such that “its substitute would not be readily available”. *Wyndham Street Investments*: this does not mean entirely different from any other property, but that it has a quality that makes it well suited to your particular use and could not be reasonably duplicated.

* There is the idea that land is not as unique as it used to be.

Warner Bros. v Nelson 1937 KB

**R**: Courts will not impose an injunction not to perform an act where it would drive the D to perform a positive act in respect of which SP would have not have been available. SP is not available for positive personal service Ks.

**F**: D, an actress, had employment K with P that barred her from appearing in films with other companies. D broke the K. P sought an injunction to prevent D from appearing in other companies’ films.

**I**: Can P get an injunction that amounts to SP in a context where SP would not have been granted?

**A**: Sometimes enforcing a negative covenant is tantamount to enforcing positive SP. This is where a D is forced to choose between carrying out an obligation and ‘remaining idle’. For example, a court should not impose an injunction that D only work for P, because that would mean D could choose between working for P and dying of starvation.