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| *R*. v. *Dawood* [1976] 1 W.W.R. 262 (Alta. C.A.)  | • An offer in a supermarket sale was held to be made by the customer at the cash desk and the contract was held to be formed when a cashier took the money. • Note that the S.C.C. overruled *R*. v. *Dawood* on the criminal law issue in *R*. v. *Milne* [1992] 1 S.C.R. 697, saying that “property does not pass for the purpose of the criminal law if the law of property creates a right of recovery”. Under *R .v. Milne,* actions such as Dawood’s would result in a criminal conviction.  | Formation: Offer & Invitation to Treat (retail sale)  |
| *Carlill* v. *Carbolic Smoke Ball Co*. [1893] 1 Q.B. 256 (C.A.)  | • An ad was held to be a unilateral contract, an offer to the public at large—to everyone who does something (a guarantee in an ad was held to be an indication of the intention to create legal obligations). • An ordinary rule of law is that acceptance of an offer requires the offeror to be notified in order that the two minds may come together. • However, in the case of a *unilateral contract*, an offer is made to the public but the contract is not concluded with everybody (all the world). It is only formed with that limited portion of the public *who come forward and perform the condition on the faith of the advertisement* (following the indicated method of acceptance).  | **Formation**: Communication of Offer – public offer to anyone who does something; Communication of Acceptance; Unilateral Contracts |
| *Re Selectmove Ltd. [1995] 2 All E.R. 531 (C.A.)*  | - the promise to pay a sum which the debtor was already bound to pay was not good consideration (confirms Foakes v. Beer) - Williams v. Roffey principle not applicable where the existing obligation is to pay money but rather only where the existing obligation is to supply goods or services  | Enforcement of Promises: Duty Owed to the Promisor  |
| ***Central London Property v. High Trees House*** ***[1947] 1 K.B. 130, [1956] 1 All E.R. 256*** | • Lord Denning relied on the doctrine of promissory estoppel and held that a promise intended to be binding, intended to be acted on and in fact acted on, is binding even if there is no consideration. Estoppel was used as a shield by tenants against the landlord who wanted to enforce a higher rent.  | Enforcement of Promises: Waiver and Promissory Estoppel  |
| *Gilbert Steel v. University Construction Ltd.* *(1976) 12 O.R. (2nd.) 19, 67 D.L.R. (3d) 606 (C.A.)*  | • A unilateral promise to increase price is unenforceable because there is no clear agreement to rescind the existing contract – the new provisions were unilaterally imported into the document and accordingly, consideration of the oral agreement was not found in a mutual agreement to abandon the earlier written contract and assume the obligations under the new oral one.  | Enforcement of Promises: Pre-existing Legal Duty—Duty Owed to the Promisor |
| *Redgrave v. Hurd* *(1881) 20 Ch.D. 1 (C.A.)*  | • A contract can be rescinded (set aside) due to a material false representation; there is a presumption that the party who made the false representation knew at the time when it was made that it was false – “a man is not to be allowed to get a benefit from a statement which he now admits to be false”. • Failure to exercise due diligence is not relevant if a person is induced to enter into a contract by a false representation.  | **Misrepresentation and Rescission** - material representation, fraudulent misrepresentation  |
| ***Smith v. Land & House Property Corporation*** ***(1884) 28 Ch. D. 7 (C.A.)*** | •In the case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. • However, if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best very often involves a statement of a material fact.  | **Misrepresentation and Rescission** – statement of opinion or misrepresentation  |
| *Kupchak v. Dayson Holdings* *(1965) 53 W.W.R. 65, 53 D.L.R. (2d) 482 (B.C.C.A.)*  | • General rule: there is no rescission for misrepresentation if a 3rd party has acquired rights, or when restitutio in integrum is impossible, or if the action to rescind is not taken within a reasonable time, or the contract is executed (except in the case of fraud), or if the injured party affirms the contract. • The court dealt with the possibility of rescission for fraudulent misrepresentation using the 2 step test: a) is rescission practical and restitution possible? b) was the claim to rescind submitted in timely fashion? • When rescission is impossible then the injured party may get monetary compensation (in this case fair market value for the property plus interest).  | **Misrepresentation and Rescission**: fraudulent misrepresentation  |
| *Heilbut, Symons & Co. v. Buckleton* *[1913] A.C. 30 (H.L.)*  | • A person is not liable in damages for an innocent misrepresentation no matter in what way or under what form the attack is made, therefore if rescission is not possible there is no remedy. • An affirmation at the time of sale is a warranty, provided it appears on evidence to be so intended, else it is only an innocent misrepresentation. • A collateral warranty must be proved strictly, not only the existence of such terms but the existence of animus contrahendi must be clearly shown.  | **Representations and Terms**: innocent misrepresentation; breach of warranty  |
| ***Hong Kong Fir v. Kawasaki Kisen Kaisha Ltd.*** ***[1962] 1 All E.R. 474 (C.A.)*** | • In addition to traditional common law categorization of terms of contract into two groups (conditions-the breach of which give rise to repudiation; warranties-the breach of which give rise to damages only) there are intermediate terms-those which are neither conditions nor warranties. • The test the court used to determine if the term was a condition or intermediate term is the nature of event and its practical effect—does it deprive the party to perform of substantially the whole benefit of contract.  | **Classification of Terms**  |
| *Wickman v. Schuler* *[1974] A.C. 235, 2 All E.R. 39 (H.L.)*  | • The contract should be interpreted as a whole and word “condition” should, on the facts of this case, be given an ordinary meaning not as a term which will entitle the innocent party to repudiate the contract in the event of a breach. • If the parties intend to give a condition such an effect they must make that intention clear.  | **Classification of Terms**  |
| *Leaf v. International Galleries* *[1950] 2 K.B. 86, 1 All E.R. 693 (C.A.)*  | • Lord Denning held: rescission may be available in cases of innocent misrepresentation if no other option is available and the innocent party behaved reasonably. • But, no rescission is available for innocent misrepresentation when the contract is executed and a reasonable time for a claim lapses. • Distinction drawn between the quality of the painting (who painted it) and the substance of the painting (picture of Salisbury Cathedral). Only allow rescission if differs in substance.  | **Classification of Terms**: innocent misrepresentation; rescission and lapse of time  |
| *Fairbanks v. Sheppard* *[1953] 1 S.C.R. 314, 2 D.L.R. 193*  | • “substantial performance”* If an obligation is entire it is not necessary to go 100% - substantial performance is enough.
 | **Classification of Terms**: Discharge by Performance or  |
| *Sumpter* v. *Hedges* [1898] 1 Q.B. 673 (C.A.)  | • The general rule is that where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. • There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a *quantum meruit* basis from the defendant’s having taken the benefit of that work. But in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. • The mere fact of the appellant remained in possession of their land is not evidence upon which an inference of a new contract can be founded.  | **Classification of Terms**:Discharge by Performance or Breach: **Remedy for a party in default**  |
| *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*, [1964] A.C. 465  | • If a party’s skill and judgment is foreseeably being relied upon, a duty is owed to take care in making statements. If care is not taken, and injury results, the party that was relied upon will be liable. • Special relationship must be shown.  | Misrepresentation and Rescission: **negligent misrepresentation**  |
| *B.G. Checo Int’l Ltd*. v. *B.C. Hydro,* [1993] 1 S.C.R. 12  | • SCC held that the limitation clauses in the contract did not negate Hydro’s duty of care. • Held that actions in contract and tort may be concurrently pursued unless the parties by a valid contract explicitly indicate that they intended otherwise. • Iacobucci in dissent said that a contract precluded the concurrent liability, but the majority of SCC held that the mere fact that the parties have dealt with a matter expressly in their contract does not mean that they **intended** to exclude all the rights to sue in relation to that matter (in this case, tort).  | Misrepresentation and Rescission: **concurrent Liability in Torts and Contracts**  |
| *Machtinger* v. *Hoj Industries Ltd*. [1992] 1 S.C.R. 986  | • A reasonable notice period is an implied term of an employment contract and the intention of the contracting parties is not relevant to terms implied as a matter of law (but only to terms implied as a matter of fact). • The test for implication of a term as a matter of law is necessity or whether the term sought to be implied is a “necessary incident” of the contract.  | **Excluding and Limiting Liability** Standard Form Contracts: **Exclusion Clauses**  |
| *Thornton v. Shoe Lane Parking Ltd.* *[1971] 2 Q.B. 163, 1 All E.R. 686 (C.A.)*  | • Lord Denning on the formation of contracts in a parking lot: the ticket is no more than a voucher or receipt for the money that has been paid on terms which have been offered and accepted before the ticket is issued… The offer was accepted when the plaintiff dove up to the entrance and by the movement of his car, turned the light from red to green, and the ticket was thrust at him. The contract was then concluded and it could not be altered by any words printed on the ticket itself. • The court should not bind a party by unusually wide and destructive exclusion clauses unless they are drawn to their attention in the most explicit way.  | **Excluding and Limiting Liability (Unsigned)**Standard Form Contracts: Exclusion Clauses and unsigned documents – ticket case  |
| ***McCutcheon v. David MacBrayene Ltd.*** ***[1964] 1 W.L.R. 125, 1 All E.R. 430 (H.L.)***  | • Previous dealings between the parties are relevant only if they prove (1)knowledge of the terms (actual and not constructive), and (2) assent to the terms in the previous dealings. • If previous dealings show that a person knew of and agreed to a term on 99 occasions, it can be imported into the 100th contract without an express statement, but without proving knowledge there is nothing.  | **Excluding and Limiting Liability (Unsigned)**Standard Form Contracts: Exclusion Clauses and unsigned documents – ticket case  |
| *Tilden Rent-A-Car Co. v. Clendenning* *(1978) 18 O.R. (2d) 601 (C.A.)*  | • In modern commercial practice, many standard form printed documents are signed without being read or understood and in many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature a party to the contract does not represent the true intention of the signer and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. • The party seeking to rely on such stringent and onerous terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum; what is reasonable is the question of facts in each instance.  | **Excluding and Limiting Liability (Signed)**Standard Form Contracts: Exclusion Clauses and signed documents  |
| *Karroll v Silver Star Mountain Resorts* [1988] BCSC – McLachlin J | • Big, clear writing, easy to read 🡪 exclusion stands• Release was consistent with the purpose of the K | **Excluding and Limiting Liability (Signed)**Notice Requirement – **Signed Documents** |
| *Karsales* v. *Wallis* [1956] 1 W.L.R. 936, 2 All E.R. 866 (C.A.)  | • Lord Denning formulates his doctrine of fundamental breach: A party cannot rely on an exemption clause when they deliver something “different in kind” from that contracted for, or when they have broken a “fundamental term” or a “fundamental contractual obligation”. • Doctrine of fundamental breach says that a breach which goes to the root of the contract disentitles the party from relying on the exemption clause. • This doctrine has been overruled by the House of Lords in *Photo Production* v. *Securicor Transport Ltd*.  | **Excluding and Limiting Liability** **Fundamental Breach**: *Lord Denning’s doctrine of fundamental breach* |
| ***Photo Production* v. *Securicor Transport Ltd*.** **[1980] A.C. 827, 1 All E.R. 556 (H.L.)**  | • Confirms the *Suisse Atlantique* case ruling that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a fundamental term, or indeed to any breach of contract, is a matter of construction of the whole contract. • Lord Diplock’s analysis of primary and secondary obligations is based on the fundamental principle of the common law of contract that parties to a contract are free to determine for themselves what primary obligations they will accept. • If the exclusion clause is *clear and unambiguous* it will protect the party relying on it from liability.  | **Excluding and Limiting Liability** **Fundamental Breach :** *Lord Denning’s doctrine overruled* |
| *Hunter Engineering* v. *Syncrude Canada Ltd.* [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321  | • Dickson J. (relying on *Photo Production* and inclined to lay the doctrine of fundamental breach to rest) held that if on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability, unless the contract or the clause is unconscionable, as might arise from situations of unequal bargaining power between the parties. • Wilson J. held that the test for whether an exclusion clause or a contract will be enforced is one of unreasonableness as between the parties and in light of the nature of the breach.  | Fundamental Breach: **Canadian courts follow *Photo Production***  |
| *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [*2010*] *SCC* | • Unfairness and unconscionability revisited• D acted “egregiously” when it breached the implied duty of fairness to bidders and **could not rely on an exclusion clause** that barred claims for compensation; it wasn’t w/in contemplation of parties that exclusion clause would bar remedy in damages arising from D’s unfair dealings  | **Excluding and Limiting Liability** **Fundamental Breach** |
| *Pao On v. Lau Yiu Long* *[1980] A.C. 614 (P.C.)*  | • The Privy Council held that “duress, whatever form it takes, is a coercion of the will so as to vitiate consent”. • In a contractual situation commercial pressure is not enough. • Test: did the person protest; did he have a practical and reasonable alternative course open to him; was he independently advised; did he try to avoid the contract.  | **Consideration/Duty Owed to a 3rd Party**Duress: Economic Duress  |
| *Gallen v Allstate Grain Co* [1984] BCCA | • Oral representation was admissible on the basis that the doc didn’t contain the whole agreement (“one K theory”), or that the document contained one complete agreement but that the oral term formed the basic part of another complete agreement (“two K theory”)• Rationale of the parol evidence principle does not apply with equal force where the oral representation + to, - from or varies the agreement recorded in the doc as it does where the oral representation contradicts the doc | **Parol Evidence Rule** |
| *Bercovici v Palmer* (1966) (Sask C.A.) | • Court may practically have no choice to rectify to the K where both parties agree there was a mistake but argue for a different mistake• Burden of convincing the court may be onerous but the court will have little choice but to correct the mutual mistake | **Parol Evidence Rule (Rectification)** – **MUTUAL** Mistake |
| *Sylvan Lake Golf v Performance Industries* [2002] SCC | • Binnie J: Rectification is now available for unilateral mistake; P must est the terms agreed to orally weren’t written down properly (fraudulently or innocently); what’s essential is that @ the time of execution of the orig doc, D knew or ought to have known the error and P didn’t; D’s reliance on the doc must have amounted to fraud or its equivalent; P must show precise form in which the written instrument can be made to express the prior intention; convincing proof beyond BoP is needed; lack of due diligence will not be fatal to a claim; court will restore parties to original bargain | **Parol Evidence Rule (Rectification)** – **UNILATERAL** Mistake |
| ***Smith v Hughes*** [1871] QB | • **Stands for the proposition that there is a view that mistake can affect the K and if and how it does so will depend on which judgment one turns to****• Cockburn CJ**: proposition that there is **no law of mistake**• Law of mistake comes from the other two judges**• Blackburn J**: If one party thought they were agreeing to one set of **terms** and the other party thought they were agreeing to a different set of terms, there is no *consensus ad idem* and thus there is no K; If one of the parties has a belief that the other party had agreed to a K that had certain **terms** in it and those terms aren’t there, that is enough of a mistake to affect the K (can be a mistake of one party only); Doesn’t matter that the 2nd party knows about the 1st party’s mistake**• Hannen J**: Concurred but really confusing decision; Doesn’t say mistake has to be limited to terms; seems to say mistake can also be made as to **belief** (unilateral mistake about common assumption) | **Mistake – Introduction** – (**Origin of the doctrine of mistake)** **Mistake - Terms** |
| *Bell v Lever Bros* [1932] A.C. 161 (H.L) | • most influential case in mistake (Lord Atkin’s reasons)• narrow basis for mistake as to quality – won’t affect assent unless it is the mistake of both parties + is as to the existence of some quality which makes the thing w/out the quality essentially different from the thing as it was believed to be• mistaken assumption about quality might affect K; quality of the thing as a K term for which one party bears risk and responsibility of the subject matter 🡪 failure to deliver that quality would be a breach of K• Mistake as to existence seems to have an almost automatic effect on the K, whereas mistake as to quality will depend on how fundamental mistake is • ***Solle v Butcher* [1949]** opened possibility of equitable effects of mistake that would operate differently than through CL; allows one party to avoid K for mistake as to **quality** or to permit the court to set K aside on terms | **Mistake – Assumption****COMMON** Mistake(Quality) |
| ***McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377 (Aust H.C.)**  | • Court held that where the non-breaching party cannot meet the burden of proof with respect to net profits he may be entitled to recover damages measured by reference to expenditure incurred and wasted in reliance on the promise given by the Commission. • The burden was then thrown on the Commission of establishing that the expense incurred would equally have been wasted (in order to reduce the amount of the reliance damages).  | **Mistake - Assumption** **Damages –****Reliance Interest**  |
| ***Great Peace Shipping v Tsavliris Salvage* [**2002] 4 All E.R 689 (C.A.) | • **mistaken assumption does has to be common**; if mistake is unilateral, probably won’t operate to prevent creation of K• deciding whether mistake is common or not is a question of fact**• Common mistake will make K void**; despite the consensus of the parties in making the K, it has never come into being legally• rolls back law of mistake to *Bell*, pre-*Solle* though this is not the final word in Canada | **Mistake - Assumption** |
| *Miller Paving v B Gottardo Construction* (2007) (Ont. C.A.) | •agreement precluded P from using common mistake• even if it could, neither CL nor equitable doctrines would result in K being set aside•**restores law in Canada to *Solle*** | **Mistake - Assumption** |
| *Shogun Finance v Hudson* [2003] UKHL | • valid distinction between face-to-face situations and those where parties deal w/ each other through docs; where face-to-face strong presumption that each intends to K w/ the other but where dealings are conducted exclusively through writing, no scope or need for sucha presumption• K of immediate vicinity different than K over distance• decision failed to clarify law on mistaken identity•mistaken identity is a basis for rescission of K | **Mistake – 3rd Party Interests (Identity)** |
| *Saunders v Anglia Bldg. Socy* [1971] UKHL | • P must establish a difference between the doc as it is and the doc as it was believed by P to be; must be a radical difference•if P carelessly signed doc, can’t rely on *non est factum*•plea of *non est factum* can’t normally be claimed by person of full capacity | **Mistake – 3rd Party Interests (Non Est Factum)** |
| *Marvco Color v Harris* [1982] SCC | • affirms *Saunders* | **Mistake – 3rd Party Interests (Non Est Factum)** |
| *Paradine v Jane*[1647] [EWHC KB J5](http://www.bailii.org/ew/cases/EWHC/KB/1647/J5.html) | \* absolute [liability](http://en.wikipedia.org/wiki/Legal_liability) for [contractual](http://en.wikipedia.org/wiki/Contract) debts – (as of the 1600’s)\* The idea that a person might fail to perform a primary obligation in a valid contract without there being any secondary obligations as a consequence was unthinkable | **Frustration - Doctrine**(absolute liability – 1600’s) |
| ***Taylor v Caldwell*** King’s Bench, 3 B. & S. 826, 122 Eng. Rep. 309 (1863) | **Issue:** May contract performance be excused for impossibility of performance if performance depends on the continued existence of a person or thing, and that person or thing ceases to exist?**Rule**: Where the foundation of the contract ceases to exist, without the fault of a contracting party, then the parties are excused from performing their promises by virtue of an ***implied term***. | **Frustration - Doctrine**(impossibility) |
| *Davis Contractors v Fareham UDC* [1956] A.C. 696 (H.L.) | • Can’t foresee an unforeseeable event (therefore ***no such thing as implied term***.)* “*Frustration occurs whenever* ***the law recognizes that without default or either party a contractual obligation has become incapable of being performed*** *because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken*” – Lord Reid
 | **Frustration - Doctrine**(impossibility) |
| *Can Gov’t Merchant Marine v Can Trading Co* [1922] S.C.J. No. 30, 64 S.C.R. 106 | * If the event WAS or MIGHT BE foreseen, then it cannot frustrate the contract (**A frustrating event has to be unforeseen**)
* “…*no such term [frustrating the contract] should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances*…” – Duff J.
* Labour dispute is NOT an unforeseeable event, but some political events are.
* Also… if an event or term is covered by insurance or req’d to be covered then it probably isn’t unforeseen
 | **Frustration – Application**(What is unforeseen) |
| ***Capital Quality Homes v Colwyn Const. Ltd*** [1975] O.J. No. 24, 9 O.R. (2d) 617 (Ont. C.A.) | * Unexpected change to land use laws **=** frustration (K was all about subdivision of land, no longer possible)
* “In my opinion the legislation destroyed ***the very foundation of the agreement***… [it] creates a situation not within the contemplation of the parties when they entered into the agreement”
 | **Frustration – Application**(Change in Law & Illegality) |
| ***Vicoria Wood Dev Corp. v Ondrey*** [1977] O.J. No. 2143, 14 O.R. (2d) 723 (Ont. H.C.J.) | * Change to land use laws **≠** frustration (because a version of the contract could still be performed.) The contract was for the transfer of one large plot that could still be used for something else.
* “…a developer in land is ***always conscious of the risk that zoning or similar changes may arise***…” (foreseeable)
 | **Frustration – Application**(Change in Law & Illegality) |
| *Maritime National Fish v Ocean Trawlers* [1935] A.C. 524 (P.C.) | * **FACTS**: claimed K frustrated due to lack of fishing license – but that was under the PL’s control.
* **RULE**: one party has caused a sudden rise in price or change in the law, then that party may not use that event as a reason to get out of the K
* “***The essence of ‘frustration’ is that it should not be due to the act or election of the party.***”
 | **Frustration – Application**(Not Caused by Party) |
| *Geffen v. Goodman Estate* *[1991] 2 S.C.R. 353, 81 D.L.R (4th) 211*  | • Wilson J. said that the plaintiff must establish the presence of a dominant relationship in order to give rise to a presumption of undue influence. Then the onus moves to the defendant to rebut it (to show that the plaintiff acted full, free and informed and that he had independent advice. The magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether undue influence was exercised).  | **Weaker Parties - Undue Influence**: Potentially dominant relationships  |
| *Morrison v. Coast Finance Ltd.* *(1965) 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A)*  | • A presumption of unconscionability requires: a) proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left them in the power of the stronger, and b) proof of substantial unfairness of the bargain in favour of the stronger. • The stronger party must rebut the presumption by proving that the bargain was fair, just and reasonable.  | **Weaker Parties - Unconscionability**: presumption of unconsionability  |
| *Lloyd’s Bank v. Bundy* *[1975] Q.B. 326, [1974] 3 All E.R. 757*  | • Lord Denning said that there are different categories of cases where there has been inequality of bargaining power (duress, unconscionable transactions, undue influence, undue pressure and salvage agreements) and that the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining  | **Weaker Parties - Unconscionability**: relief  |
| *Harry v. Kreutziger* (1978) 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.)  | • McIntire J referred to the test in *Morrison* for unconscionability: Inequality of position of the parties due to the ignorance, need or distress of the weaker, coupled with proof of substantial unfairness in the bargain. • Lambert J. A. introduced a new test: whether the transaction seen as a whole is ***sufficiently divergent from community standards of commercial morality that it should be rescinded.***  | **Weaker Parties - Unconscionability**: relief |
| ***KRG Insurance Brokers v Shafron*** [2009] SCC 6 | • Restrictive covenants are a **restraint of trade** that courts have always been very cautious to apply. In order for an employer to be permitted to hold a former employee to a restrictive covenant, the clause must be reasonable and unambiguous. In particular, the clause must be reasonable in respect to three primary factors: 1) The clause must have a reasonable geographical scope; 2) The clause must have a reasonable time limit; 3) The clause must be reasonable in the activities it seeks to restrict.• The primary issue in the *KRG* case was the ambiguity attached to the term the "Metropolitan City of Vancouver." SCC: **an ambiguous clause cannot be a reasonable clause, and will not be enforceable**. |  **Illegality – Contracts Contrary to Public Policy**(Restricting Trade) |
| *Still* v. *Minister of National Revenue* [1998] 1 F.C. 549 (C.A.)  | • The modern approach to the law of illegality rejects the understanding that simply because a contract is prohibited by statute it is illegal and therefore void *ab initio*. Where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party, when … it would be contrary to public policy, reflected in the relief claimed, to do so.  | **Illegality**: **The “modern approach”**  |
| ***Fuller and Purdue*** (1936) 46 Yale L.J. 52 – this is an article | • Damages Fulfill: (1) the **Expectation Interest**, (2) the **Reliance Interest**, (3) the **Restitution Interest**• The sole purpose of Damages is to compensate – no more, no less.• If using a particular formula to find the quantum would result in overcompensation then it should not be used.• If need to distinguish between net and gross profits – net profits is preferred.• “*Yet in this case we "compensate" the plaintiff by giving him something he never had. This seems on the face of things a queer kind of "compensation". We can, to be sure, make the term "compensation" seem appropriate by saying that the defendant's breach "deprived" the plaintiff of the expectancy. But this is in essence only a metaphorical statement of the effect of the legal rule. In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order*.” | **Damages – The Interests Protected**(Heads of Damages) |
| *Sunshine Vacation Villas Ltd.* v. *Hudson Bay Co.* (1984) 58 B.C.L.R. 33, 13 D.L.R. (4th) 93 (C.A.)  | • The Court of Appeal held that the defendant could not recover for loss of capital and loss of gross profit because they were alternatives and it was wrong to make awards based on mixture of two approaches. • The court also held that the plaintiff could elect to claim its expenses but that, if the owner could show that the plaintiff would have incurred a loss had it completed the contract, only nominal damages should be awarded.  | **Damages: Reliance Interest**  |
| *Attorney-General v Blake*, [2001] 1 AC 268  | • In exceptional cases where the normal remedies of damages, specific performance and injunction are inadequate compensation for a breach of contract, the court can, if justice demands it, grant the discretionary remedy of requiring the defendant to account to the plaintiff for the benefits received from the breach of contract.  | **Damages:** **Restitution (Quantification )** |
| *Chaplin* v. *Hicks* [1911] 2 K.B. 786 (C.A.)  | • "The fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."  | **Damages: Quantification**  |
| *Groves* v. *John Wunder Co*. (1939) 286 N.W. 235 (Minn.C.A.)  | • In a construction contract, the law attempts to give the injured party what he was promised and the cost of remedying the defect is the amount awarded as compensation for failure to render the promised performance--“the owner is entitled to compensation for what he has lost, that is, the work which he has been promised” (cost of performance test). • Not followed in *Peevyhouse v. Garland Coal Mining Co*., 382 P. 2d 109 (Okla. S.C., 1962)  | **Damages: Quantification-**cost of performance or diminution of value |
| *Jarvis* v. *Swans Tours* [1973] 1 Q.B. 233 (C.A.)  | • Lord Denning held that there are cases where one can recover damages for the mental distress, disappointment and discomfort caused as a result of breach of a contract for a package holiday. • The court held that the right measure of damages is to compensate the plaintiff for the loss of entertainment and enjoyment which the plaintiff was promised and which he did not get.  | **Damages: Quantification**  |
| ***Hadley v Baxendale* (1854), 9 Exch. Rep. 341, 156 E.R.** | • One is [liable](http://en.wikipedia.org/wiki/Liable) for all losses that ought to have been in the contemplation of the contracting parties.• An injured party may recover those damages reasonably considered to arise naturally from a breach of contract{General Damages}, {**and**} • those damages within the ***reasonable*** contemplation of the parties at the time of contracting. {Special Damages} but one must KNOW AT THE TIME OF THE CONTRACT about the special circumstances.• **What is reasonably foreseeable at the time of contracting requires evidence of the circumstances under which the parties entered into the contract and the knowledge that they possess. Such knowledge can be imputed to the parties from customary trade practice and other sources.**• Consequential damages are linked to knowledge and foreseeability at the time of contracting and deal with the recovery of damages for loss other than those arising naturally.{**Don’t forget Exclusion and Limitation clauses – these are very much a part of damages**.} | **Damages – Remoteness**(the scope of [consequential damages](http://en.wikipedia.org/wiki/Consequential_damages) arising from a [breach of contract](http://en.wikipedia.org/wiki/Breach_of_contract)) Part 1 of 3 |
| ***Victoria Laundry v Newman Industries Ltd.*** [1949] 2 K.B. 528 | * “*Knowledge ‘possessed’ is of two kinds, one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ‘ordinary course of things’* [first rule in Hadley v. Baxendale]”
* “*…there may have to be added in a particular case knowledge which one actually possesses, of special circumstances outside the ‘ordinary course of things’, of such kind that a breach of these special circumstances would be liable to cause more loss.* [second rule in Hadley v. Baxendale]”
* Damages are recoverable if “the loss is a “**serious possibility**” or a “**real danger**” or “**liable to result**” – always with defendant’s knowledge.
 | **Damages – Remoteness**(the scope of [consequential damages](http://en.wikipedia.org/wiki/Consequential_damages) arising from a [breach of contract](http://en.wikipedia.org/wiki/Breach_of_contract)) Part 2 of 3 |
| ***Koufos v Czarnikow*** (The Heron II) [1969] 1 A.C. 350 (H.L.) | * The distinction between remoteness in Contract and Tort. (Tort allows for much wider liability)
* “*…****the question is, on the information available, when the contract was made, should a reasonable man in his position would have realised that such a loss was sufficiently likely to result… or that loss of that kind should have been within his contemplation****.”* –Lord Reid
 | **Damages – Remoteness**(the scope of [consequential damages](http://en.wikipedia.org/wiki/Consequential_damages) arising from a [breach of contract](http://en.wikipedia.org/wiki/Breach_of_contract)) Part 3 of 3 |
| *Asamera Oil Corp v. Sea Oil & General Corp,* *[1979] 1 S.C.R. 633*  | • If the innocent party fails to mitigate the loss they may not be entitled to the full range of remedies. • The defendant cannot be called upon to pay for avoidable losses.  | **Damages - Mitigation** (Specific Performance ) |
| ***Semelhago* v. *Paramadevan*** **[1996] 2S.C.R. 415**  | • Sopinka, J: Specific performance should not be granted as a matter of course absent ***evidence that the property is unique*** to the extent that its substitute would not be readily available, but specific performance was given in this case.  | **Damages: Time of Measurement**(Money instead of Specific Performance) |
| *Dunlop Pneumatic Tyre ltd. v. New Garage and Motor Co. [1915] A.C. 79 (H.L.)*  | • The provision will be liquidated damage if it contains nothing unreasonable, unconscionable or extravagant.  | Damages: Liquidated Damages and Penalties  |
| *Shatilla v. Feinstein* *[1923] 1 W.W.R. 1474, 16 Sask. L.R. 454*  | • When the damages which may arise out of the breach of a contract are in their nature uncertain, the law permits the parties to agree beforehand as to the amount to be paid in case of breach. • Whether the sum agreed upon is a penalty, must depend upon the circumstances of each case. • An agreement for payment of a fixed sum on any one of a number of breaches, some trivial and some serious, is presumed to be void as a penalty since “the strength of a chain is its weakest link”.  | **Damages: Liquidated Damages and Penalties**  |
| *H.F. Clarke Ltd. v. Thermidaire Corp.* *[1976] 1 S.C.R. 319*  | • It is always open to the parties to make the predetermination, but it must yield to judicial appraisal of its reasonableness in the circumstances. • The sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach (Snell’s principles). • The formula of gross trading profit was not defined and it departs markedly from any reasonable approach to recoverable loss or actual loss.  | **Damages: Liquidated Damages and Penalties** |
| *J.G. Collins Insurance Agencies Ltd. v. Elsley* *[1978] 2 S.C.R. 916*  | • Held that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression • A penalty clause should function as a limitation on the damages recoverable—if the actual loss turns out to exceed the penalty, the party should be allowed to recover only the agreed sum.  | **Damages: Liquidated Damages and Penalties** |
| ***Stockloser v. Johnson*** ***[1954] 1 Q.B. 476, [1954] All E.R. 630 (C.A.)*** | • Where there is no forfeiture clause, if money is handed over in part payment of the purchase price and then the buyer makes default as to the balance…once the seller rescinds the contract or treats is as at an end the buyer is entitled to recover their money in law, but the seller can claim damages. • Where there is a forfeiture clause or the money is expressly paid as a deposit a party may have a remedy in equity but two things are necessary: 1. the forfeiture clause must be of a penal nature and 2. it must be unconscionable for the seller to retain the money.  | **Damages: Liquidated Damages and Penalties** |
| *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.(2003),* *63 O.R. (3d) 304 (C.A.)*  | • Specific performance will be granted only if the plaintiff can demonstrate that the subject property is unique: the party seeking specific performance must show that the property has a quality that cannot be readily duplicated elsewhere. • A supervening event causing a radical change in obligation is required to invoke the doctrine of frustration.  | **Equitable Remedies: Specific Performance**  |
| *Warner Bros. v. Nelson* *[1937] 1 K.B. 209, [1936] 3 All E.R. 160*  | • The court granted an injunction, and found an award of damages not an appropriate remedy since they could not reasonably and adequately compensate the defendant’s “special, unique, extraordinary and intellectual” services and no adequate damages were available.  | **Equitable Remedies: Injunction**  |
| *Zipper Transportation v. Korstrom* *(1997) 122 Man. R. (2d) 139 (Q.B*  | • Applying the test as set out in Elsley v. J. G. Collins the court held that the agreement was reasonable and that it would not be contrary to public interest to enforce the injunction.  | **Equitable Remedies: Injunction** **(Interlocutory)**  |
| *Zipper Transportation v. Korstrom (1998) 126 Man. R. (2d) 126 (C.A.)*  | • The Court of Appeal applied a different test considering irreparable harm and balance of convenience and denied the injunction; holding that if the injunction is upheld, no benefit would accrue to Zipper by regaining the Piston Ring runs and that no irreparable harm would result to Zipper if the relief is denied since it was possible to quantify damages 􀃆 So let Korstrom keep the “stolen client” (Piston ring) until the result of the trial is known.  |   |

Misrepresentation - Four Part Test

1. A Statement of Fact,
2. That is Untrue,
3. That is Material,
4. That is Relied On.

Contra Proferentem – an ambiguous term in a Contract will be construed strictly against the party who imposed its inclusion in the Contract (esp. with standard form contracts, a.k.a. contracts of adhesion.)

**TERM ONE:**

| **Topic** | **Case** | **Rule** | **Facts** |
| --- | --- | --- | --- |
| **Offer & Invitation to Treat** | ***Canadian Dyers Assn. Ltd. v Burton* (1920) 47 OLR 259 (HL)** | * No contract unless offer + acceptance
* Mere quotation of price is not an offer, only an invitation to treat
* It is a question of INTENT at the time. Courts will look at language in light of circumstances that is used and the subsequent actions of both parties to determine whether it is a mere quotation or a true offer to sell.
 | * Letter, deed, and acceptance of deposit showed that there was more than mere quotation of price; therefore, contract made
 |
| **Offer & invitation to Treat** (not limited to retail only) | ***Pharmaceutical Society v Boots* [1953] 1 QB 401 (CA)** | * In retail self-service sales: the placing of goods on shelves with price is an invitation to treat
* Offer + acceptance takes place at cashier when customer offers to buy at the price and cashier accepts the offer
 | * P claims no supervision of purchase of poisons in pharmacy– when was purchase/contract made?
* P’s action fails
 |
| Unilateral Contracts**Communication of Offer** | ***Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256 (CA)** | * Advertisement = usually invitations to treat **unless** a reasonable person would think otherwise
* **Mere puffs** are when reasonable person would not intend legal consequences. The details given show it is not a mere puff.
 | * D advertised 100*l* for anyone who used the smoke ball as prescribed and still contracted influenza
* P bought ball, used it, and caught influenza
* P entitled to money
 |
| **Communication of Offer** | ***Williams v Carwardine* (1883) 110 ER 590 (KB)** | * Motive of the offeree does not matter. Only requires performance and knowledge of the offer
 | * P was not induced by offer or reward
* Still entitled to receive award?
* Yes – she performed act outlined in the unilateral contract
 |
| **Communication of Offer**(Public offer to anyone who does something) | ***R v Clarke* (1927) 40 CLR 227 (Aust. HC)** | * In contrast with *Williams v Carwardine*, court held that defendant was *not entitled to reward* because he didn’t act in reliance of the offer and did not intend to accept it
* Reconcile with *Williams v Cawardine* by noting that in a bilateral contract knowledge is required (to enable meeting of minds), but motive is irrelevant
* Knowledge of the offer and intent to accept is required
 | * Proclamation of reward for information leading to arrest
* Clarke entitled to reward?
* No – did not mentally assent to Crown’s offer (no meeting of minds) because he had no knowledge of offer
 |
| Acceptance / Counter Offer**Termination of Offer – Rejection and Counter offer** | ***Livingstone v Evans* [1925] 3 WWR 453 (Alta SC)** | * Rejected offers cannot be accepted without consent of offerror
* Offeror’s response to a counter-offer may be a renewal of original offer, depending on wording and circumstances
* Mere inquiry is not a rejection of an offer
 | * D offered to sell P land for $1800. P answered with: “I will give you $1600. If you won’t take that, wire your lowest price.” D answered: “Cannot reduce price.” P accepted the offer.
 |
| Acceptance / Counter Offer(Battle of Forms) – not applicable | ***Butler Machine Tool v Ex-cell-o Corp.* [1979] 1 WLR 401 (CA)** | * Common law does not create a contract for the parties
* Offers are killed by materially different counter-offers unless some communication reinstates it
* **Denning’s first shot/last shot does not apply**
 | * P quoted price. On back of offer were terms that said “these shall prevail over all others”
* D placed order, but with different terms and conditions -- no mention of price change
* Whose terms prevail? Look at all documents as a whole – found that last document decisive
* D’s terms prevail
 |
| **Communication of Acceptance**  | ***Felthouse v Bindley* (1962) 11 CB** | * Silence does not amount to acceptance, even if person intended to accept
* Some cases of silence can be acceptance, depends on previous dealings of the parties and their practices
* Communication of acceptance can be waived, not the actual acceptance
 | * P discussed with nephew sale of horse; said to send him horse at his convenience, but nephew never responded; horse sold at auction; P sues auctioneer
* No contract made – absence of notification of rejection does not amount to acceptance
 |
| **Communication of Acceptance** | ***Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256 (CA)** | * Actual acceptance can be via conduct
* Communication of acceptance can be waived (ie. Silence is ok)
* Acceptance occurs when the person arrives at the door asking for $$
 | * D advertised 100*l* for anyone who used the smoke ball as prescribed and still contracted influenza
* P bought ball, used it, and caught influenza
* P entitled to money
 |
| **Instantaneous Methods of Communication** | ***Brinkibon v Stahag Stahl* [1983] 2 AC 34 (HL)** | * Acceptances valid when received, including instantaneous communications
* Mailbox rule is the exception that applies to mail and telegrams, valid when sent
 | * Contract made in UK? No – using telex, contract made where acceptance is received (Vienna)
 |
| **Mailed Acceptances (Postal Rule)** | ***Household Fire v Grant* (1879) 4 Ex D, 216 (CA)** | * Mailbox rule upheld despite acceptance not received
* Parties can specify rules to the communication of acceptance and override mail box rule
* Mailbox rule applies if it is logical to do so based on circumstance
 | * acceptance was mailed, but never reached D (who never paid), P tried to claim money from D who said he never was a shareholder
* Contract found – D liable for shares
 |
| **Mailed Acceptances (Postal Rule)** | ***Holwell Securities v Hughes* [1974] 1 WLR 155 (CA)** | * Mailbox rule should only apply if it does not lead to “manifest inconvenience and absurdity.”
* The postal rule does not apply if the express terms of the offer specify that the acceptance *must* reach the offeror. The requirement for “notice” was held to override the mailbox rule
 | * P wanted to exercise options to purchase property; clause stated written notice was required; notice was lost in the mail
 |
| Termination of Offer**Revocation** | ***Byrne v Van Tienhoven* (1880) CPD 344** | * The mailbox rule does not apply to revocation – *revocation must be communicated to the other party to be effective*.
 | * D mails revocation of offer before he receives P’s acceptance and before P receives revocation
* No revocation – binding contract
 |
| Termination of Offer**Revocation** | ***Dickinson v Dodds* (1876) 2 Ch D 463 (CA)** | * If offeror dies, the offer cannot be accepted
* *an offer could be revoked by indirect communication* (or by third party) applying the same general rule logic – that is, once the person to whom the offer was made knows that the property has been sold to someone else, it is too late for them to accept the offer and the contract is impossible to make.
* Promise to keep offer open is not binding unless there is an options contract
 | * D agreed to keep offer to sell house open until Friday; P heard that D was in talks with another on Thursday; P still gave acceptance to D but D said it was too late, already sold to another
* Is D bound to sell to P if another purchases? No – P’s action for specific performance fails
 |
| Unilateral Contracts**Revocation of Unilateral Contract** | ***Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256 (CA)** | * Offer can be revoked up till the point when someone approaches to accept, by giving notice to revoke
* Unilateral contract is formed when person approaches for $$
 |  |
| Termination of Offer**Revocation of Unilateral Contract** | ***Errington v Errington and Woods* [1952] 1 KB 290 (CA)** | * Unilateral contracts are formed when all conditions of the offer are met
* In unilateral contracts, must make distinction between performance and acceptance. Acceptance is complete when offeree has unequivocally commenced performance, but the offeror is not bound to provide his performance until the act is completely performed
* Restitution imposes an obligation to keep the offer open if offeror is aware that performance has started, although acceptance is not completed
 | * Unilateral promise by father (in-law) to give house to kids: gave down-payment as gift and got loan in his name for them to repay over time; he was seeking their act of payment as acceptance; kids kept paying and living there on promise that father would transfer title when all payments made; upon his death, his estate owned the house and kids left as ‘bare licensees’
 |
| Counter OfferTermination of Offer – Rejection and Counter offer | ***Livingstone v Evans* [1925] 3 WWR 453 (Alta SC)** | * See previous entry
 | * D offered to sell P land for $1800. P answered with: “I will give you $1600. If you won’t take that, wire your lowest price.” D answered: “Cannot reduce price.” P accepted the offer.
 |
| Termination of Offer**Lapse of Time** | ***Barrick v Clarke* [1951] SCR 177** | * An offer will lapse in any of the following cases:
1. Time limit specifice by offeror passed
2. Within reasonable time(if not time limit specified)

Courts will use a “reasonable time” depending on the nature/character of the item, circumstances, conduct of the parties and the usual course of business. | * Offer made to R; R was away hunting
* R did not accept A’s offer within reasonable time – no contract made
* Implied rejection is based on actions of offeree and possible to look at circumstances after
* Implied revocation based on proof up till offer
 |
| Certainty of Terms**Incomplete Terms** | ***May & Butcher v R* [1934] 2 KB 17 (HL) This case is only used to interpret SOGA nowadays, use Hillas instead!** | * Reasonable price section in SOGA only applies when parties never mentioned price, does not apply when parties designated a way to ascertain price
* **This case is only used to interpret SOGA nowadays, use Hillas instead!**
 | * P agreed to buy from government at unspecified terms of price and dates.
* Price “will be determined from time to time”
* Agreement too vague? Yes – no binding contract made. SOGA can’t imply price. Arbitration clause also not binding
 |
| Certainty of Terms**Incomplete Terms** | ***Hillas v Arcos* (1932) 147 LT 503 (HL)** | * Court will interpret fairly/broadly if parties intend/believe to be in contract
* Note difference between imposing a contract vs discovering the terms of it
* Missing of essential terms will make it not binding BUT courts will interpret as best they could rather than perish
* Will take into account circumstances, context, expression, importance, etc
 | * P brought action against D for breach of contract of sale of timber – agreement left essential terms to be decided later
* CA: no enforceable contract
* HL: enforceable contract
 |
| Certainty of TermsIncomplete Terms | ***Foley v Classique Coaches Ltd.* [1934] 2 KB 1 (CA)** | * Interpreted HL’s general principles in *Hillas* to mean that each case should be decided on the construction of the particular document.
* An agreement to agree on price from time to time was certain enough since the parties believed they had a contract and acted for 3 years as if they did (i.e. partial performance: transfer of land, portion of sale of gas agreement had been performed).
 | * D agreed to purchase land with supplemental agreement to buy gas at a price to be agreed upon; P sued when D tried to buy petrol elsewhere
* Contract? Yes – P entitled to damages
 |
| Certainty of Terms**Agreements to Negotiate** | ***Empress v Bank of Nova Scotia* [1991] 1 WWR 537** | * The courts will try to give the proper legal effect to any clause that the parties understood and intended to have legal effect.
* an *implied term* to negotiate in good faith, it is enforceable to *some extent*.
* When parties stated a formula (i.e. market value) to ascertain a clause but did not supply machinery for applying the formula, the courts will supply the machinery and apply the formula (as long formula not defective).
* Where formula is set out but defective and machinery is provided, the machinery may be used to cure the defect in the formula.
* This case gives *some meaning* to promises to negotiate, but does not impose a contract
 | * P leased to bank (D) for 5 years, with option to renew lease for a further 5; rental rates were to be those prevailing at the start of the renewal term as mutually agreed b/t landlord and tenant; D wanted to renew, P didn’t want to let them.
* P not granted writ of possession
 |
| Certainty of Terms**Agreements to Negotiate** | ***Mannpar Enterprises v Canada* [1997] 33 BCLR (3d) 203 (SC)** | * Promises to negotiate does not impose a contract
* Courts imply terms to give business efficacy to contracts
* Use of the term “renegotiate” does not promise a future agreement or duty to negotiate in good faith
 | * P held a 5-yr permit under Crown to remove and sell sand/gravel from Indian reserve – agreement to enter into negotiation of the rate after 5 yrs for another 5.
* Was there an obligation to negotiate in good faith, stated or implied? No
 |
| **Intention to Create Legal Relations** | ***Balfour v Balfour* [1919] 2 KB 571** | * AtkinLJ: the common law does not regulate agreements between spouses.
* There is a strong presumption that family agreements are not intended to produce legal consequences.
* **Might not represent view of the courts nowadays**
* Contract void if no intention BUT is enforceable. Court may still adjudicate
 | * Husband failed to pay wife money he promised her; deal was made during their marriage.
* Binding contract? No
 |
| **Intention to Create Legal Relations** | ***Rose and Frank v JR Cromptons & Bros.* [1923] 2 KB 261 (CA)** | * There is a strong presumption that business agreements are intended to produce legal consequences.
* However, if there is a clear and definite expression to the contrary, there is no reason in public policy why effect should not be given to their intention.
* However, terms ousting the court as adjudicator will likely be ignored
 | * P distributed D’s paper products; 1913 signed new agreement that said “not subject to legal jurisdiction in US or UK” to which they each “honourably pledge themselves”; D terminated agency agreement
* “honor” pledge effective in keeping the agreement outside of enforcement? Yes
 |
| Consideration**Nature of Seals** | ***Royal Bank v Kiska* [1970] 2 OR 379 (CA)** | * Seals can still be used to create a legal contract with no consideration
* Seal requires **action** and **acknowledgment by the promise** that shows the **understand** the seriousness of what they are doing
 | * D signed a guarantee which had no wafer seal attached; the word “seal” was printed next to D’s signature
 |
| Consideration**Nature of Consideration**  | ***Thomas v Thomas* (1842) 2 QB 851** | * Consideration is something which is of some value in the eyes of the law.
* Consideration must move from the promisee
* Consideration must be of value; it need not be adequate.
* Motive (“wishes of the diseased) is irrelevant as consideration
 | * Husband wanted to leave house to wife when
* After death of co-executor, D tried to eject P out of house.
* Binding agreement? Yes – sufficient consideration in wife’s annual rent of 1*l*
 |
| Consideration**Adequacy of Consideration** | ***Mountford v Scott [1975] Ch. 258*** | * Anything of value, however small the value, is sufficient consideration to support a contract at law.
* Adequacy is for the parties to decide at that time, not for the courts
 | * D sold P an option for 1 pound; the option gave P right to buy D’s house for 10,000 pounds; D wanted to cancel firm offer, but P exercised option to purchase the house
 |
| Consideration**Past Consideration** | ***Eastwood v Kenyon* (1840) 113 ER 482 (QB)** | Past consideration is not good consideration for a new promise made *after* a benefit was conferred or when the benefit was not conferred at the request of the promisor.Promise made (when without capacity) and repeated when regaining capacity will be binding | * P spent money on ward’s education; when ward of page, promised to repay and made one payment before marrying; husband then promised to pay and didn’t; P sued for breach
* Held: D’s agreement lacked consideration
 |
| Consideration**Past Consideration** | ***Lampleigh v Brathwait* (1615) 80 ER 255 (KB)** | * Past consideration may be a good consideration for a subsequent promise if the previous benefit was conferred at the request of the promisor and there was an understanding that it will ultimately be paid for
 | * D killed someone and asked P to ride around the countryside to get the king’s pardon; afterwards, D agreed to pay P for his trouble, but didn’t.
* Held: Good consideration, so D should pay.
 |
| Consideration**Forbearance** | ***Callisher v Bischoffsheim (1870) England QB*** | * Forbearance can be valid consideration, IF the person giving promise honestly believes the lawsuit has merits
* Forbearance is **not** valid consideration if he knows the case is without merit
 | * P had *potential* lawsuit against D. D promised to pay in exchange for dropping suit. D never paid
 |
| ConsiderationPre-existing Legal Duty – Duty Owed to **Third Party** | ***Pao On v Lau Yiu Long* [1980] AC 614 (PC)** | * A promise to perform, or the performance of a pre-existing contractual obligation to a third party can be valid consideration.
* Reusing a previous obligation to a third-party is further detriment to promisor and creates new obligation
 | * P agrees to sell shares to Fu Chip in exchange for 4M shares in Fu Chip (as part of this deal, P agrees to hang onto 60% of stock in order to prevent its depression); P wants protection in case the stock price goes down, so gets indemnity agreement with D; when P realizes they won’t receive benefits if the price goes up, they re-negotiate a new indemnity deal; D will buyback the shares at a min of $2.50 each if stock goes lower by xx date.
* Stock crashes to $0.36, D won’t buyback
* 2 separate contracts: (1) P + Fu Chip, (2) P and D (indemnity deal)
 |
| ConsiderationPre-Existing Legal Duty – Duty Owed to the **Promisor** | ***Gilbert Steel v University Construction Ltd.* (1976) 67 DLR (3d) 606 (CA)** | * Promise to pay more is not enforceable without consideration (see Greater Fredericton for new proposition)
* It would have been enforceable if the parties clearly intend to abandon the old agreement and used its forbearance as consideration for the new one
 | * P entered into written contract with D to sell steel at fixed price; P announced increase in price – made a new contract; had another oral agreement about a price increase with 2 new clauses, but these weren’t mentioned later.
* Was there consideration for this new contract? P argued ‘good price’ was consideration – No
 |
| ConsiderationPre-Existing Legal Duty – Duty Owed to the **Promisor** | ***Greater Fredericton Airport v NAV Canada (NB court)*** | * Post contractual *modification* (not adding new things) of an existing obligation is enforceable without consideration if there is no economic duress
* Economic duress doctrine relaxes need for consideration
* English law no longer requires consideration for modification as long as promise receives some benefit
 | * Airport agreed to pay more under a pre-existing agreement
 |
| ConsiderationPre-Existing Legal Duty – Duty Owed to the **Promisor** | ***Foakes v Beer* (1884) 9 App. Cas. 605 (HL)** | * common law: an agreement to accept less without consideration not binding
* consideration can be given by giving something extra in return (ie. A pen) or different form of payment
* *Note*: this case has been overruled in BC by **s. 43 of Law and Equity Act** – *Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.*
 | * D held judgment against P and agreed to take $500 down and payments in exchange in forbearance; when paid in full, D sued P for interest
* Consideration? No
 |
| ConsiderationPre-Existing Legal Duty – Duty Owed to **Promisor** | ***Foot v Rawlings* (1964) (SCC)** | * Taking less for debt is ok as long as there is accord and satisfaction. The consideration van be very little, such as different form of payment
* Post-dated cheques were good consideration for the agreement to forbear action – as long as D continues giving cheques, P’s right to sue is suspended.
 | * P agreed to lower the interest on debts and take payments on condition that D make the payments on time; D made payments, but P sued him for whole amount anyways
* Consideration? Yes
 |
| Consideration**Waiver and Promissory Estoppel** | ***Central London Property v High Trees House* [1947] 1 KB 130** | * Promises (without seal or consideration) are binding when made with the following conditions 1. Intended to create legal relations, 2. To the knowledge of the person making the promise, was going to be acted on by the other party, and 3. Other party acted on it.
* The promise can be extinguished if the prevailing conditions no longer exist or if the promisor gives reasonable notice.
* It cannot be used as a cause of action.
 | * P agreed to take lower rents during the war.
* After war, P wanted to enforce higher rent; P brought action for payment – granted partially.
 |
| Consideration**Waiver and Promissory Estoppel** | ***John Burrows v Subsurface Surveys***  | * The passive conduct of the appellant was not taken by the court as a waiver of his rights to seek enforcement of the contract, but only as friendly indulgences – *indulgences not equal to intention.*
* When there is no consideration or deed, any relaxation of terms must be clear and unequivocal.
* Estoppel only applies when there is an intent to change relations and promise leads the other party to believe so..
 | * P held promissory note for D with a default clause; over 18 months, D was late with payment but P took no action; then, P sued for whole amount.
* Does equitable estoppels or estoppels by representation apply here? No
 |
| Consideration**Waiver and Promissory Estoppel** | ***D&C Builders v Rees* [1966] 2 QB 617** | * Estoppel can be used to suspend legal rights and preclude enforcement
* Estoppel only works when it would be inequitable for it not to
* Must be true accord and satisfaction for agreement to take less to be binding
* A promise made under duress should not be estopped.
 | * P took a lesser-sum settlement for contracting work agreeing to ‘satisfaction.’
* Settlement binding on P? No – no true accord; deal under duress and shouldn’t be estopped.
 |
| Consideration**Waiver and Promissory Estoppel** | ***Combe v Combe*[1951] 2 KB 215 (CA)** | * Promissory estoppels cannot be used as a cause of action itself, it can be secondary as part of a real cause of action (but not too much part of it).
* Promissory estoppel only can be used as a shield, not a sword
* PE should only be used when there is a pre-existing legal relationship.
 | * Husband agreed to pay allowance to ex-wife (with no consideration) but never does; after 7 yrs she sues (using estoppels as sword)
* Is she entitled? No – no consideration
 |
| Consideration**Waiver and Promissory Estoppel** | ***Waltons Stores Ltd. v Maher* (1988) 62 ALJR (HC)** Beware of its applicability in Canada | * Australian court made an exception to the general rule that promissory estoppel is confined to pre-existing legal relationship.
* Promissory estoppel can be used in absence of pre-existing legal relation if there was a reliance on the promise that was a reasonable expectation and if a departure from the promise is unconscionable behaviour.
* Estoppel used as sword; can’t encourage other party to act in detriment where outcome would be unconscionable. Ie. There was reliance/detriment
 | * P negotiated with D for lease of land; P sent letter saying: “we’ll let you know by tomorrow if anything isn’t agreed to.” No notification was sent, and demolition/construction of bldg began with P’s knowledge.
* Is P stopped from denying existence of binding contract?
 |
| Consideration**Waiver and Promissory Estoppel** | ***M(N) v A(AT)* (2003) 13 BCLR (BCCA)** | * Courts seem positive towards *Walton* stores case but it was not applied
* Courts said in this case there was no reasonable expectation that a legal relationship be made
 | * M promised to pay A’s mortgage in UK; M never paid but lent her $100,000.
* Promise to pay mortgage binding? No – lack of mutuality
 |
| **Privity**Third Party Beneficiaries | ***Tweddle v Atkinson* (1861) 1 B & S 393** | * A third party can neither sue nor be sued on a contract, even as a beneficiary
* Common law principle that no stranger to the consideration can take advantage of a contract (even for his benefit), not it is changed by statute and overruled in some jurisdictions but NOT in Canadian courts
 | * Father and father-in-law of P agreed to pay P 200$ and say he can sue if he doesn’t get it; P sues for the $$ when father dies.
 |
| **Privity**Third Party Beneficiaries | ***Dunlop Pneumatic Tyre v Selfridge’s* [1915] AC 847 (HL)** | * Only a person who is a party to a contract can sue.
* A principal not named in the contract, however, may sue upon it if the promisee really contracted as his agent and provides consideration.
 | * P sold tires to wholesaler, Dew, with agreement not to sell below listed price except to customers in the motor trade; Dew sells tires to D; they sign agreement not to sell below list, or to give P 5$ each if they do.
 |
| **Circumventing Privity**Specific Performance | ***Beswick v Beswick* [1966] 1 Ch. 538 (CA)****[1968] AC 58 (HL)** | * Under common law, a third party has no right to sue under a contract because no consideration (none from aunt).
* Rule of privity is not changed from this case, this case only illustrates that the courts went around it by allowing the aunt to sue as the administratix. PRIVITY STILL APPLIES!
* CA and HL granted specific performance to aunt as an equitable remedy, very rare for specific performance to happen
 | * Uncle sells business to nephew in exchange for nephew paying support to aunt; nephew refuses to pay after uncle’s death.
* By not paying money, nephew was in breach, only uncle’s estate can sue, but estate sustained no damage, specific performance is difficult to get
* Can wife (third party) sue? Yes – but only as administratrix, not on behalf of herself.
 |
| **Circumventing Privity**Employment | ***London Drugs v Kuehne & Nagel* [1992] 3 SCR 299** | * doctrine of privity is modified to allow employees to use limitation of liability clauses (made for their benefit) in a contract which they are not a party to. This can only be used as a shield, not a sword. Must satisfy 2 conditions:

 1. Limitations of liability clause expressly or implicitly extend benefits to employees seeking to rely on it (courts say that intention to extend the benefit of limitations is implied in all cases, unless the contrary is stated)2. Employees must be acting in the course of employment **AND** performing the services provided for in the contract between their employer and the plaintiff when the loss occurs (ie. If they were doing something they were not supposed to, then they can’t use this as a shield) | * P’s transformer dropped by D’s warehousemen; company had $40 limitation clause.
* Can employees obtain benefit of the clause? Yes
 |
| **Circumventing Privity**Subrogation | ***Fraser River Pile & Dredge v Can-Dive Services* [1999] 3 SCR 108** | * Parties to a contract cannot extinguish terms of the contract that benefits a third party if the third party’s benefits have crystallized.
* This case is an extension of the exception in the *London Drugs* case
* Third parties (not just employees) can rely on limitations of liability clauses/waivers on contracts (as a shield) which they are not a party to if:
1. The parties intended the benefits to extend to the third party (explicit or implicit).
2. The third party’s activities are within the scope of the contract
 | * A’s barge sank while under charter to R; contract of insurance between A and insurer contained ‘waiver of subrogation against any charterer’ clause, which extended coverage to charterers.
* A and insurance Co wanted to vary contract so insurer could sue R for negligence.
* Is R entitled to rely on clause? Yes
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