### OFFER V INVITATION TO TREAT

**Intention is the key to determining whether or not an offer exists.**

* Words & Actions
* Whether the conduct of parties to an outside observer implies an offer

**Factors to Distinguish Offer from Invitation to Treat (ABSENT AUTHORITY)**

* Whether all details of the eventual contract are clear or can be made out from the communication
* Whether treating a communication as an offer could lead to an absurdity

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| ***Canadian Dyers Association Ltd. V. Burton***  ***Words and Actions to See Intent***  ***Mere Price Quotations are usually invitation to Treats*** | 1. **MERE PRICE QUOTATIONS ARE USUALLY AN INVITATION TO TREAT** 2. **OBJECTIVE TEST TO THE WORDS AND ACTIONS OF THE PARTIES TO SEE INTENTION** |
| ***Pharmaceutical Society of Great Britain v. Boots Cash Chemist***  ***Display of Goods in Invitation to Treat*** | 1. **DISPLAY OF GOODS IS AN INVITATION TO TREAT** 2. **CUSTOMER MAKES THE OFFER WHEN THEY TAKE GOODS TO CASHIER, CASHIER ACCEPTS OFFER** |
| ***Carlill v.Carbolic Smoke Ball Co.***  ***Ads are invitation to treat unless language is clear and ordinary person would construe as offer*** | 1. **ADS ARE GENERALLY INVIATION TO TREAT UNLESS THE LANGUAGE IS CLEAR THAT AN ORDINARY PERSON WOULD CONSTRUE AN INTENTION TO OFFER “REASONABLE PERSON TEST”** 2. **OFFEROR CAN WAIVE NOTICE OF ACCEPTANCE BY WAY OF WORDING OF THE CONTRACT** 3. **ACCEPTANCE IS CONVEYED BY PERFORMANCE OF THE CONDITIONS** |

### COMMUNICATION OF OFFER

**Offers must be communicated to the acceptor. One cannot accept an offer in ignorance. Intention to accept an offer is required, but motive for doing so is considered irrelevant**

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| ***Wiiliams v. Carwardine***  ***Knowledge + Intent Required to Accept (Motive Irrelevant)*** | 1. **MOTIVE IS IRRELEVANT IN ACCEPTANCE; ONLY KNOWLEDGE OF THE OFFER AND SOME INTENT TO ACCEPT IT IS NECESSARY.** |
| ***R.v. Clarke***  ***Knowledge + Intent Required to Accept*** | **A. KNOWLEDGE OF OFFER AND INTENT TO ACCEPT THE OFFER IS REQUIRED** |

### REVOCATION OF OFFER

**Ways to terminate an offer: Revocation by the offeror, rejection by offeree (include via counter-offer, and laspse of time (explicitly states or implicitly inferred)**

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| ***Byrne v. Van Tienhoven***  ***Revocation must be communicated***  ***Offers can be revoked anytime*** | 1. **OFFERS CAN BE REVOKED AT ANYTIME BEFORE ACCEPTANCE, BUT REVOCATION MUST BE COMMUNICATED** 2. **POSTAL ACCEPTANCE RULE DOES NOT APPLY TO REVOCATIONS** |
| ***Dickinson v. Dodds***  ***Offeror not bound to keep offer open*** | 1. **OFFEROR NOT BOUND BY HIS PROMISE TO KEEP OFFER OPEN UNLESS THERE IS CONSIDERATION FOR THAT PROMISE** 2. **OFFEREE CANNOT ACCEPT AN OFFER THAT HE KNOWS NO LONGER EXISTS BECAUSE SOMEONE ELSE HAS ACCEPTED IT (INDIRECT REVOCATION)** |
| ***Carlill v.Carbolic Smoke Ball Co***  ***Generally, offer can be revoked prior to completion in Unilateral K, sometimes not once performance has started (Errington)*** | 1. **GENERALLY, OFFER CAN BE REVOKED PRIOR TO COMPLETION IN UNILATERAL K, SOMETIMES NOT ONCE PERFORMANCE HAS BEGUN** 2. **DIFFICULT TO DETERMINE WHEN UNILATERAL K IS ACCEPTED AND THEREFORE WHEN AN OFFER CAN BE REVOKED—GENERALLY TAKEN TO MEAN WHEN PERFORMANCE HAS STARTED** |
| ***Errington v. Errington & Woods***  ***Unilateral binding when conditions begin*** | 1. **UNILATERAL K BINDING ONCE PERFORMANCE OF CONDITIONS BEGINS**     1. **Subject to the qualification that the offeror knows that the performance to accept has begun** 2. **TRY TO MAKE CONTRACTS BILATERAL** |

### REJECTION AND COUNTER-OFFER

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| ***Livingstone v. Evans***  ***(Counter-Offer is Rejection)***  ***(Mere Inquiry is not Rejection)*** | 1. **COUNTER OFFER IS A REJECTION OF THE ORIGINAL OFFER THAT OFFEROR CAN REVIVE** 2. **MERE INQUIRY OR CLARIFICATION ABOUT THE OFFER DOES NOT KILL IT** |

### LAPSE OF TIME

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| ***Barrick v. Clark***  ***Acceptance within reasonable time*** | 1. **ACCEPTANCE MUST BE COMMUNICATED WITHIN TIME LIMIT, OR IF NO TIME LIMIT, WITHIN A REASONABLE TIME** |

### ACCEPTANCE

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| ***Livingstone v. Evans***  ***Mere inquiry not Counter-Offer—adding something is*** | 1. **MERE INQUIRY ABOUT THE OFFER DOES NOT KILL IT**    1. **Adding something could be construed as a counter-offer**    2. **Acceptance needs to be an “unqualified yes”** |
| ***Butler Machine Tool Co. v. Ex-Cell-O-Corp***  ***Terms on the last form wins*** | 1. **TERMS ON THE LAST FORM WINS AS THIS IS THE LAST OFFER AND ACCEPTANCE** |

### COMMUNICATION OF ACCEPTANCE

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| ***Felthouse v. Bindley***  ***Silence is not acceptance*** | 1. **SILENCE CANNOT CONSTITUTE ACCEPTANCE AS THAT PLACES AN UNFAIR BURDEN ON THE OFFEREE (IMPOSES A BURDEN TO THE OFFEREE), UNLESS THERE IS AN ACTION (CARLILL)** 2. **JUST BECAUSE PARTIES INTENDED THERE BE A K DOESN’T MEAN THERE IS ONE** |
| ***Carlill v.Carbolic Smoke Ball Co.***  ***Notice of Acceptance can be waived*** | 1. **NOTICE OF ACCEPTANCE CAN BE WAIVED BY THE OFFEROR** 2. **PERFORMANCE OF TERMS CAN CONSTITUTE ACCEPTANCE** |
| ***Brinkibon v. Stahag Stahl***  ***Notice of Acceptance can be waived***  ***Receipt Rule of Acceptance: Contract is made when and where acceptance is received (not necessarily communicated)*** | 1. **CONTRACT COMES INTO EXISTENCE WHEN AND WHERE ACCEPTANCE WAS RECEIEVED** 2. **CAN STIPULATE WHAT LAW APPLIES AND WHAT COURTS WILL HEAR THE MATTER** |
| ***Household Fire & Carriage Accident Insurance Co. v. Grant***  ***Postal Acceptance Rule*** | 1. **POSTAL ACCEPTANCE RULE: ACCEPTANCE TAKES PLACE WHEN THE COMMUNICATION IS GIVEN TO THE POST OFFICE (NOT REALLY FAIR TO OFFEROR)—BUT OFFEROR CAN SPECIFY WHAT THE ACCEPTANCE HAS TO LOOK LIKE.** |
| ***Howell Securities v. Hughes***  ***Postal Acceptance Rule does not apply if stipulated or absurd*** | 1. **POSTAL ACCEPTANCE RULE DOES NOT APPLY IF (1) TERMS OF THE OFFER STIPULATE OTHERWISE OR (2) ITS APPLICATION WOULD PRODUCE ABSURDITY AND INCONVENIENCE.**     1. **Such as personal service, marriage, etc.** |

### CERTAINTY OF TERMS

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| ***May & Butcher Ltd. v. R.***  (Should probably use Hillas) | 1. **IF CRUCIAL TERM IS UNDERTERMINED THERE IS NO K** 2. **IF THERE ARE THINGS TO BE AGREED UPON THEN THERE IS NO K** 3. **SOGA ONLY APPLICABLE WHEN PARTIES ARE SILENT TO PRICE** |
| ***Hillas & Co. v. Arcos Ltd.***  ***Try to Preserve Contract if intended*** | 1. **COURTS SHOULD NOT CREATE A K WHERE THERE ISN’T ONE BUT SHOULD TRY TO PRESERVE ONE IF THE PARTIES INTENDED IT TO EXIST** 2. **COURTS MUST LOOK AT INTENTION AND UPHOLD WHEREVER POSSIBLE** |
| ***Foley v. Classique Coaches Ltd.***  ***Courts fill in details in Business K*** | 1. **LOOK TO INTENTION—STRONG PRESUMPTION IN BUSINESS K THAT COURTS WILL FILL IN DETAILS** 2. **UPHOLD EXISTING K AS MUCH AS POSSIBLE, ESPECIALLY IF BOTH PARTIES BELIEVED AND ACTED AS IF THEY HAVE A K** |
| ***Empress Towers Ltd. v. Bank of Nova Scotia***  ***Agreement to agree not enforceable—has some meaning but no K*** | 1. **CAN’T ENFORCE AN AGREEMENT TO AGREE, BUT THERE IS AN OBLIGATION TO NEGOTIATE IN GOOD FAITH AND NOT TO WITHOLD AN AGREEMENT UNREASONABLY** 2. **AGREEMENT TO AGREE HAS SOME MEANING BUT NOT FULL K**    1. **Landlord should be precluded to possess the property before negotiating in good faith therefore it is premature** |
| ***Mannpar Enterprises v Canada***  ***Agreement to agree=No K*** | 1. **THERE IS NO CONTRACT DUTY TO NEGOTIATE IN GOOD FAITH IN AN AGREEMENT TO AGREE** 2. **AN AGREEMENT TO AGREE= NO K** 3. **DUTY TO NEGOTIATE IS NOT WORKABLE WITHOUT A BENCHMARK** 4. **FIDUCIARY DUTY SOMETIMES TRUMPS CONTRACT (UNLESS YOU PUT YOURSELF IN THAT POSITION).** |

### INTENTION TO CREATE LEGAL RELATIONS

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| ***Balfour v. Balfour***  ***Family Agreements Not K*** | 1. **FAMILY AGREEMENTS ARE NOT ENFORCEABLE BECAUSE THERE IS STRONG PRESUMPTION THAT THEY WERE NOT INTENDED TO HAVE LEGAL CONSEQUENCES (UNLESS EXPLICITLY STATED)**    1. **Hurts the weaker party—perhaps quite odd nowadays** |
| ***Rose & Frank v. JR Crompton & Bros***  ***If Parties say no intent to create legal creations then no K (not likely valid today)*** | 1. **IF PARTIES EXPLICITLY STATE THAT THEY HAVE NO INTENTION TO CREATE LEGAL RELATIONS, THEN THE K IS NOT BOUND BY THE COURT**     1. **CLAUSE NOT LIKELY TO BE EFFECTIVE TODAY**    2. **ARBITTRATION CAN USE USED TODAY**    3. **CASE MAY NOT BE RELEVANT** |

### CONSIDERATION

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| ***Royal Bank v. Kiska***  ***(Seal Requirements)*** | 1. **SEAL REQUIRES ACTION AND ACKNOWLEDGEMENT BY THE PROMISSOR THAT SHOWS HE WAS AWARE THAT HIS ACTIONS IS MAKING THE AGREEMENT LEGALLY BINDING** |
| ***Thomas v. Thomas***  ***(Nature of Consideration)*** | 1. **CONSIDERATION MUST BE SOMETHING OF VALUE IN THE EYES OF THE LAW—NEEDS TO BE SUFFICIENT BUT NOT NECESSARILY ADEQUATE** 2. **CONSIDERATION MUST MOVE FROM PROMISEE TO PROMISOR** 3. **MOTIVE (LOVE & AFFECTION) IS NOT THE SAME AS CONSIDERATION** |
| ***Mountford v. Scott***  ***(Adequacy of Consideration)*** | 1. **ANYTHING OF VALUE IS SUFFICIENT SO LONG AS THE PARTIES AGREE** |
| ***Callisher v. Bischoffsheim***  ***(Forbearance)*** | 1. **FORBEARANCE IS NOT VALID CONSIDERATION IF HE KNOWS THAT THE CASE IS WITHOUT MERIT** 2. **FORBEARANCE CAN BE CONSIDERATION IF THE PERSON GIVING PROMISE HONESTLY BELIEVES THE LAWSUIT HAS MERITS** |
| ***Eastwood v. Kenyon***  ***(Past Consideration)*** | 1. **PAST CONSIDERATION IS NOT GOOD CONSIDERATION FOR A NEW PROMISE MADE AFTER THE BENEFIT WAS CONFERRED** |
| ***Lampleigh v. Brathwait***  ***(Emergency Doctrine)*** | 1. **Emergency Doctrine: Promises coupled with an expectation of an action can become binding. If a vague reward (no consideration) or reasonable expectation of reward is promised and then made explicit (consideration) the promise becomes binding despite the timeline of events.** 2. **An act done before a promise to pay can sometimes be consideration for the promise. The act must have been done at the promisor’s request and there was an understanding that it will be ultimately paid for.** |
| ***Pao On v Lau Yiu Long***  ***Pre-existing legal duty is good consideration***  ***Economic Duress may vitiate consent and render K voidable*** | 1. **PRE-EXTISTING LEGAL DUTY IS VALID CONSIDERATION AS IT CREATES SOMETHING NEW** 2. **COURT ALSO APPROVES DEFENCE OF ECONOMIC DURESS TO PREVENT EXPLOITATION IN SIMILAR SITUATIONS—THIS IS COERCION OF THE WILL SO AS TO VITIATE CONSENT AND CAN RENDER A K VOIDABLE, BUT MUST BE CLAIMED PROMPTLY** |

### Duty Owed to Promissor

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| ***Gilbert Steel v. University Construction Ltd.***  ***Promise to do more than original promise not sufficient consideration*** | **PROMISE TO DO MORE THAN ORIGINAL PROMISE MADE IN PRE-EXISTING K CANNOT BE SUFFICIENT CONSIDERATION UNLESS WHAT IS RECEIVED IS CHANGED**   1. **Variation in price is a modification, not a new contract** 2. **Estoppel cannot be used as a sword, only shield (Also have to show that person relied on it P did not)** |
| ***Greater Fredericton Airport v. NAV Canada***  ***Modifications to K enforceable if not procured under Econ. Duress***  (Conflicts with Gilbert Steel) | **POST-CONTRACTUAL MODIFICATIONS WITHOUT FRESH CONSIDERATION CAN BE ENFORCEABLE IF VARIATION WAS NOT PROCURED UNDER ECONOMIC DURESS**   * 1. **Promise must be sincere and enhance existing obligation and not procured under economic duress**   2. **Also allows for economic duress claim which P used to win**  1. **COMMERCIAL REALITIES NEEDS TO BE RECOGNIZED, AND THE LAW SHOULD PROTECT THE PARTIES’ LEGITIMATE EXPECTATIONS THAT MODIFICATIONS WILL BE ENFORCEABLE** |
| ***Foakes v. Beer***  ***Promise to accept less not good consideration (Overridden)*** | **A PROMISE TO DO LESS FOR THE SAME PROMISE IS NOT GOOD CONSIDERATION**   * 1. **(Overridden by Statute in BC)** |
| ***Foot v. Rawlings***  ***Difference in form/time payment is good consideration*** | 1. **IF THERE IS A DIFFERENCE FORM OR TIME OF PAYMENT, THERE WILL BE GOOD CONSIDERATION**    1. **Different forms can have practical benefits** |
| ***Law and Equity Act, s.43*** RSBC 1996, c. 253 – Supplement 6 | ***Part performance of an obligation, either before or after the breach of it, when expressly accepted( Must be voluntary) by the creditor in satisfaction of rendered under an agreement for that purpose though without any consideration, must be held to extinguish the old obligation.***   1. **WOULD OVER RULE FOAKES V. BEER—NOTE: PAYMENTS MUST BE STARTED AND ACCEPTED (ROMMERILL V. GARDNER [1962] (BCCA).** 2. **CANNOT BE USED TO GET MORE MONEY—Not about Promises, but about Actions** |

### Promissory Estoppel and Waiver

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| ***Central London Property Ltd. v. High Trees House***  ***Promise intending to be binding, intended to be acted upon, and in fact acted on is binding*** | 1. **A PROMISE INTENDED TO BE BINDING, INTENDED TO BE ACTED UPON AND IN FACT ACTED ON, IS BINDING SO FAR AS ITS TERMS PROPERLY APPLY EVEN ABSENT OF CONSIDERATION (I.E. CONDITIONS CAUSING PROMISE TO BE MADE STILL EXIST)**    1. **IT CAN ONLY BE BINDING IF IT WOULD BE INEQUITBLE OTHERWISE** 2. **(NARROWER RATIO) IF YOU HAVE MADE A PROMISE TO ACCEPT A LESSER SUM IN SATISFACTION OF A LARGER SUM AND IT WAS INTENDED TO BE BINDING AND IT WAS RELIED UPON IS BINDING ABSENT CONSIDERATION** |
| ***John Burrows Ltd. v. Subsurface Surveys Ltd***  ***Waiving rights in the past ≠ waiving rights in the future*** | 1. **WAVING RIGHTS IN THE PAST DOES NOT MEAN PROMISING TO WAIVE RIGHTS IN THE FUTURE (THERE HAS TO BE A PROMISE)** |
| ***D. & C. Builders Ltd. v. Rees***  ***Must be fair to enforce promise*** | 1. **PROMISSORY ESTOPPEL: IT MUST BE FAIR TO ENFORCE THE PROMISE** 2. **CREDITOR IS BARRED FROM HIS LEGAL RIGHT ONLY IF IT WOULD BE INEQUITABLE FOR HIM TO INSIST ON THEM** 3. **NOT BOUND BY A PROMISE UNLESS THERE IS TRUE ACCORD—A PROMISE MADE UNDER DURESS SHOULD NOT BE ESTOPPED** |
| ***Combe v. Combe***  ***Promissory Estoppel is a Shield*** | 1. **ESTOPPEL IS A SHIELD NOT A SWORD** 2. **ESTOPPEL COULD ACT ON EXISTING OBLIGATIONS LIKE CONTRACT PROMISES** 3. **ESTOPPEL CAN BE USED AS PART OF A CAUSE OF ACTION BUT NOT THE WHOLE OF CAUSE OF ACTION** |
| ***Waltons Stores (Interstate) Pty. Ltd. v. Maher***  ***Both Shield and Sword (for Unconsciousable Outcomes)—Even without pre-existing duty***  ***(Persuasive Only)*** | 1. **ESTOPPEL IS A SWORD AND A SHIELD—EVEN WHERE THERE IS NO PRE-EXISTING LEGAL RELATIONSHIP**    1. **REMOVES RESTRICTION TO ALLOW COURT TO RECTIFY UNCONSCIOUSABLE OUTOMES** 2. **ALL FORMS OF ESTOPPEL SHOULD BE USED TO LIMIT DETRIMENTAL RELIANCE** 3. **CANADIAN COURTS WOULD LIEKLY USE RESTITUTION TO SOLVE THIS KIND OF PROBLEM INSTEAD OF K OR ESTOPPEL** |
| ***M. (N.) v. A. (A.T.)***  ***Require Intention create Legal Relations for Estoppel [Promise needs to be made seriously]*** | 1. **PROMISSORY ESTOPPEL REQUIRES INTENTION TO CREATE LEGAL RELATIONSHIP WITH A BINDING PROMISE (Distinguished the Walton case)** 2. **FOUND LITTLE EVIDENCE IN CANADIAN AUTHORITIES TO INDICATE A MOVE TOWARDS A MORE GENEROUS APPROACH TO PROMISSORY ESTOPPEL**    1. **TEST: DID PARTIES INTEND TO AFFECT THEIR LEGAL RELATIONS?** |

### Privity

**Ways around Privity: Agency, Trust, Specific Performance, Employment (LD), General, Assignment (selling contract)**

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| ***Tweddle v. Atkinson***  ***Horizontal Privity*** | 1. **ONLY PARTY WHO HAS PROVIDED CONSIDERATION CAN SUE: HORIZONTAL PRIVITY** |
| ***Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.***  ***Vertical Privity*** | 1. **VERTICAL PRIVITY: P CAN’T SUE A PARTY IN K THAT HE DOESN’T HAVE A K WITH**   **EVEN IF THE CONTRACT SAYS THIRD PARTY HAS RIGHTS UNDER THE CONTRACT—THOSE RIGHTS NOT UNENFORCEABLE** |
| ***Beswick v. Beswick [Court of Appeal]***  ***Tries to get rid of Privity*** | 1. **DENNING: WHERE A K IS MADE FOR THE BENEFIT OF A 3RD PARTY WHO HAS LEGITIMATE INTEREST TO ENFORCE IT CAN BE ENFORCED BY 3RD PARTY IN THE NAME OF THE CONTRACTING PARTY (OVERRULED BY HL)** |
| ***Beswick v. Beswick [House of Lords]***  ***Privity Remains; Specific Performance*** | 1. **A THIRD PARTY CANNOT ENFORCE A K** 2. **WIDOW CAN SUE AS AN EXECUTOR FOR SPECIFIC PERFORMANCE BUT NOT AS HERSELF** |
| ***London Drugs Ltd. v. Kuehne & Nagel Intl Ltd.***  ***Employees can use K as defence*** | 1. **EMPLOYEES CAN SOMETIMES BENEFIT FROM CONTRACT IN WHICH THEY ARE 3RD PARTIES IN CASES OF DEFENCE (SHIELD NOT A SWORD) IF:**    1. **THE LIMITATION OF LIABILITY CLAUSE EXPLICITY OR IMPLIEDLY EXTENDS TO THE EMPLOYEES**    2. **EMPLOYEE WAS ACTING IN THE COURSE OF EMPLOYMENT AND UNDERTAKING TO REQUIREMENTS OF THE K** |
| ***Fraser River Pile & Dredge Ltd. v. Can‐Dive Ser. Ltd***  ***Removes Employees Exception from LD*** | 1. **LONDON DRUGS EXCEPTION DOES NOT ONLY APPLY TO EMPLOYEES (LIMITATION REMOVED)**    1. **TEST SHOULD DEPEND ON INTENTIONS OF THE PARTIES AND IF 3RD PARTY WAS ACTING IN ACCORANCE WITH K** |

### Writing Requirements

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| ***Law and Equity Act s.59***  ***Writing Requirements*** |  |

### Parol Evidence Rule (p.425)

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| ***Gallen v All State Grain Co***  ***Parol Evidence Rule-presumption that written document is the whole K if it looks like the whole k and parol evidence will not be heard—either party can introduce evidence against this motion.***  ***Applies to Terms*** | 1. Can admit oral evidence if it is part of the K or if it is a collateral K.    1. Parol evidence rule leads to a presumption against collateral Ks if they contradict the main K. Presumption is stronger for custom Ks, weaker where a specific oral term contradicts a general exclusion clause.    2. Generally, when writing and oral terms contradicts, the writing will prevail    3. **Tendency NOT to apply Parol Evidence Rule when both parties have not participated in the terms (i.e. standard form K is used).**    4. True intention must be considered along with written terms. P wins. |

### Representation and Terms

**Conditions, Warranties and Intermediate Terms: Only terms are *contractually* binding and breach leads to remedies**

**Representation:** Usually a statement of fact (i.e. about the quality of something)—can be from the contracting party or a 3rd party

**Term**: Usually has a future aspect to it—i.e. a promise—a promise that is untrue gives you an instant remedy because K is strict liability

**Termination:** Primary Obligations End. Ends the duties of both parties beyond that point in time

**Breach of Condition:** Repudiation of Primary Obligations, if there is condition precedent, it must occur before obligations are enforceable (can be an obligation or event), but **cannot be undecided or too discretionary** (because the court may say that you do not have a K to begin with)

**If K is silent, conditions are concurrent:** Ability to claim damages subject to ability to show his ability to perform

**Terms in a k are characterized at the time of acceptance and can be subdivided into 3 types of terms** which determine what the consequences of breach of the term will be:

1. **Condition** = statement of fact which forms an essential term in the k
   * *Remedy* = damages and the innocent party can treat the k as **repudiated** = the k comes to an end, the primary obligations are terminated, but the secondary obligations remain
2. **Intermediate Term** (Innominate)
   * *Remedy* = determined after the breach occurs based on the seriousness of the consequences of the breach, not the breach itself, and uses either of the remedies for condition or warranty (*Hong Kong Fir Shipping*)
3. **Warranty** = a term which is not essential to the k and is collateral to the main purpose of the k
   * *Remedy* = unless stipulated otherwise in k, only remedy is damages (therefore must prove harm was done)

**NOTE**: These labels are put on the terms at the time the k comes into existence and CANNOT be changed.

\*\*\*Putting labels on the terms in a k is not absolute (the court makes the decision), thus it is better to specify the secondary obligations in the k to illustrate the types of terms (*Wickman v Schuler*).**\*\*\***

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| ***Heilbut, Symons & Co v Buckleton***  ***Intention is key to differentiating a representation from a term—term must be intended to guarantee strictly and to have legal effect*** | 1. Standard for collateral Ks is high, not met here. 2. **Intention is key** to differentiating a representation from a term. While clearly a representation, it was an inquiry not meant to be a term of legal effect. 3. Term had to be in collateral K because Main K for share was in writing 4. Innocent misrepresentation gives no right to damages. |
| ***Leaf v. International Galleries***  ***-No Rescission is available for innocent misrepresentation when the K is executed and a reasonable time lapses (deemed to have accepted the goods)***  ***-Doctrine of Merger: Cannot argue that one statement is both a term and representation—nature of a term swallows up the nature of a representation—if it be categorized as a term, it cannot be a representation for the purpose of a remedy.***  ***-Distinction drawn between quality of the painting (who painted it) and the substance (painting of cathedral) .Only recission if difference in substance.*** | 1. If the K cannot be ended through a breach of K, then it cannot be argued that a term is misrepresentation and should be ended in recission. 2. Claim for breach of condition barred = claim for rescission also barred 3. Not just a statement of fact, but a promise because it is so central to the K 4. Time Frame is the issue in which they have accepted the goods. You can’t reject something that you have accepted. Cannot claim not to accept. |

**Entire versus Severable Contracts:**

**Severable K or Obligation** = can be cut up into smaller obligations or k’s.

**Entire Obligations** = cannot be broken down.

🡪 Courts are reluctant to sever contracts (Blue Pen Test = if the judge cannot draw a blue line through obligations in the k, then the k cannot be severed)

**Qualifications on concept:**

1. To say obligation is performed, simply needs to be substantially performed (*Fairbanks v Sheppard*)
2. 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 v Hedges*)

### Classifications of Terms

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| ***Hong Kong Fir v Kawasaki Kisen Kaisha***  ***Introduces the Intermediate Term (Test to determine whether a Term is a Condition or Immediate Term)*** | ***Breach of a Condition*** = Gives rise to an event which relieves the party not in default of further performance of primary obligations  ***Breach of Intermediate Term*** = Remedies determined after the breach occurs **based on the seriousness of the consequences**, not the breach, and uses either of the remedies for a condition or warranty.  ***Breach of a Warranty*** = Party cannot treat himself as discharged from the k.  **Test for whether it is intermediate term or condition**: Does the occurrence of the event deprive the party with further undertakings to perform of substantial benefits? |
| ***Wickman Machine Tool Sale Ltd. V L Shuler AG***  ***Labeling something as a condition does not make it so--(HAVE TO INTERPRET CONDITIONS IN LIGHT OF THE K) A way around this to set out what is to happen in case of a breach)*** | 1. Issue did not go to the heart of the K so it is not a condition, given how minimal the breach was 2. D cannot repudiate just because the K says term is a condition—(A way around this is to set out what is to happen in the case of a breach)—IF THE PARTIES INTEND TO GIVE A CONDITION SUCH AN EFFECT THEY MUST MAKE INTENTION CLEAR 3. THE K SHOULD BE INTERPRETED AS A WHOLE AND THE WORD “CONDITION” SHOULD BE INTERPRETED IN LIGHT OF THE K AS A WHOLE—IF PARTIES INTEND TO GIVE A CONDITION SUCH AN EFFECT, THEY SHOULD MAKE THAT INTENTION CLEAR 4. **CONDITION** SHOULD GO TO THE HEART OF THE K |
| ***Fairbanks v Sheppard***  ***Substantial Performance Doctrine=An obligation is complete when it is substantially completed.***  ***Can also claim completion if it’s other party’s fault that you could not complete*** | 1. An obligation is completed when it is **SUBSTANTIALLY COMPLETED** 2. Can also claim completion if it was the other party’s fault that you could not complete the obligation 3. There is a reasonableness component to it |
| ***Sumpter v Hedges***  ***Quantum Meruit—If innocent party of an abandoned K takes the benefit of the work done, he can be liable for the cost of that work. (Party must Benefit—(i.e. use it for actual benefit).*** | 1. When K is not completed, it is treated as abandoned. Innocent party has the option to treat K as repudiated (which would terminate the K). But if party takes the benefit of the work done, then he is creating a new K in which he is liable for the cost of that work. 2. If it is left on party’s property, it doesn’t mean that he’s benefitting because he has no other option—**he must use it for an actual benefit and must have the option not to take the benefit in order to create a new K.. He has not abandoned the original K.** 3. Quantum Meruit—labour 4. Quantium Valebat—Property |
| ***Machtinger v Hoj***  ***Terms can be implied into a K based on Custom, Usage, Business efficacy, or presumed intention and terms implied by law*** | 1. Look at custom, usage, presumed intention, business efficacy, and terms necessarily implied by law 2. Term implied only if **NECESSARY**, not merely because they are reasonable |

### Excluding and Limiting Liability

**Clauses Limiting Liability**:

**CL Provisions used to limit liability:**

1. Exclusion = excludes liability
2. Limitation = limits liability
3. Procedural = imposes a procedure that the law does not impose on someone seeking compensation.

**Techniques used to control and reduce the use of the above provisions (because Courts do not like limiting liability):**

1. **Notice Requirement**
   * In order to be bound by a clause, there needs to be an awareness of the clause – do not need to know exactly what it says, just know that it is there **(*Thornton v Shoe Land; Tilden v Clendenning*)**
   * Simply signing the document does not constitute notice—In B.C. generally if you sign, the notice requirement has been met **(L’Estrange)**
   * If notice requirement is met, then the exclusion/limitation clause is part of the k
2. **Construction:** Does is apply in this circumstance? Particularly relevant in Standard Forms. If Onerous term, it is to be construed narrowly
3. **Doctrine of Fundamental Breach (Bad Law)**

* If there is a fundamental breach then an exclusion/limitation clause cannot apply (*Karsales v Wallis*)
* There’s now legis in England governing certain types of exclusion/limitation clauses
  + However, problem is that jurisprudence in England applies, but not the legislation and there is no comparable legislation in Canada
* Doctrine no longer exists in Canada

1. **Doctrine of Unconscionability**

* If there is inequality in the bargaining power **at the time of acceptance**, then the limitation/exclusion clause does not apply
* Developed in response to Canada’s lack of legislation on doctrine of fundamental breach

1. **Public** **Policy-**(perhaps another form of illegality)—Public Policy usually refers to the time of the formation of K (Charging 90% Interest)
   1. (*Tercon v BC))*

**Notice Requirements: UNSIGNED DOCUMENTS**

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| ***Thornton v Shoe Lane Parking***  ***A limitation of liability clause is only binding if the customer had a reasonable notice of the clause before entering into the agreement.*** | 1. **Reasonable Notice** requires that the person **must have a chance to read the conditions BEFORE entering into a K.** 2. If details are provided later, they cannot be included into the K as contractually binding 3. Customer is only bound by the terms on a ticket if the terms were sufficiently brought to his notice beforehand, but not otherwise |
| ***McCutcheon v David MacBrayne***  ***A statement can be imported into a K if previous dealings show that a party knew or agreed to the term in previous dealings*** | 1. Previous dealings relevant if they prove knowledge of terms, actual and not constructive, and assent to them 2. If previous dealings show that a party knew or agreed to a term, there is a basis for arguing that it can be imported into K without an express statement, but it depends on circumstances 3. No implication can be made against a party that was unknown |

**Notice Requirements: SIGNED Documents [At common law, signature is generally enough (L’Estrange Doctrine)]**

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| ***Tilden Rent-a-Car Co. v Clendenning***  ***Unless reasonable measures are taken to draw a party’s attention to unusual (onerous) terms in a standard form document, the terms are not enforceable*** | 1. Signature is not enough for unsophisticated parties 2. Absent such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove fraud, misrepresentation, or non est factum 3. Generally, signed K binds unless not their act, fraud was involved, or if other party knew that they didn’t understand the terms | **Facts**: When D rented a car from P, he signed the agreement without reading it, which was obvious to the clerk helping him. The D alleges that if he knew about the terms of the k he would not have entered into it. **Limiting a Contractual liability—more possible that Limitation Clause got lost in other terms** |
| ***Karroll v. Silver Star Mountain Resorts Ltd.(Typical of BC Case)***  ***Only must draw attention to terms if a reasonable person would know that the signing party was not consenting to the terms in question or did not understand them (Limits Tilden)*** | 1. **Requirement to draw attention to terms only applies (1) where party seeking to enforce to the document knew or had reason to know of the other’s mistake as to its terms (because there is lack of consent) (2) where someone signs a document where one has reason to believe he is mistaken as to its contents (Fraud or Misrepresentation) (3) Non est factum (not my signature)** 2. **General rule:** Must only draw attention if a reasonable person would know that the party was not consenting to the terms in question, because this is basically equivalent to misrepresentation by omission 3. **Factors**: if clause runs contrary to party’s normal expectations, length and format of k, time available to read k. | **Facts**: P signed document releasing D from liability for injuries in a ski race. P claims she wasn’t given adequate notice or opportunity to read it but admits it would have only taken 1-2 minutes and doesn’t recall if they gave her an opportunity to read it. **Limiting Tort Liability—The point is to limit liability**  How is the promise to change the K binding? Case doesn’t deal with it. There is a good argument that these are not binding in K. Can probably use Promissory Estoppel. |

**Fundamental Breach (& Liability/Exclusion Clauses)**

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| ***Karsales v Wallis***  ***Doctrine of FB applies to all FBs. Exclusion clauses can’t be used to avoid liability for fundamental breaches (ADOPTED IN CAN, BUT NOW NOT USED)*** | 1. Doctrine of Fundamental Breach: A BREACH WHICH GOES TO THE VERY ROOT OF THE K DISENTITLES THE PARTY FROM RELYING ON THE EXEMPTING CLAUSE 2. PROBLEM: REMOVES FREEDOM OF K AND APPLIED TO PARTIES THAT DID’NT NEED IT | **Facts**: 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. D told P he would not accept the car. |
| ***Photo Production v Securicor***  ***Doctrine of FB no longer exists, but FBs do. (Overrules Karsales in England)*** | 1. Doctrine of Fundamental Breach no longer exists. 2. Words are strict but ultimately clear, P is sophisticated party 3. Courts can’t reject clause when meaning is clear 4. IF **EXCLUSION CLAUSE** IS CLEAR AND UNAMBIGUOUS, IT WILL PROTECT THE PARTY RELYING ON IT FROM LIABILITY: IT IS SIMPLY A MATTER OF WHTHER THE PARTIES INTENDED FOR THE EXCLUSION CLAUSE TO APPLY. | **Facts**: D in k with P to patrol P’s business. D’s employee purposely set fire to P’s business. D has limitation clause. |
| ***Tercon Contractors v BC (Transportation) SCC***  ***No Doctrine of FB in Canada. Exclusion clauses must be interpreted in light of the whole K (Overrules Karsales in Canada)***  ***EXCLUSION CLAUSE—POLICY*** | 1. CONFIRMS THAT THERE IS NO DOCTRINE OF FUNDAMENTAL BREACH IN CANADA 2. EXCLUSION CLAUSES MUST BE INTERPRETED IN LIGHT OF THE WHOLE K—IN LIGHT OF ITS PURPOSES AND CONTEXT AS WELL AS THE OVERALL TERMS 3. HERE, TENDERING HAS AN IMPLIED DUTY OF FAIRNESS, SO LANGUAGE WOULD NEED TO BE CLEAR ABOUT EXCLUDING LIABILITY 4. DISSENT: COURT SHOULD NOT OVERRIDE EXCLUSION CLAUSES UNLESS THERE IS SOME PRE-EMINENT REASON OF PUBLIC POLICY. 5. TEST FOR **EXCLUSION CLAUSES**: DO THEY APPLY TO THE CIRCUMSTANCES AT HAND? IF SO, WAS IT UNCONSCIONABLE AT THE TIME THE K WAS MADE? IF NOT, SHOULD THE COURT NONETHELESS REFUSE ENFORCEMENT ON GROUNDS OF PUBLIC POLICY? (RELATES TO THE FORMATION NOT SUBSEQUENT EVENTS BUT DEBATEABLE.) | **Facts**: Province enters tendering k with 6 companies specifying that only those companies are eligible. One of the 6 companies combines with an ineligible company and enters a co-bid. P and the co-bid are the 2 finalists but P loses. P sues, saying they would have won if rules in k had been followed. Exclusion clause in k specifies no damages “as a result of participating” in the tendering process. |

### Excuses for Non-Performance of the Contract

**Rescission and Misrepresentation**

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

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

🡪 Not in law of k, in law of torts

* Holding them to the lie as though the truth (Continue as if lie were true and continue)—One way is to affirm the K—**Estoppel by Representation**
* Holding them to the truth (I want the operate as if the lie were not given and getting rid of the effects of the lie)—Misrepresentation
* If misrepresentation was by a 3rd party, generally speaking, you are out of luck

**In order to be an Operative Misrepresentation:**

1. **Have to be a misrepresentation of fact:**
   * Statements about the future, the law or opinion/belief are not statements of fact
   * Ignorance of law is no excuse, thus statements about the law cannot be basis for misrepresentation
   * Conduct (such as a nod or wink) can form a statement of misrepresentation ***(Walters v Morgan)***
2. **There has to be something said that is false**

* **Duty to inform when representation becomes untrue before K is entered into (*With v. O’Flanagan*)**
  + **Silence** can constitute a misrepresentation when:
    1. If there is a fiduciary duty
    2. When a question is asked but there is whole or partial silence in response
    3. When statutes state that there is a duty to disclose information

1. **The statement must be Material**
   * + Representation must be “Substantial” and “Goes to the route of the K” *(Guarantee Co. of North America v Gordon Capital Corp)*
2. **The representation must induce the k**
   * Must be a statement about something significant
   * Must be one reason for entering into K, but not the only reason or sole reason of entering into a K

**REMEDIES:**

There are 3 types of operative misrepresentations:

1. **Innocent** = operative misrep but not negligent or fraudulent (did not know it was false)—No Tort Damages because there is no associated Tort
2. **Negligent** = should have known
3. **Fraudulent** = knew but did not tell (Historically, you were entitled to have the K rescinded)

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|  | **Common Law (Damages)** | **Equity (Rescission)**  **(A Relief)** |
| **Innocent** | **N** | **Y** |
| **Negligent** | **Y** | **Y** |
| **Fraudulent** | **Y** | **Y** |

**Rescission** = Undoing of the K

* Both parties will be put back to the position which they were in before the k existed
* If you cannot obtain the conditions that occurred before the k existed, then rescission is not an option (though Kupchak says something contrary)
* **Therefore, there is no remedy for an innocent misrep unless you can acquire the conditions before the k came into existence**

**Bars to rescission:**

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

1. **Rescission would adversely affect a 3rd party’s rights**
   * Would upset 3rd party entitlements
2. **The impossibility of complete restitution**
   * Some things are fungible (i.e. money – can give back different notes but add up to same amount)
   * Perhaps you’ve used the goods and you have affirmed the K
3. **Affirmation = the innocent party may lose an equitable remedy because they are taken to have affirmed the K. *(Leaf v International Galleries)***
   * When a person discovers the misrepresentation, they must chose to 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
   * Could be delay, inaction, etc.
4. **Execution of the k-k has been discharged *(Leaf v International Galleries)***
   * Highly arguable – may not be law (particularly for innocent misrepresentation)
   * 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.
   * Very weak argument—historical concern —courts are more generous now
   * Completed Executed vs Completely Executory
5. **Delay(Equity is taking election away from you-LACHES) *(Leaf v International Galleries)***
   * Unwarranted delay in claiming the remedy, the person is guilty of LACHES and delay would cause hardship.
   * Person loses the claim to rescission but can still claim for damages for deceit or negligence.
   * Time starts fairly quickly—Equity has a short temper (Statute says 7 years limitation) –Legally, when you ought to have realized
   * ***Kupchuk*** is quite generous with the LACHES issue
   * If through your own actions you encourage continuing the use of products—you are estopped (Promissory Estoppel) from arguing that the other party has elected

**Remedy of rescission swallowed up by Equity, but Estoppel by Representation is said to be both CL and Equity**

**Rescission and Misrepresentation**

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| ***Redgrave v Hurd***   * ***It is not a defense to say that P should have tried harder to learn the truth—There is no duty to check representations*** * ***(caveat emptor means that you have to ask questions, not that you have to go investigate)*** * ***Innocent Misrepresentation can form the basis for a remedy of rescission*** | 1. It is not a defense to say P should have tried harder to learn the truth—there is no due diligence burden 2. Providing someone with the opportunity to investigate does not mean there is no operational misrepresentation 3. **CL:** K may be set aside even if the person did not know the statement was false and was said recklessly and without care 4. **Equity**: In order for K to be set aside for op. Misrep, it is not necessary for D to know at the time that the representation is false | **Facts**: P enters into k with D to start a practice with a specified income. P finds out income not correct while researched but D assures him the difference would be made up. P later finds out the business is worthless. |
| ***Smith v Land and House Property Corp***  ***A statement of opinion is a statement of fact when the facts are not equally known by both parties if it implies the statement is based on fact*** | 1. WHEN FACTS ARE NOT KNOWN EQUALLY BY BOTH SIDES, A STATEMENT OF OPINION THAT IMPLIES THE STATEMENT IS BASED ON FACT IS USUALLY A MATERIAL FACT. 2. IF FACTS ARE KNOWN EQUALLY BY BOTH PARTIES, THEN USUALLY JUST AN EXPRESSION OF OPINION | P sold hotel to D, stated there was a “most desirable tenant.” D buys hotel, then the tenant goes bankrupt. |
| ***Kupchak v Dayson Holdings***  ***Rescission of a K is an option even when complete restitution cannot be reached (i.e. Money Compensation). However, most of the time won’t work and needs to be real restitution—same property, but more convincing when case involved fraud.***  ***Equity is more open to using money substitute if the representor did something with the property they got than vice versa.***  ***CL says you have decided, Equity says causing hardship to the other party.*** | 1. GENERAL RULE: NO RESCISSION FOR MISREPRESENTATION WHEN RESTITUTIO IN INTEGRUM IS IMPOSSIBLE, OR IF ACTION TO RESCIND IS NOT TAKEN WITHIN A REASONABLE TIME, OR THE CONTRACT IS EXECUTED (EXCEPT IN CASES OF FRAUD), OR IF THE INJURED PARTY AFFIRMS THE K. 2. RESCISSION CAN BE PART MONETARY COMPENSATION (NOT DAMAGES BECAUSE REMEDY IS IN EQUITY) TO MAKE UP FOR THE DIFFERENCE OF FRAUDULENT MISREPRESENTATION | **Facts**: P bought share of a motel from D. Later it was discovered hotel’s earnings were falsely(perhaps Fraudulently) misrepped by agent of D. P already renovated and began running the hotel. Completely Executed Contract. |

**Mistake**

**Mistake** = one of the parties argues that he did not think that the k did what the other party says it did.

🡪 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. The difference is that misrepresentation requires fault to be proven.
* Courts are keenly aware when people are trying to get out of a bad contract

Types of Mistake: Where X is correct.

Unilateral: A thinks X, B thinks Y (courts are unlikely (extremely reluctant) to interfere except though rectification)

Mutual: A thinks Z, B thinks Y (Usually taken care of by Offer and Acceptance—i.e. no meeting of the minds). Sometimes it is interpreted as a unilateral mistake by seeing which interpretation is the better one

Common: A thinks Y, B thinks Y (Often the easiest one and usually not litigated)

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| ***Smith v Hughes***  ***First Case on Mistake: 3 opinions on what is needed for mistake:***  ***Mistake has to be a term where there is a unilateral mistake where that party is mistaken about the terms of the contract.***  ***What we do NOT know is whether the other (non-mistaken party) has to KNOW.***  ***Generally, unilateral mistake, D has to know the Mistake. Hannen is generally the law today*** | 1. **Cockburn:** Assumptions outside the K are irrelevant. It does not matter what the parties thought. Mistake does not exist. In his mind, it is simply a matter of offer/acceptance. 2. **Blackburn (most liberal)**: In an action for mistake, **P must show that he was mistaken about what D was promising about the K.** What is important is the mind of P. D’s mind unimportant. Unilateral mistake can lead to non-existence of K. Unilateral mistake about a term will generate a mistake, but perhaps also broad enough to cover assumptions, but he talks about fraud or deceit in allowing you to remain under misapprehension. 3. **Hannen:** P must show he was mistaken. D knew about the mistake and knew P was mistaken (D’s mind matters) | **Facts:** D takes samples of Oats and buys the oats. D assumed that they were old oats, but oats that D got were new oats.  Mistaken party wants some result, and if the K was void, mistaken party is happy.  However, either party can argue that the K is void. So a person responsible for the mistake is able to argue mistake to get out of K. So problems at common law because K is void and either party can argue that. |

**Mistaken Assumption**

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| ***Bell v Lever Bros***  ***A mistake about the qulity of subject matter of the k may affect the k***  ***There are three areas in which mistake can occur: ID of Parties, Existence of Subject-Matter, Quality of Subject-Matter*** | 1. **There are three areas in which mistake may occur**     1. **COMMON MISTAKE OF OWNERSHIP/TITLE: CONTRACT IS VOID IF BOTH PARTIES DID NOT KNOW**    2. **COMMON MISTAKE AS TO EXISTENCE OF SUBJECT MATTER: CONTRACT IS VOID BUT IF SELLER KNEW THAT THE GOODS WERE NON-EXISTENT, THEN NOT VOID.**    3. **COMMON MISTAKE AS TO QUALITY OF SUBJECT-MATTER: CONTRACT WILL NOT BE AFFECTED UNLESS IT IS A MISTAKE OF BOTH PARTIES IN RELATION TO EXISTENCE OF SOME QUALITY WHICH MAKES THE THING WITHOUT THE QUALITY “ESSENTIALLY DIFFERENT” FROM THE THING BELIEVED TO BE** | **Facts**: P pays severance to D then finds out D did things he could have been fired for anyways with cause.  Contraction of the law from Smith and Hughs. Bell and Lever largely ignores Smith—implicitly saying that Smith is not good law. Importance is the 2nd paragraph on 561—says if there is a mistake it has to be a mistake as to quality and that quality cannot be dealt with as a term in K..if it is go to K..must be common mistake…and must be essential. |
| ***McRae v CDC***  ***Party can’t rely on its own mistake as a defense if mistake was made negligently or recklessly*** | 1. **A party cannot rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds and is used to induce the same belief in the other party’s mind.** 2. **Parties cannot rely on mistake if they made it due to negligence, recklessness, wilful blindness, etc.** | **Facts**: P buys oil tanker from D that is allegedly wrecked on a reef but the oil tanker doesn’t actually exist. P wanted to sue for breach of K and get damages. D argues that K is void for mistake. |
| ***Great Peace Shipping v Tsaviris Salvage***  ***Elements of Common Mistake***  ***\*SAYS SOLLE AND BUTCHER IS BAD LAW IN ENGLAND\****  ***\*\*SOME CANADIAN COURTS HAVE PERCEIVED THIS APPROACH AS UNDULY RESTRICTIVE AS TO WORK POSSIBLE UNFAIRNESS\*\**** | **Elements of common mistake to avoid K:**  Following elements must be present for common mistake to void contract:  1.There must be a common assumption as to the existence of a state of affairs  2.There must be no warranty by either party that that state of affairs exists  3.The non-existence of the state of affairs must not be attributed to fault of either party  4.The non-existence of the state of affairs must render performance of the contract impossible  5.The state of affairs may be the existence, or a vital attribute of the consideration to be provided  **The mistake must “make the thing contracted for essentially different from the thing that it was believed”.** | **Facts**: D hires P to fix D’s boat but P is farther away than they both thought so D hires someone else, doesn’t pay P.  **SOLLE & BUTCHER**  -Common mistakes that are not so fundamental as in Bell & Lever may also be affected provided they can do so without injustice to 3rd parties  -In certain cases of unilateral mistake in assumption if it would be unconscientious (snapping up offer)  -Seems to say the mistake can operate with regard to mistake to law also  -Allows one party to avoid K or can set aside K on terms |
| ***Miller Paving v B Gottardo Construction***  ***Before allowing mistake, you must look to the K to see if bearing of risk has been provided for in K.***  ***\*\*\*Says Great Peace is NOT the last word on mistake in Canada\*\*\**** | **Look to the K first to see if parties have provided for who bears the risk of a mistake**  **Common mistake requires that the subject matter of the K become essentially different due to the mistake** | **Facts**: Parties sign agreement saying P has been paid for all materials. P later tries to charge for something it forgot.  Dec for P |

**Mistake as to Terms**

* Usually resolved under certainty of terms
* Unilateral mistakes tend to seek equitable remedy (but must come to court with clean hands)
* See *Smith v. Hughes* under part A, but note *Bell v. Lever* says this doesn’t exist in section 2.

**Mistaken (assumption as to) Identity (i.e. Service Contracts)**

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| ***Shogun Finance v Hudson***  ***K is with the rogue if face-to-face (voidable) but with the name in k if done through indirect contact (void)*** | **Mistaken ID can affect K (via common law and equity) but depends on how K was entered.**  **Basic Rule: If you enter K with a person face-to-face with mistake about ID, the K is not affected (However, can argue this in equity if person commits fraud in a situation where ID is crucial—can ask the court to rescind the K because it is voidable).**  **When dealing through paper, email, etc. K is with the person IDed in the papers, not with the rogue. If that person doesn’t know, then they can argue non-est factum (K is VOID)**  **Writing pre-empts face-to-face K** | **Facts**: Rogue buys car using financing from P and sells it to D. Both P and D claim title to the car.  For P. It was through paper, so Patel had title not the rogue. |

**Can put Identity as a term and include the secondary obligations (i.e. voidable K) –Should make clear what the secondary obligations are**

**Non Est Factum (Common Law Doctrine=VOID)**

**Non Est Factum** = it is not my deed.

* **Occurs if someone deliberately misled another into entering a k**
* Akin to the Notice Doctrine—the idea is that you didn’t know what you entered into. Notice usually for exclusion clause, Non-Est Factum for the entire K.
* Can be for a variety of reasons: too much fine print, it was too loud, etc.
* The idea of blame—that the other party is also somehow culpable
* These doctrines were developed during a time when most people were illiterate
* The innocent party cannot be negligent
* **Remedy = Void K—There was no Contract**

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| ***Saunders v Anglia Bldg. Socy***  ***P cannot plead non est factum if signing is due to carelessness, even if the document differs fundamentally.***  ***P will succeed in claiming non est factum if the reasonable person with similar traits would have been deceived, but not if he just fails to read the K.***  ***Generally, fully capable adults cannot rely on the doctrine.***  ***Non Est Factum not applicable if there is no blameworthiness of the other party.*** | **A person who signs a document differing fundamentally from what he believed it to be is disentitled from successfully pleading non est factum if his signing of the document is due to his own carelessness.**  **TEST: Would a reasonable person with the traits similar to the party have taken the same actions as the party pleading non est factum took?** | **Facts**: P negotiating with ICBC and they couldn’t read. Thought they were signing something else. |
| ***Marvco Color v Harris***  ***Carelessness is the standard for non est factum.***  ***D cannot claim non est factum because of his own carelessness (didn’t read the K), and the law must acknowledge that P is not blameworthy here—this interpretation is necessary for certainty and security in commerce and the law. However, this depends on the circumstances of each case.*** | **Carelessness is the standard for non est factum, NOT negligence (as in Saunders)** | **Facts**: D thought they were signing an amendment to their mortgage. However, their daughter’s boyfriend got them to sign a new mortgage to another party. D did not know what they were signing. |

### Rectification (Equitable Doctrine)

* **Given that the piece of writing is merely evidence of the contract—Equity can change the K so that the written contract reflects the actual agreement**
* **Only need this situation when the writing governs the obligations**

1. **You need a written record**
2. **At least one party argues that the written record does not reflect the agreement**
3. **Therefore, that party argues that there is a mistake of that record**
4. **The mistake can be of three types:** 
   1. **Unilateral mistake**
   2. **Mutual mistake (Both parties arguing that it wasn’t correct, but they both thought that it should be corrected in different ways)—the court here doesn’t have much choice but to change the record—it could be that there is no K because there was no offer and acceptance and no meeting of the minds or uncertainty of terms**
   3. **Common mistake (easiest one, since both parties think the same thing). Argue that it was a common mistake, but they changed their mind after the agreement.**

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| ***Bercovici v Palmer (QB)***  (Common Mistake) | **Cottage was never mentioned in negotiations, D never acted as if he owned the cottage until 5 years later, Parcel was even mislabeled in K and bears no relationship with business. This is clearly a common mistake made by the lawyer writing the K. P wins.** | **Facts**: P sold two retail business to D—5 years later D claims another parcel of land which was written into the K—P claims neither party intended that to be the case, asks for rectification. |
| ***Bercovici v Palmer (CA)***  ***Rectification only when there is no “fair and reasonable doubt” that the deed does not embody final intentions of the parties.***  ***Can look at the conduct of either party after the K is concluded (no error at trial)*** | **Rectification must be carefully used. Should only be used if there is no “fair and reasonable doubt” that deed does not embody final intentions of the parties**  **Intention: Documents + Conduct (even Post-K conduct)** | **Facts**: As above, but D appeals and says that behavior after the K cannot be taken into consideration. |
| ***Sylvan Lake Golf v Performance Industries***  ***Rectification is really only used to correct typos and the like. The goal is to return parties to their original bargain, not help a party who made a mistake. Changing the K beyond a significant degree is beyond the remedy.***  ***Although usually for common mistakes, it is possible to use rectification for a unilateral mistake if certain requirements are met***  ***(SEE REQUIREMENTS).*** | **TRADITIONALLY, ONLY FOR COMMON MISTAKE, BUT NOW ALSO FOR UNILATERAL MISTAKE PROVIDED THAT:**   1. **P MUST ESTABLISH THAT THERE WAS A PRIOR ORAL K WITH DEFINITE, ASCERTAINABLE TERMS** 2. **THE OTHER PARTY KNEW OR OUGHT TO HAVE KNOWN OF THE ERROR AND P DID NOT 🡪 ATTEMPT TO RELY ON THE ERRONEOUS WRITTEN DOCUMENT MUST AMOUNT TO “FRAUD OR THE EQUIVALENT OF FRAUD” (LOW STANDARD)** 3. **P MUST SHOW “THE PRECISE FORM” IN WHICH THE WRITTEN INSTRUMENT CAN BE MADE TO EXPRESS THE PRIOR INTENTION.** 4. **ALL OF THE ABOVE MUST BE ESTABLISHED WITH “CONVINCING PROOF” (BARD)**   **\*Whether you were careless is a factor to be considered, and carelessness is not necessarily detrimental\***  **\*Evidence after the agreement is often used** | **Facts**: Dispute about the size of the land for housing development. S wants the K to be rectified to state “correct” size. This is a unilateral mistake.  Situations where there is truly a unilateral mistake. I truly didn’t know, but you did and you are quite happy. |

### Protection of Weaker Parties (The Following Doctrines are Equitable Doctrines (Duress has possible consequences in Common Law)

Some view that it is not the business of the court to “protect” people—because it has a political element that it should be dealt with by the legislature.

Duress

**One of the oldest Doctrines: Looks at a particular event when the K was entered into: Duress must exist at the time the k was entered into**

* **Says that one of the parties was in no position to accept/make an offer, and that they do not have a legally operative mind (“coercion of will”)**
* **Threat can be from a 3rd party outside of the K (usually in a family context)**
* **Historically, K was void, but sometimes the wrong person got protected (allows person to get out of a K)**

**Remedy: Equity makes the K voidable or finds certain obligations unenforceable. Courts now usually use Equity to address issues of Duress.**

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| **Pao On: Economic Duress TEST (Apparently good law)** |

* 1. **Did the person protest?**
  2. **Did he have a practical and reasonable alternative course open to him?**
  3. **Was he independently advised?**
  4. **Did he take timely steps to avoid the contract?**
  5. **Greater Fredericton: Added 5th Element: Examining the legitimacy of the threat. Is there a legal reason for exerting the pressure?**
     + **To be illegitimate, it doesn’t need to be illegal, but legal does not necessarily mean legitimate.**

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| ***Greater Fredericton Airport v Nav Canada***  ***Test for Economic Duress (But perhaps limited to modifications of existing K) STILL HAVE TO TALK ABOUT PAO ON*** | **The Cornerstone of Duress is lack of consent**  **The onus is on the pressuring party to prove the modification to the K wasn’t procured under Duress**  **Two conditions precedents:**   1. **Promise must be extracted as a result of the exercise of “pressure” (i.e. demand, threat)** 2. **Exercise of that pressure must have been such that the coerced party had no practical alternative but to agree**   **Ultimate Question:**  **Did the coerced party consent to the variation?**  **3 Factors:**   1. **Was there consideration?** 2. **Was it made under “protest” or “without prejudice”? (Failure to voice objection may be vital to your claim)** 3. **Did the coerced party take reasonable steps to disaffirm the promise as soon as practicable? (Can’t just sit on it)**   **\*Commercial Pressure is not enough**  **\*Failure to object usually nullifies Duress**  **\*Passage of time will also nullify Duress** | **FACTS:** Nav contracted to move equipment for GFA but decided to just replace it instead. There was a dispute about who should pay for new equipment. Nav’s obligation was to pay since it insisted on buying new equipment. Airport eventually agreed to pay by way of letter signed under protect then refused to make promised payment.  Ruling for P: K voidable |

### Undue Influence

**Undue Influence**: Influence which **disables a person influenced from acting spontaneously from exercising an independent will. Considers the nature of the relationship over time rather than the particular event at the time the k was entered. More concerned with abuse of trust and confidence**

* **Equitable Doctrine: Makes the K voidable. Some courts may be rule that some parts of the K as unenforceable, but usually all or nothing.**

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| ***Geffen v Goodman Estate***  ***For undue influence, burden is on the claimant to show that they were incapable of acting spontaneously or had no independent will***  ***However, irrebutable presumption arises in certain relationships (those with presumption of fiduciary obligation)***   * ***Parent*** 🡪 ***Child*** * ***Guardian*** 🡪 ***Ward*** * ***Solicitor*** 🡪 ***Client*** * ***Trustee*** 🡪 ***Beneficiary*** * ***Physician*** 🡪 ***Patient (Dentist not included)*** * ***Religious Advisor*** 🡪 ***Advisee*** | **Test to establish undue influence:**   1. **P must establish undue influence b/w parties🡪 Is there potential for “dominating influence” inherent in nature of relationship? (May be an irrebutable presumption if falls under the established categories)**     1. **COMMERCIAL CONTEXT (K) 🡪P Have to examine the K itself and established there is a manifest disadvantage to P (Wilson J says this may be required, La Forest says it is not necessary)**    2. **NON-COMMERCIAL CONTEXT (Not K)** 2. **Examine the actual K to see whether the influence led to an unfair K (If it is a commercial relationship).**     1. **What was the nature of the transaction?**    2. **Was P unduly harmed or D unduly benefitted?**    3. **Mere imbalance/bad bargain is insufficient**    4. **Only applies in the context of commercial transactions** 3. **Once this presumption is established, D must rebut with evidence that the transaction was entered into “as a result of claimant’s own free will and informed thought”, and that the K was not affected in fact by undue influence.**     1. **E.g. independent advice** | **FACTS:** Trust set up by woman with mental health issues. Her son argues her brothers unduly influenced her to do it.  Dec: Trust allowed to stand. Brothers were acting for her care and woman had independent legal advice. |

### Unconscionability

**Unconscionability:** invokes relief against unfair advantage gained by an inconscientious use of power by a stronger party against a weaker one. **Concerned with equality between the parties and the content of the K. Deals with unconscionability at the time when the K was created.**

**Remedy: Equitable Doctrine—courts more apt to tinkering with K and finding part of K unconscionable.**

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| ***Morrison v Coast Finance***  ***Created doctrine of unconscionability. Test for unconscionability.*** | **Test for determining Unconscionability:**   1. **Proof of inequality rising from weaker party’s ignorance, distress, or need that left him in power of a stronger party** 2. **Proof of substantial unfairness obtained by the stronger party** 3. **The stronger party can repel this by proving the bargain was just, reasonable, and fair** | **Facts**: Old widow induced into mortgaging her home to allow two men to buy cars.  Here, bargain was unequal, D had scheme to cheat P, no rational fully-informed person would have agreed, B had no independent legal advice.  Dec: Court restructures K in favour of P. |
| ***Lloyds Bank v Bundy***  ***Denning groups all mechanisms of protecting weaker parties together***  ***Shows that one cannot pigeonhole anything into one category—they overlap.*** | **Four categories of inequality between parties:**   1. **Duress of goods=inequality in bargaining power** 2. **Unconscionable transactions=unfair advantage gained by unconscientious use of power by stronger party** 3. **Undue Influence** 4. **Undue Pressure=a K should be based on free and voluntary agency of the individual who enters it**   **These all rest on “inequality of bargaining power”.**  **English law gives relief to one who w/o independent advice, enters into a k upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence, or pressures brought to bear on him by or for the benefit of the other.**  **\*Independent legal advice cannot save every transaction but absence of it may be fatal**  **\*This view has not been generally accepted, but is sometimes used to “inform” decisions (e.g. Lambert in Harry)** | **Facts**: D mortgages his farm to help son’s debt and bank forecloses on it.  Dec for the P. |
| ***Harry v Kreuziger***  ***There are two tests for unconscionability***  ***Lambert’s test is more broad*** | **Two Tests for Unconscionability:**   * **McIntyre: Basically, Morrison Test (inequality + fraud)** * **Lambert: Sets out new test that takes focus away from the individual and puts focus on the bargaining itself and the K (Lends more itself to the idea that this would apply after the formation of the K)** * **Test: Did the transaction, seen as a whole, diverge significantly enough from community standards of morality so that it should be rescinded?** * **Problem: What is the community? What is morality? What is immoral?** * **Benefits: Much more open-ended and less structures by an intricate list of pre-requisites.** | **Facts**: P sold fishing boat to D for low price. D told P he could get a new license after but he knew that was a lie.  Dec for P. |

### Illegality

**Common Law Illegality:** K can be rendered unenforceable on the grounds that it is contrary to public policy. Ex: Commit a crime, treasonous, contrary to the administration of justice, restraint of trade, immoral. Note that illegal Ks are

not necessarily criminal.

**Statutory Illegality:** A Ks creation or execution is prohibited by statute. If the **creation** of the K is

prohibited, then it was generally void (*Still* tries to change this). If the **execution** of the K is prohibited,

then equity may step in to make it unenforceable or voidable based on the facts and policy (*Still* has a

new slightly different approach).

* **Blue‐Pencil Severance:** Court removes words or more of a K (adds and changes nothing).
* **Notional Severance:** Court reads down or changes a provision.

**Purposive approach** (*Still*): Fashion a remedy that keeps with the purpose of the statute.

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| ***KRG Insurance Brokers v Shafron***  ***Illegality for Ks against Public Policy***  ***Blue Pencil severance*** | **Restraints on trade, there is Prima Facie presumption K is unenforceable**   * **Exception: Where the restraint on trade is found to be reasonable** * **Reasonableness: geographic coverage, period of time in effect, extent of activity prohibited,** * **Terms must be unambiguous to be reasonable. Ambiguous covenants are prima facie unenforceable**   **Blue Pencil Severance (Striking Out): Court removes word or more of K**   * **Part removed must be clearly severable, trivial, and not part of main purport of restrictive covenant** * **TEST: Only used if the obligations are sensible and reasonable in itself that the parties would have unquestionably agreed to them without varying other terms**   **Notional Severance: Reading down an illegal provision in K to make it legal and enforceable. You can also write things into K that parties did not agree to explicitly or impliedly (Usually for Interest Rate Ks)** | **Facts**: D signed covenant saying he can’t work in insurance in the “Metropolitan City of Vancouver” but the area was not specifically defined.  Covenant is unenforceable |
| ***Still v Minister of National Revenue***  ***Effects of Illegality*** | **Old Approach: If formulation of the K is illegal then the k is void, but if performance of K are illegal, K is not void but it can be argued that the k is not enforceable for parties with the intention to break the law.**  **Courts may find a way around an unenforceable K through restitution or:**   1. **Where the party claiming for return of property is less at fault** 2. **Where the claimant ‘repents’ before the illegal k is performed** 3. **Where the claimant has an independent right to recover (e.g. recover through tort)**   **New Approach: Whether the illegality is direct or indirect, one can argue that the k is not void.**   * **THE PURPSE OF THE LAW IS CONSIDERED AND HOW IT IS BEST SERVED IN A SPECIFIC PURPOSE (VERY UNPREDICTABLE)**   **Choices of Remedy: Void, Voidable, Unenforceability, or Combo**  **Relief is not available if it would have the effect of undermining the purpose of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.** | **Facts**: Woman moves to Canada, marries a Cdn, and applies for citizenship. She gets papers from govt that imply she can now legally work in Canada so she gets a job. Later applies for EI but is denied as an illegal worker. |

### Remedies

* As soon as an obligation is breached, there is a right to damages (Common Law Remedy)
* Damages in **contracts**: the court looks to the future and awards money that puts the party in the position that it would have been in had the promises been fulfilled

**Characterizations of Damages:**

1. **Interest Protected**
   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 = tend to be a debt owed by the innocent party

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

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

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

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

* 3 types of damages and their purposes:

1. Expectation
   * Aims to put innocent 3rd 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 finished
     + **i.e. these are profits – sometimes hard to quantify**
   * This is the weakest argument – it’s just disappointment in not getting what was promise
   * However, it does arouse a sense of injury
   * Enforcement of promises is important – discourage breaches of contract
   * Purpose can therefore be seen as penalizing a breach (not compensating the P)
2. Reliance
   * 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
3. Restitition

* Aims to give back what the innocent party transferred to the breaker of the k
* Prevent gain by a promisor defaulting at the expense of the promise (i.e. D-based)
* Can involve both losses occurred and gains prevented (disgorgement damages)
* 2 elements:
  1. Reliance by the promise
  2. A resultant gain by the promisor

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

### Reliance Interests

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| ***McRae v CDC***  ***When expectation interests cannot be determined, reliance interests should be awarded*** | **Purpose of awarding damages is to put P in the position they they’d be in if K had been performed (expectation). When expectation cannot be quantified, the court will look to award reliance damages (Need to establish on a BOP)**  **IF A PARTY HAS LOST EXPENSES B/C OF OTHER PARTY FAILING TO DO K (I.E. WASTED EXPENDITURES)**  **HOWEVER, MUST BE TRULY WASTED—CAN’T CLAIM EXPEDITURES YOU CAN USE ELSEWHERE.** | **Facts**: P buys oil tanker from D that is allegedly wrecked on a reef. P goes to salvage the wreck but there is no boat. |
| ***Sunshine Vacations Villas v The Bay***  ***Both reliance and expectation damages cannot be awarded unless it will not overcompensate*** | **DAMAGES CANT BE AWARDED FOR BOTH RELIANCE AND EXPECTATION UNLESS IT WILL NOT COMPENSATE**   * **IF PROFITS ARE TOO DIFFICULT TO QUANTIFY, RELIANCE DAMAGES WILL BE AWARDED** * **IF P WOULD HAVE MADE A LOSS, RELIANCE DAMAGES ARE AWARDED—ONUS ON P TO SHOW PROFITS > RELIANCE** | **Facts**: Bay reneged on a deal to allow P to become the exclusive travel agency in several of its stores. |

### Restitution

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| ***Attorney General v Blakes***  ***Restitutionary damages can be awarded where P has legitimate interest in preventing D from profiting.*** | **Damages are usually compensatory, but they aren’t always measured in financial loss—it can also be measured by the benefit of the wrongdoer in exceptional circumstances where D retains the profit as a result of the breach**  **GENERAL GUIDE: DID P HAVE A LEGITIMATE INTEREST IN PREVENTING D’S PROFIT-MAKING ACTIVITY AND DEPRIVING HIM OF PROFIT?**   * **I.E. DID D PROFIT BY DOING EXACTLY WHAT HE CONTRACTED NOT TO DO?** | **Facts**: British spy becomes agent for the USSR then gets sent to jail for leaking secrets. He busts out of jail and writes book about it. AG sues because his spy contract had a term saying he could not divulge info in books or press.  DEC FOR P—P HAS LEGITIMATE INTEREST |

### Damages—Quantification Problems

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| ***Chaplin v Hicks***  ***If there is a breach of K, P has a right to damages even if they are impossible to calculate*** | **THE FACT THAT EXPECTATION DAMAGES ARE NEAR IMPOSSIBLE TO CALCULATE DOES NOT RELIEVE THE WRONGDOER OF THE REQUIREMENT OF PAYING DAMAGES FOR BREACH OF K. JURY MUST SIMPLY DO THE BEST THEY CAN.** | **Facts**: Contestant in beauty contest whines that the final decision process was given on too short of notice so she missed it and couldn’t win. Defence: chances of the P to win are impossible to assess. |
| ***Groves v John Wunder***  ***Damages should be for the work to be provided, not the difference in value of the property being worked on.*** | **DAMAGES SHOULD BE AWARDED TO DO WHAT THE K REQUIRED, NOT FOR THE MARKET VALUE—HAVE TO CHARACTERIZE THE OBLIGATION (IS IT THE OBLIGATION TO DO THE WORK OR TO HAVE PUT THE PROPERTY IN A PARTICULAR POSITION?)**  **“ECONOMIC WASTE” IS NOT A DEFENCE: OWNER IS ENTITLED TO WHAT HE HAS LOST (THE WORK/STRUCTURE HE WAS PROMISED)** | **Facts**: P owns a crappy lot, leases it to D for gravel extraction on condition D leaves it in its original state. D intentionally breaks this. Value of property assessed at $12K but cost of returning it to that state would be $60K.  DEC. FOR P |
| ***Jarvis v Swan Tours***  ***Damages for non-quantifiable harm—mental distress/Emotions*** | **DAMAGES CAN BE AWARDED FOR MENTAL/EMOTIONAL DISTRESS AND LOSS OF ENJOYMENT IF THEY ARE NOT TOO REMOTE AND THE SUBJECT MATTER OF THE K WAS INTENDED TO GENERATE A CERTAIN EMOTION BUT THE BREACH RESULTS IN THE OPPOSITE EMOTION.**  **THERE MUST BE AN ACTUAL BREACH OF K (NOT JUST A DISSAPOINTMENT)** | **Facts**: P buys holiday from D based on a brochure but the holiday was a piece of crap unlike the brochure. Here, the contents of the brochure were warranties that were breached. |

### Remoteness of Damages

Any claims for damages must first go to *Hadley v Baxendale*, then look at the other cases.

You MUST cite *Hadley* but where you use *Victoria Laundry* or *Koufos* is up to you.

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| ***Hadley v Baxendale***  ***\*\*\*\*\*TEST FOR AWARDING DAMAGES\*\*\*\****  ***\*MUST CITE\**** | **DAMAGES WILL BE AWARDED FOR LOSSES THAT:**  **GENERAL DAMAGES: Occurred naturally from the breach (anyone who would have suffered the breach would have suffered the same loss)—“may fairly and reasonably be considered as arising naturally” according to the usual course things, from the breach itself” 🡪 Only the terms of K are relevant (not purpose, intentions, etc.)**  **SPECIAL DAMAGES: Were contemplated by the parties as a probable result of the breach of K—“anything that may reasonably be supposed to have been in the contemplation of both parties at the time they made the K”, as the probable result of the breach of it 🡪 The Special Circumstances Needed to be Known at the time the K was entered into**  **🡪Just need to know general nature, not the details/specifics 🡪 P has to show that D knew** | **Facts**: Broken shaft given by P to D to bring to a repair shop. D was not told that the absence of the shaft meant that work would stop completely at P’s mill. Carrier breached k by delivering several days late. P sued for loss of profits but D argued that this loss was too remote.  For D. P did not let D know about the necessity of shaft so can’t claim profit losses. |
| ***Victoria Laundry v Newman***  ***\*\*BROAD REMOTENESS TEST\*\**** | **Ratio**: 6 points on the law of remoteness for damages:  1) Governing purpose of damages is to put the party whose rights were violated in same position, as money can do, as if his rights had been observed. This would include improbable losses (too harsh) so there are qualifications (2-6).  2) Aggrieved party is only entitled to recover such part of the resulting loss that was foreseeable at time of k.  3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or at all events, by the party who later commits the breach.  4) Knowledge possessed is of 2 kinds – imputed and actual. Imputed is knowledge that is ordinary/normal/expected (first branch of *Hadley*). Actual is the special circumstances and relates to the 2nd branch of *Hadley*.  5) For the breacher of the k to be liable, it is not necessary that he should actually have asked himself what loss is liable to result from a breach. It suffices that, if he HAD considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (i.e. objective test, not subjective).  6) Nor, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the D could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough he could foresee it was likely to result 🡪 A serious possibility or a real danger that is likely to occur. | **Facts**: P bought a boiler from D, D agreed to deliver by a certain day. Boiler was broken during the dismantling process on D’s property and had to be fixed, so it ended up being delivered late.  **Dec:** P gets some damages (reasonably foreseeable) but not others. |
| ***Koufos v Czarnikow***  ***\*\*Overules the broad definition of remotness in Victoria for a much narrower definition\*\**** | **TEST FOR REMOTENESS SHOULD BE MORE DIFFICULT IN K THAN TORTS.**  **In Hadley, not every type of reasonable foreseeable damage could have been intended to be included.**  **CRUCIAL QUESTION: Whether, on the info available to D when the K was made, he should, or the reasonable man in his position would have realized that such a loss was SUFFICIENTLY LIKELY to result from the breach of K to make it proper to hold that the loss FLOWED NATURALLY from the breach or should have been in his contemplation.** | **Facts**: A ship delivering sugar breached its k to deliver the sugar on time. The sugar arrived 9 days late and the price for sugar had dramatically decreased in this time. Ship captain ought to have known this was “not unlikely.”  **Dec:** The loss of profit was too remote. |

### Mitigation

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| ***Asamera Oil Corp v Sea Oil & General Corp***  ***Mitigation Principle: P has to mitigate and keep the damages within reason*** | **You are required to stem your losses as early as reasonable and to bring your damages to claim in a timely manner.**  **Damages will be recoverable in an amount representing what the purchaser would have had to pay for the goods in the market, less the contract price, at the time of the breach.**  **Court said you don’t have to act right away, but has to be reasonable 🡪 If you have already paid for something, you are given more leeway to assume that the party will deliver. If you still have the money, however, then you have to act within a reasonable time.**  **Damages will only be awarded for a reasonable amount of time and Impecuniosity is not a defense (can’t say too broke to mitigate). However, mitigation doesn’t have to perfect, just reasonable. Sometimes, don’t have to mitigate if you let the other party know in advance of the K that you cannot mitigate.** | **Facts**: P had rights to shares from D, D broke k. Share prices changed over long trial – when should $ be calculated?  **Dec:** Use price when P should have started their claim (after all steps to save K failed).  Election to accept the breach or hold the other party to the obligations and ask for SP. Some courts say not entitled to this election in circumstances where SP is unlikely. |

### Time of Measurement of Damages

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| ***Smelhago v Pramadevan***  ***Damages at common law are to be calculated at the time of breach.***  ***Damages in lieu of specific performance are to be calculated at the time of judgment.*** | **General Rule: Use value at the time of breach so P can buy goods in the market. However, if P asks for specific performance, the K is “saved” as D can deliver at any point before judgment.** | **Facts**: P buys house from D, D breaks K. P wants SP or damages. Market value of house rose from $205K or $325K in between breach and trial. Which price should be used?  In this case, damages should be valued at the time of judgement (as this is when the K is really broken). Even though you are entitled to SP, at some point you have to face reality and if you wait beyond what is reasonable, you will get less damages because you did not mitigate.  Exchange rate is determined at the time of payment. |

If there is an **anticipatory breach**—one party says they are not going to perform before an actual breach, then you have an election to opt for breach today or to affirm the K (and wait and expect performance and go for damages then). If you know that waiting will increase the amount of damages, courts are divided as to whether this is allowed.

### Liquidated Damages, Deposits and Forfeitures

**Liquidated Damages:** Damages the parties agree to beforehand and put in the K to use in the event of

breach, must be an accurate estimation of the actual loss to P.

**Penalty:** Clause in the K that makes D pay P every time he breaks the K. **Penalty clauses Not valid under EQUITY unless it is justified as liquidated damages (Penalty Doctrine). Common law, simply enforces it if there was notice, meant to apply in the context, and agreement. However, Equity steps in.**

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| ***Shatilla v Feinstein***  ***Liquidated damages must be a genuine pre-estimate of damages***  ***Calling it a “liquidated damage” does not mean that it is, and it can actually be a penalty*** | **GENERAL TEST : IF THE SUM IS LARGER THAN ANY ACTUALY DAMAGE WHICH COULD POSSIBLY ARISE, IT IS NOT CONSIDERED TO BE A BONDA FIDE PRE-ESTIMATE OF DAMAGES AND WILL BE FOUND TO BE A PENALTY 🡪 IS IT A GENUINE ESTIMATE OF DAMAGES? 🡪 CAN’T BE EXTRAVAGENT OR UNREASONABLE.**  **IF REPEATED BREACH POSSIBLE—FIXED SUM FOR THE BREACH OF A NUMBER OF STIPULATIONS OF VARIOUS DEGREES OF IMPORTANCE—PRESUMPTION THAT IT IS A PENALTY. [CAN BE REBUTTED IF IT IS SHOWN ON THE FACE OF THE AGREEMENT, OR ON EVIDENCE, THE PARTIES HAVE TAKEN INTO CONSIDERATION THE DIFFERENT AMOUNTS OF DAMAGES THAT MIGHT OCCUR AND ARRIVED AT AN AMOUNT THEY FELT PROPER.** | **Facts**: P buys wholesale business from D. K said D can’t work in that business in that city for 5 years and that if this is breached, D must pay $10,000 in liquidated damages. D buys shares in another company, becomes their direction.  No way breach is worth 10,000. |
| ***HF Clarke Ltd v Thermidaire***  ***FORMULAS for liquidates damages must be reasonable and fair*** | **GENERAL TEST : IF PARTIES INTEND TO BE BOUND BY A LIQUIDIATED DAMAGE CLAUSE, THEY MUST TAKE INTO ACCOUNT NOTIONS OF FAIRNESS AND REASONABLENESS (TO BE JUDGED BY THE COURT) 🡪 MUST BE ABLE TO DEFEND THE RESULTS OF THE FORMULA AS REASONABLE.**  **IF FORMULA IS DEPENDENT ON TIME, IT IS IMPORTANT THAT P BRING THE CLAIM WITHIN REASONABLE TIME** | **Facts**: Breach of covenant against competition clause. Remedy stipulated as “gross trading profits.”  Dec: Formula altered to be for net profits and extent of damages limited within a reasonable time. |
| ***JG Collins Insurance v Elsley***  ***Penalty Clauses can be upheld if used as a cap to limit damages: The agreed upon sum is the cap regardless of whether it is damages or a penalty*** | **THE POWER TO STRIKE DOWN A PENALTY CLAUSE INTERFERES WITH FREEDOM OF K AND SHOULD ONLY BE USED FOR THE PURPOSE OF PREVENTING OPPRESSION OF THE PARTY THAT HAS TO PAY 🡪 IF ACTUAL LOSS IS GREATER THAN THE PENALTY, P ONLY HAS TO PAY THE PENALTY.** | **Facts**: D breaks K with liquidated damages clause but P sues because the actual damages were much higher.  For D. D only has to pay penalty. |
| ***Stockloser v Johnson (DEPOSITS)***  ***Forfeiture clauses have no remedy at common law (but possibly in equity, provided that the required circumstances are met.*** | **IF THERE IS NO FORFEITURE CLAUSE: AS LONG AS SELLER SAYS BUYER CAN STILL FINISH K, THEN BUYER CAN’T GET HIS MONEY BACK. BUT IF SELLER RESCINDS, BUYER CAN GET HIS MONEY BACK.**  **IF THERE IS A FORFEITURE CLAUSE: OR THE MONEY IS EXPRESSLY PAID AS A DEPOSIT, THEN THE BUYER WHO IS IN DEFAULT CANNOT RECOVER THE MONEY AT LAW**   * **HOWEVER, MAY HAVE REMEDY IN EQUITY:**   **REQUIRED CIRCUMSTANCES FOR COURT TO USE AN EQUITABLE REMEDY: (1) FORFEITURE CLAUSE MUST BE OF A PENAL NATURE (SUM FORFEITED OUT OF PROPORTION TO THE DAMAGE) AND (2) IT MUST BE UNCONSCIONABLE FOR THE SELLER TO RETAIN THE MONEY (**i.e. Ridiculous 50% deposit, trying to take advantage of seller 🡪 must be unconscionable, this relates to restitution. | **Facts**: P buys stuff from D by installments. Clause in K says D is owner until all payments are made. P failed to pay once near the end of the K and then sued to recover previous payments, saying the clause was a penalty.  Dec. For D. P was dumb with his money, not unjust for D to keep it. |
| ***Law and Equity Act, s.24 (DEPOSITS)***  ***The court may relieve against all penalties and forfeitures*** | **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 THAT THE COURT THINKS FIT** | **CT MAY strike down penalty and forfeiture clauses as it wishes, but the criteria for doing so are not mentioned (LIKELY CL principles).** |

### Equitable Remedies

* 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*)
* **These are discretionary – courts will consider these factors:**
  + Are CL remedies adequate? Would damages be inadequate? Does P have clean hands? What was P’s conduct w/respect to k obligations? Hardship on 3rd parties and D? Will it require obligations extending over a period of time (a negative, but may be awarded if not complex [*Beswick*])? Is it an obligation to perform a personal service (*Warner*)? Difficult for court to evaluate compliance?

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| ***John Dodge Holdings v 805062 Ontario***  ***Specific Performance Test for uniqueness: Determination takes place at the date of actionable wrong*** | **FOR REAL PROPERTY: SP CAN BE GRANTED IF THE PERSON SEEKING IT CAN SHOW THAT THE PROPERTY IN QUESTION WAS UNIQUE AND NOT READILY AVAIALABLE OR THAT IT CANT EASILY BE DUPLICATED ELSEWHERE DUE TO A QUALITY THAT MAKES IT SUITABLE FOR THE INTENDED PURPOSE. DETERMINATION TAKES PLACE AT THE DATE OF THE ACTIONABLE WRONG**  **\*YOU ARE ONLY OBLIGED TO MITIGATE DAMAGE BY SEEKING ALTERNATIVES IF YOU ARE NOT ENTITLED TO SPECIFIC PERFORMANCE.** | **Facts**: P agreed to buy land from D for development. D did not complete sale so P sued for specific performance.  **Dec:** For P. At the time D broke the k, the land had a unique proximity to shopping malls. |
| ***Warner Bros v Nelson***  ***Injunction of Personal Services***   * ***Court cannot enforce positive convenants of personal service even if expressed in the negative*** | **CAN’T ENFORCE POSITIVE CONVENANT FOR SERVICE, EVEN IF EXPRESSED IN THE NEGATIVE.**  **HOWEVER, CAN ENFORCE SOME NEGATIVE CONVENANTS IN K FOR PERSONAL SERVICE, BUT NOT IF THEY AMOUNT TO PROVIDING D AN OPTION BETWEEN PERFORMANCE AND STARVING. 🡪 ARE THERE REASONABLE ALTERNATIVES?** | **Facts**: D had k with P saying she’d only act in their movies but wants more $ so she breaks k. P wants injunction so D can’t be in other movies.  **Dec:** For P. Injunction given for 3 years. |